



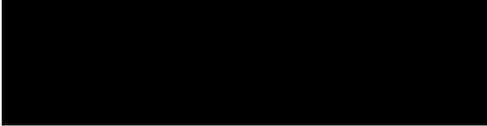
U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

PUBLIC COPY



FEB 27 2003

File: EAC 00 253 52182 Office: Vermont Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

IN BEHALF OF PETITIONER:
[Redacted]

Identifying data deleted to prevent unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an engineering consultant for The Tri-Tech Group, a construction management and consulting firm based in New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer.

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veterans facilities.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6.

A review of the petitioner's Form ETA-750B, Statement of Qualifications of Alien, reveals that from 1994 to 1997, the petitioner pursued his master's degree and served as research assistant under the direction of [REDACTED] Dean of Engineering, at the University of New Brunswick ("UNB"). It should be noted that the Form ETA-750B does not account for the petitioner's activities from July 1997 until November 1999. In November 1999, according to the Form ETA-750B, the petitioner began working for The Tri-Tech Group in New York. Given that this petition was filed in 2000, the absence of information about the petitioner's activities from July 1997 to November 1999 is a significant omission from the record.

Along with four of the petitioner's published articles, the petitioner submitted five witness letters. [REDACTED] supervised the petitioner's graduate studies at UNB and co-authored all four of the published articles submitted by petitioner. [REDACTED] states:

[The petitioner] was a graduate student under my supervision from 1993 to 1995 at UNB... He distinguished himself by highly fulfilling all the requirements and was awarded an M.Sc.E. in Civil Engineering (1997).

[The petitioner] was a very well organized, highly-talented, hard-working, reliable, diligent and honest graduate student. He had come from British Columbia, Canada, originally from Shanghai, P.R. of China, and had obtained several years practical experience before coming to UNB as a mature student. His research contributions were outstanding in the area of computer based information technology systems for construction equipment selection and estimates. This record may be judged by his outstanding publication record in refereed international journals. The international journals were the *International Journal of Construction, Civil-Comp. Press*, Edinburgh, the *Canadian Journal for Civil Engineering*, and *Computer Mechanics* by Elsevier Publications. The papers received considerable attention and he is recognized as an expert in his field.

[REDACTED] Professor, Chinese Academy of Forestry, describes himself as "an internationally recognized expert in the field of information technology and information techniques." [REDACTED] states: "[The petitioner] published his findings in world-renowned journals... and his works have been widely recognized as significant."

While the petitioner has been the co-author of scholarly articles appearing in engineering journals, the weight of this evidence is diminished by the lack of direct evidence that these articles have influenced the field. When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work. The above witnesses' assertions that the petitioner's works "received considerable attention" and "have been widely recognized as significant" would not suffice to establish such recognition, when the petitioner offers no evidence from citation indices to support these claims.

The remaining individuals offering letters of support did not discuss how they became aware of the petitioner's work.

[REDACTED] Chief Architect, Lin Tung-Yen & Li Guo-Hao Consultants, Ltd., Shanghai, credits the petitioner with the design and development of a computer system referred to as the Earthmoving Equipment Selection and Estimation Tool ("EESSET"). Dr. Chen states: "Utilizing his native talent and state-of-the-art techniques in engineering and investigating the problems existing in reality, [the petitioner] established a mathematical model for earthmoving estimation, cost

prediction and equipment production.” [REDACTED] describes the petitioner as “an emerging prominent engineer.”

[REDACTED] Economist, International Monetary Fund, states:

Although my expertise is not involved in civil engineering, the economic loss and its impact all over the world as the results of earthquake are within my field [sic].

* * *

The petitioner creatively developed a computer expert system to perform reliable production calculation and accurate cost estimating, based on different conditions in reality, for earthmoving equipment operation, which is a major operation of the reconstruction after earthquake disasters worldwide... The system can help engineers reach quick solutions to problems in the earthmoving process that is time-consuming if performed by human experts.

[REDACTED] Nuclear Safety Analyst, Atomic Energy Canada, Ltd., states: “[The petitioner] developed a new system called EESET... Never before has any researcher in this field developed such an exhaustive technique that can perform estimating of earthmoving costs so accurately and efficiently...”

Counsel cites a letter from Paula McMahon, a research assistant at the University of Teeside, requesting “a list or copies of the petitioner’s published work.” Counsel states: “This [letter] is convincing evidence that the [petitioner’s] work has been in the widespread of the implementation of the work of others [sic].”¹ The record, however, contains no evidence showing that Paula McMahon actually implemented any of the petitioner’s findings or that she cited the petitioner’s work in her own published research. The petitioner has offered little or no evidence to demonstrate that independent researchers throughout the engineering field view the petitioner’s published findings as particularly significant.

