

PUBLIC COPY



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

[Redacted]

File: [Redacted] (LIN-99-140-50257)

Office: Nebraska Service Center

Date: **JAN 17 2003**

IN RE: Petitioner:
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]

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability. The petitioner seeks to employ the beneficiary as an environmental hydraulic engineer. 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 beneficiary qualifies for classification as an alien of exceptional ability or 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) . . . 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.

It appears from the record that the petitioner seeks to classify the beneficiary as an alien of exceptional ability. This issue is moot, however, because the record establishes that the beneficiary holds a Ph.D. in Engineering from the University of California, Berkeley. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary 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 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.

We concur with the director that the beneficiary works in an area of intrinsic merit, environmental engineering, and that the proposed benefits of his work, restoration of damaged water environments and the species that live there, such as pacific salmon, would be national in scope. It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

According to the petitioner, the beneficiary works on several projects at the petitioning company involving the restoration of the Clark Fork River, designated as a “Superfund” site by the Environmental Protection Agency (EPA); the contaminated Silver Bow Creek; and the vegetation stripped Grande Ronde River by request of the Army Corps of Engineers. In addition, the beneficiary is working on environmental impact analysis for projects contracted by Native American Tribes hoping to license the Kerr Dam and the Department of Justice pursuing water rights on behalf of Native Americans. Finally, the beneficiary is working on the Fish Mechanical Injury Study sponsored by the Army Corps of Engineers to analyze the impact of hydroelectric dam spills at the Snake and Columbia rivers in Oregon.

Initially, the petitioner submitted an introductory letter summarizing the beneficiary's experience and projects with the petitioning company, information about the petitioning company, the beneficiary's degrees and class ranking, a certificate for receipt of the Hans Albert Einstein memorial fellowship, the beneficiary's engineering license, the beneficiary's professional memberships, and letters from his immediate circle of colleagues. While the fellowship is an indication that the beneficiary was a successful student, it is not necessarily evidence that his professional achievements have been influential. Even if we considered the fellowship evidence of recognition by one's peers, that is only one factor for classification as an alien of exceptional ability. Similarly, the beneficiary's professional memberships and license relate to other factors for that classification. We cannot conclude, however, that meeting one, two, or even the requisite three requirements for classification as an alien of exceptional ability, a classification that normally requires a labor certification, warrants a waiver of the labor certification requirement.

As stated above, the reference letters are all from the beneficiary's immediate circle of colleagues. Ching-Ling Liu, general director of the Chung Shan Institute of Science and Technology in Taiwan, asserts that the beneficiary was a critical member of the hydrodynamic team in the electronic department of that institution. Mr. Liu continues that the beneficiary "conducted complex hydrodynamic theories and experiments and developed a computer model to predict fluid behavior, which is an essential factor to improve the environment." Professor Frank Young, the beneficiary's advisor at the National Taiwan University, asserts that upon graduation, the beneficiary was hired as an associate researcher, a title normally reserved for those with doctoral degrees, which the beneficiary did not yet have. Professor Young discusses the beneficiary's design of flood models that predict the amount of flooding likely to result from impending hurricanes.

Professor Mostafa Foda, the beneficiary's advisor at the University of California (UC), Berkeley, asserts that acceptance onto Professor Foda's research team is evidence of exceptional ability and concludes that the beneficiary's current project is in the national interest. Professor Foda, while noting that he and the beneficiary co-authored two conference presentations and a journal article, provides little discussion of how the beneficiary's research at UC Berkeley has been influential.

Dr. Han-Bin Liang, president of WRECO in California, discusses the beneficiary's work for that firm. Dr. Liang states:

While working for me, he performed advanced physical hydraulic model design and conducted complicated experiments to protect our environment and to reduce the risk of harm to property and human life. He analyzed how potential floods might affect low-lying residential and commercial areas in towns and cities along the Guadalupe River, Russian River, and Lynch Creek in central California.

[The beneficiary] also worked on a wetland project for WRECO. Because of his effort on this project, the delicate wetland eco-system environment in Taipei, Taiwan was analyzed, protected, and saved.

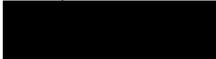
In response to the director's request for additional documentation, the petitioner submitted more letters from the beneficiary's immediate circle of colleagues. Professor Hideo Hirayama, a visiting scholar at UC Berkeley during the beneficiary's time there, reviews the beneficiary's experience. He asserts that the beneficiary's Ph.D. dissertation revealed sediment fluidization under surface waves, important because such sediment causes the loss of salmon spawning habitats. Mr. Hirayama next discusses the beneficiary's work at the petitioning company and its importance. Professor Hsieh Wen Shen of UC Berkeley provides similar information, adding that the beneficiary "invented" a method of stabilizing stream banks using willow trees. Yoshihiko Maeno, the beneficiary's thesis advisor at UC Berkeley, provides similar information.

Finally, the petitioner submitted evidence that Dr. Foda, the beneficiary's Ph.D. advisor, cited two of the beneficiary's articles in his own articles. One of the cited articles is co-authored with Dr. Foda. Self-citation, while normal and expected, is not evidence of influence on the field as a whole.

As stated by the director, the numerous discussions in the above letters regarding the importance of the projects on which the beneficiary has worked relates to the intrinsic merit of the beneficiary's work and whether it is national in scope, issues acknowledged above. Ultimately, however, 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 beneficiary's contributions in the field are of such unusual significance that the beneficiary 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. A petitioner must demonstrate the beneficiary's past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, note 6.

The record contains no evidence that the beneficiary has influenced his field beyond his contributions to the specific projects discussed above and in counsel's appellate brief. We do not find that the director erred in failing to afford more weight to the beneficiary's role with these projects. As stated above, the letters are all from the beneficiary's immediate circle of colleagues. The record contains no letters from independent experts who have been influenced by the beneficiary or from high-level officials at interested government agencies such as the EPA or the Army Corps of Engineers. In addition, that the beneficiary's colleague, Dr. Foda, cited the beneficiary's work on two occasions is not evidence that the beneficiary has influenced his field as a whole. Counsel's argument on appeal that the director failed to consider the beneficiary's development of analytical software is not persuasive. The record contains little discussion of this software and no evidence that this software has been licensed for use by anyone outside the beneficiary's immediate circle of colleagues. While the beneficiary is clearly experienced, as stated by the director, such experience can be enumerated on a labor certification application.

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 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.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.