



U.S. Department of Justice

Immigration and Naturalization Service

B5

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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



FEB 28 2003

File: [Redacted] WAC 01 216 56913 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:



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:



PUBLIC COPY

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, California 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 energy research consultant specializing in the "research and development of working energy design models from natural sources." 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 did not dispute that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but concluded 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 requirement 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 petitioner obtained a doctorate degree in chemical engineering from the University of Melbourne, Australia in September 1995. His special area of study was extractive metallurgy. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue 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 pertinent 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 pertinent 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.

In this case, the director found that the petitioner's field of endeavor in energy technology is an area of substantial intrinsic merit, and also found that the proposed benefit of the petitioner's employment in developing improved energy technology would be national in scope. The remaining issue is whether the petitioner 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.

Documentation submitted with the petition includes the petitioner's resume; the form ETA 750-B; the petitioner's degrees and grade transcripts including evidence of the receipt of academic scholarships; evidence of membership in two professional associations; a copy of a paper presented at a minerals conference; copies of four internal reports generated at the University of Melbourne's graduate school research center; a copy of the petitioner's PhD thesis; a copy of an extract from the petitioner's master's thesis; and several letters of support attesting to the petitioner's abilities.

While the petitioner's awards for academic achievement are commendable, they are not evidence of his professional recognition or influence in his field of endeavor. Even if such evidence represented

recognition for achievements and significant contributions to his field, that is simply one criterion for exceptional ability set forth at 8 C.F.R. § 204.5(k)(3)(ii), a classification that normally requires a labor certification. Similarly, the petitioner's professional affiliations with *The Minerals, Metals & Materials Society* (TMS) and the *Iron & Steel Society* relate to another criterion in that classification. We cannot conclude that satisfying one, or even the requisite three criteria for a classification that normally requires a labor certification warrants a waiver of the labor certification requirement in the national interest. We also note that although the petitioner asserts that these professional associations require outstanding achievements from their members, the record contains no evidence that outstanding achievements are demanded by these organizations as a condition of membership.¹

The petitioner also submits a copy of a published conference presentation in which he was the lead author, and four internal, confidential reports produced during his post graduate work at the G K Williams Cooperative Research Centre for Extractive Metallurgy at the University of Melbourne. He was a co-author on these reports. The record also contains a copy of the petitioner's doctoral thesis relating to the behavior of coke during the smelting process of ferromanganese and a copy of his master's thesis from the University of Heidelberg accompanied by an English translation of the executive summary of the thesis. When assessing the influence and impact that the petitioner's written work has had, the act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may establish originality, but it cannot be concluded that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Similarly, frequent citation by independent researchers would be viewed as a more reliable indication that the petitioner's work has attracted widespread interest or authoritative recognition. The record in this case contains nothing showing that the presentation or publication of one's work is rare in the petitioner's field, or that any of the petitioner's published work has been cited by independent researchers. The petitioner asserts that he is working on articles that will be submitted for publication, but he must establish his eligibility at the time of filing the petition; a petition cannot be approved at a future date after an alien becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner includes several reference letters in support of his petition. [REDACTED] a market development manager for CSIRO, an Australian national research organization, was the petitioner's PhD advisor at the University of Melbourne. He describes the petitioner's doctoral work:

The project [the petitioner] worked on was funded by BHP Limited and was aimed at investigating the behaviour of coke in submerged arc furnace production of ferromanganese. . . . [The petitioner] performed a detailed experimental and mineralogical study of the furnace materials (reacted and unreacted) and developed a comprehensive understanding of the processes that occur in the furnace and the

¹ The designated internet websites for the organizations indicate that *The Minerals, Metals & Materials Society* classifies its members based on education and/or experience; the *Iron & Steel Society* appears to approve membership for anyone engaged in activities associated with any branch of iron and steel technology.

changes that the coke undergoes in the furnace. From this he was able to identify the key criteria for selecting coke for this application. The work was very competently carried out and the results make a good significant contribution to the fundamental understanding of carbothermic reduction processes.

██████████ a director at the University of Melbourne's GK Williams Cooperative Research Centre for Extractive Metallurgy, also offers praise for the petitioner's PhD project, stating that it contributed to the "fundamental understanding of the thermodynamics and kinetics of ferro-alloy smelting" and that it aided BHP in its smelting process.