With regard to the petitioner’s published works and development of the EESET system, we cannot ignore that [REDACTED] the petitioner’s frequent co-author, is himself a respected and established figure in the engineering field. [REDACTED] stature far exceeds that of the petitioner based on his publication record and his status as Dean of Engineering and [REDACTED] in Construction and Engineering Management at UNB. Given that the petitioner was a graduate student at the time their research articles were prepared, it could be argued that [REDACTED] was the primary researcher responsible for their published findings and the development of the EESET system. The record in this case does not address the petitioner’s contributions relative to those of his superior, Dr.

¹ We cannot ignore that the exact same wording (irregular grammar included) appears in the letter from [REDACTED] concludes his letter by stating that the petitioner’s work is “...in the widespread of the implementation of the work of others [sic].” While [REDACTED] in signing his letter, is clearly supportive of the petitioner, it appears that, based on the identical wording and irregular grammar, [REDACTED] did not independently formulate the wording of his letter, thus detracting from its evidentiary weight.

Christian.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. The director informed the petitioner: "The record shows that your expertise will primarily benefit the persons, institutions, corporations, and professional firms who retain your services." In response, the petitioner submitted eight additional witness letters.

██████████ is the Chief Consulting Engineer of the ██████████ Institute of Architectural Design and Research Company, Ltd.² He states:

[The petitioner's] research work has been recognized in the field of civil engineering in a worldwide scale, which can be proved by his papers published in renowned international journals. In this writing, however, I would like to emphasize the practical significance of the EESET system developed by the petitioner.

The EESET system is not simply a computer system for easy use in dealing with earthmoving equipment. More importantly, the system is a major invention of a renovated methodology that can be adopted and applied systematically to handle issues, in different areas of the construction world, which requires intensive use of human expertise.

Other witnesses from the Shanghai Modern Architectural Design Group, the Shanghai Pharmaceutical Industry Design Institute, and the Shanghai Metallurgical Industry Design and Research Institute offer letters of support describing the benefits of the EESET computer system.

██████████ Executive Vice President, The Tri-Tech Group (New York), states that the petitioner's research contributions have improved construction management and "have practical significance to the U.S. construction industry by virtue of the EESET system." ██████████ describes the EESET computer system as "particularly useful and helpful in the decision-making process for earthmoving planning." He further states: "Using the EESET system into which experts' knowledge is implemented, more accurate estimates for both machine production and machine costs are obtained, which leads to substantial improvement in the decision-making process and yields optimal construction plans to guide actual construction efficiently and effectively."

The petitioner, however, has offered no evidence showing that the EESET system has been successfully marketed to the construction industry on a national scale or that the EESET system is widely utilized by U.S. architectural firms and construction companies. Further, the petitioner has not shown that independent experts throughout the U.S. construction industry (beyond the petitioner's professional contacts in New York) view the system as a significant improvement

² According to the petitioner's form ETA-750B, the petitioner received his bachelor's degree from the "Shanghai Institute of Architectural and Engineering." It is not clear whether Shi Luxiang is from this same institute.

over existing estimation methods. Finally, the petitioner has not sufficiently demonstrated his individual role in the development of the EESET system. For example, the petitioner has not provided a patent listing himself, rather than ██████████ as the inventor of the EESET system.

██████████ and ██████████ Chief Estimator, The Tri-Tech Group, describe how the petitioner's employment has benefited their firm's projects. The petitioner may have indeed benefited various projects undertaken by The Tri-Tech Group, but his ability to significantly impact the field beyond his firm's projects has not been demonstrated. The performance of engineering services for a given firm is of interest mainly to that particular firm and the construction projects in which it participates.

The letters from ██████████ and ██████████ also refer to the petitioner's expertise in engineering and computer technology. We note here that any objective qualifications that are necessary for the performance of a research position can be articulated in an application for alien labor certification. Pursuant to *Matter of New York State Dept. of Transportation*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

██████████ identifies himself as a professional engineer "currently employed as Chief Estimator for a general contracting company in New York City." ██████████ an individual who worked with the petitioner in a previous employment position, states that the petitioner greatly impressed him with the petitioner's knowledge-based computer system. ██████████ further states: "Based upon the article reprints [the petitioner] showed me, I see that his research has been published in national and international journals and was well received and recognized in the field of civil and construction engineering."

██████████ identifies himself as the director of the Facility Department, Queens College (New York) and states that he is "in charge of all of the construction projects at Queens College." ██████████ asserts that "hundreds of professional papers in civil engineering have been published each year, but very few of them have made a lasting impact as [the petitioner's]."

The petitioner, however, has not provided a citation history of his published works. Without evidence reflecting independent citation of his articles, we find that the petitioner has not significantly distinguished his results from those of other engineering researchers. It can be expected that if the petitioner's published research were truly significant, it would be widely cited. The petitioner's participation in the authorship of four published articles prior to the filing of the petition may demonstrate that his efforts yielded some useful and valid results; however, the impact and implications of the petitioner's findings must be weighed. The record fails to demonstrate that the petitioner's published works have garnered significant attention from throughout the construction industry or among independent researchers in the engineering field. The extent of the petitioner's recognition generally appears limited to those he has collaborated with in Shanghai, New York, and New Brunswick.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director stated: "While it is apparent that your work related to EESET is innovative, its impact on the field, not originality, is of primary importance in determining whether a national interest waiver should be granted." The director noted a lack of "independent evaluations" by industry and governmental experts addressing the impact of the petitioner's work.

On appeal, counsel notes errors in the director's decision pertaining to the petitioner's employment history and educational degree. The director's decision contained four sentences that do not pertain to this particular petitioner. The main part of the director's decision, however, correctly indicates that the petitioner is "an engineering consultant employed by Tri-Tech Planning Consultants." The director's decision also specifically addresses evidence submitted with the petition and in response to the director's request for evidence. For example, the director addresses the letters from [REDACTED] and [REDACTED]. While the director's decision does contain four sentences irrelevant to this particular petitioner, there is no indication that the director would have rendered a substantially different decision without these clerical errors.

Counsel asserts that the petitioner "has structured an invaluable tool for the employment of earth-moving equipment and estimation methodology never before implemented in the construction industry" and that the petitioner's work "has already had international recognition." The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Beyond the geographic areas where the petitioner has studied or worked such as New York, Shanghai, and New Brunswick, the record contains no evidence to support counsel's assertion that the petitioner's work has garnered international recognition. While the petitioner has published some articles, there is no indication (such as heavy independent citation) that the petitioner's research has had an especially substantial impact on the overall field. Counsel contends that the petitioner has made such a showing but offers no support except for the statements of witnesses selected by the petitioner. These statements cannot establish, first-hand, that individuals without direct ties to the petitioner share similar opinions regarding the significance of his work. Independent evidence that would have existed whether or not this petition was filed, such as heavy citation of one's published findings or trade media attention, would be more persuasive than the subjective statements of individuals selected by the petitioner.

While the research surrounding the EESET system may indeed be original and have practical applications, it can be argued that any scholarly article, in order to be accepted by a university or for publication, must offer new and useful information to the pool of knowledge. It does not follow that every engineering researcher whose work is accepted for publication has made a significant contribution to his field.

Counsel acknowledges that the development of the petitioner's "technique appears to be somewhat limited in national scope due to the applicant's recent exposure to industry-wide organizations in the United States." Counsel further states:

One must consider [the petitioner's] discovery, because of its uniqueness, may not have penetrated national awareness in the industry due to its novelty, or complexity; however, it may be perceived to contemporary peers... What should be considered more significantly is that the petitioner, if permitted to work in this field, may expand his techniques more effectively so that a national impact of his individual contributions will result in this field.

Statements pertaining to the petitioner's potential to make future contributions cannot suffice to demonstrate the petitioner's eligibility for a national interest waiver. Counsel's assertion that the petitioner's contributions will have a national impact if he is permitted to work in the U.S. is entirely speculative and does not persuasively distinguish the petitioner from other competent engineering researchers. Furthermore, a petitioner cannot file a petition under this classification based on the expectation of future eligibility. See Matter of Katighak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

We cannot ignore the fact that the EESET system was developed in the mid-1990s; therefore, the system has had ample time to garner attention from the construction industry and the engineering field. We note here that the petitioner's appeal was filed on July 20, 2001. Beyond the letters from the petitioner's coworkers at The Tri-Tech Group and his professional acquaintances in New York, the record contains no evidence from U.S. companies that have successfully utilized the EESET system or from independent engineering scholars throughout the U.S. acknowledging the significance of the EESET system.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. Without evidence that the petitioner has been responsible for significant achievements in the engineering field, we must find that the petitioner's assertion of prospective national benefit is speculative at best. In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on the national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.