██████████ a professor and head of the engineering department at Purdue University, Calumet, has known the petitioner since 1997 when the petitioner advised the engineering department at the university in the development of a bachelor of science program in metallurgy. Professor ██████████ states:

[The petitioner] is an accomplished, internationally recognized researcher in the very important area of materials science. He has made significant contributions to the development of new and improved methods of selection of metallurgical coke for various ferroalloys production. . . . As recognition of his international reputation, [the petitioner] has been selected to serve as a member of the Scientific Commission.

There is no indication in the record explaining what the "Scientific Commission" is, or how the selection process for this group supports the petitioner's request for a national interest waiver.

██████████ a professor and engineering department head at Purdue University, Calumet, confirms that the petitioner was offered a guest lecturer position based on his expertise and experience and asks for expedition of the petitioner's work authorization approval.

██████████ the president of the National Metal Services Corporation, a placement firm serving the metals industry, contends that many large companies made inquiries about the petitioner and that the petitioner has an "outstanding vision for the future of the U.S. Steel Industry."

██████████ of Long Beach, California, summarizes the petitioner's credentials and expresses confidence that the petitioner's expertise will "benefit the industrial communities of the USA at all levels. ██████████ does not explain how he is acquainted with the petitioner or his qualifications.

The petitioner submits a letter he received from ██████████ a vice president of Sound Technologies Inc., Michigan City, Indiana, who acknowledges the petitioner's consulting services provided to the company, recognizes the petitioner's unique skills, and asks if he would consider a job as a project manager.

These letters do not establish that the petitioner's skills and contributions have been significantly recognized or influential in the field.

Copies of two pieces of correspondence on the letterhead of the [REDACTED] College in Chicago also appear in the record. One is a letter of recommendation for a teaching or research position written by [REDACTED] a professor and head of the mathematics department [REDACTED] praises the petitioner's skills and professionalism as an instructor in mathematics. The other letter, written by the department chair in the physical science and engineering department, offers the petitioner a position teaching geology and physical science at the same institution. Counsel contends that these job offers support the argument that there is a "national interest" and demand for the petitioner's skills that mandate his eligibility for a national interest waiver. This would seem to be an argument for obtaining a labor certification, rather than waiving it. If there has been substantial interest in the petitioner from various companies and institutions as indicated in some of the letters submitted by the petitioner, then it would seem that an employer could readily obtain a labor certification on the petitioner's behalf. The labor certification process was designed to address the issues of worker shortages and demand for needed skills. *See Matter of New York State Dept. of Transportation, supra.*

The record also contains a letter written by [REDACTED] the Northwest Indiana Director for Senator Dick Lugar [REDACTED] writes:

[The petitioner] has shared with our office documents which support his immigrant worker petition in the national interest category. The documents indicate that [the petitioner] possesses a unique set of skills that would be valuable based on his expertise as metallurgist and chemical engineer.

....

We trust you will give [the petitioner's] application due consideration.

While we respect the opinion of [REDACTED] and other witnesses who support the petition, exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner brings to his field must greatly exceed the "achievements and significant contributions" set forth in 8 C.F.R. § 204.5(k)(3)(ii)(F). It is not sufficient to state that the alien has unique skills. The benefit of an alien's skills and background must substantially outweigh the inherent national interest in protecting U.S. workers through the labor certification process.

Virtually all of the petitioner's witness letters are from individuals who have had direct ties with the petitioner. While these endorsements have value because these persons have the most direct knowledge of the petitioner's specific contributions, they do not show, first-hand, that the petitioner's work has attracted significant attention on its own. Independent evidence that would have existed whether this petition were filed, such as widespread citation of one's published findings, would generally be more persuasive than the more subjective statements from individuals selected by the petitioner.

Counsel contends that current world events mandate the urgent need for the U.S. to develop alternative energy sources. The intrinsic merit of the petitioner's field of research is not disputed, but eligibility for the waiver must rest with the alien's qualifications rather than with the position sought. This applies whether the position is publicly or privately funded. It is generally not accepted that a given project is of such importance or of such urgency that any alien qualified to work on it must also qualify for a national interest waiver. The 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. *Matter of New York State Department of Transportation* at 219, n.6.

We cannot conclude that the witness letters and the other evidence of the petitioner's work in the record establish that this petitioner's contributions and influence in the field of energy technology 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. A national interest waiver is not warranted in this case.

As is clear from the plain wording of the statute, it is 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. Similarly, 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. Based on the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification would 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, 8 U.S.C. § 1361. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.