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U.S. DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS AAO, 29 Mass, 3/F
Washington, D.C. 20536



File: EAC 02 073 50031 Office: VERMONT SERVICE CENTER

Date: **JUL 03 2003**

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)

ON BEHALF OF PETITIONER:



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 Bureau of Citizenship and Immigration Services (Bureau) 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. At the time he filed the petition on December 29, 2001, the petitioner was a software development engineer for an information technology company. 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 or exceptional ability, but noted 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.

The petitioner obtained a PhD in mechanical engineering from Syracuse University in May 2000. He obtained a master of science degree in computer engineering from the same institution in December 1998. He also has a master of engineering degree from the Institute of Mechanics of Chinese Academy of Sciences that he received in September 1986. 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 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.

In this case, the director did not contest that the petitioner worked in an area of substantial merit or that the proposed benefits of his employment would be national in scope. The director did not find that the petitioner had established that he would serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. These determinations recognized that the petitioner changed employment after the petition was filed. The petitioner had formerly been employed for a private information technology firm developing Internet encryption and security software. He was subsequently hired by the American Bureau of Shipping (ABS) as a research engineer specializing in improving the system technology in the design and structural assessment of ships.

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 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 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. 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. *Matter of New York State Dept. of Transportation*, at 219, n.6.

The petitioner submits several witness letters in support of his petition. Four of these references come from colleagues at his former company, Trintech, Inc. [REDACTED] is a vice president of engineering. Dr. [REDACTED] states:

[The petitioner] has been a very important member of our engineering team since he joined Trintech in January 1999. He worked on the analyses of timing profiling of the S/Pay software, SSL Gateway Certificate Management Project, PayWare eIssuer initiative version, and T/3 Manager project of PayWare eAcquirer Capture Module. His original and innovative contributions at this company have assisted us in improving our competitiveness in the electronic commerce market, improving the Internet security in our products and improving our customer services and thereby saving costs, and in improving our productivity. Especially, Payware™ eIssuer based on the implementation of its initial version is a great success in the e-Commerce industry.

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[The petitioner] is involved in developing a novel type of software that would be introduced the secure payment transaction [sic] into mobile wireless commerce industry, called PayWare™ mAccess. His design and approach to the development of this software is quite challenging in the Internet security technology....

In conclusion, I cannot overemphasize the importance of [the petitioner] to the efforts of the U.S. wireless commerce industry. He represents a valuable national resource whose work touches on numerous aspects of Internet security technology. He will undoubtedly continue to make significant contributions to the Internet security technology, computer science and electronic commerce industry.

[REDACTED] a director of intellectual property at Trintech, Inc., also praises the petitioner's expertise. Dr. [REDACTED] describes some of the petitioner's activities at Trintech:

[The petitioner] has been carrying out several different projects including software performance analysis, cryptographic protocols and algorithm implementations, and the development of digital certificate management tools related to the SSL networking secure communication. . . . Early versions of S/Pay were far too slow to allow it to handle the expected volumes of eCommerce transactions. [The petitioner] carefully analyzed the performance bottlenecks of S/Pay, which led to significant performance improvements. This has allowed S/Pay to become the underlying engine of our SET-based Internet produce suite.

The other project on which [the petitioner] is currently working is the SSL Gateway Certificate Management Project. Many products rely on both SET and SSL security

communication protocols. . . . [The petitioner] developed a Graphical User Interface (GUI) that provides a convenient mechanism for users to manage their secret keys. This GUI uses industry-standard cryptographic algorithms including public and private-key cryptography.

In his work, [the petitioner] uses a variety of cryptographic techniques to ensure the transaction security. . . . [The petitioner] has a solid understanding of these functions and a good working knowledge of how to efficiently implement them in high-performance software. This is a very valuable asset for improving the security of Internet traffic on a national basis.

* * *

[The petitioner's] unique ability and expertise are essential to the Internet security of the U.S. . . . It is my recommendation that [the petitioner] be allowed to continue to be a strong contributor to the research and development of the U.S. Internet security technology.

Although Dr [REDACTED] and Dr [REDACTED] clearly valued the petitioner's services to the company, it is notable that neither letter specifically distinguished the petitioner from other talented software developers in the industry. We also note that since the petitioner is no longer employed in the development of commercial electronic payment technology, it does not appear that he will continue to make significant contributions in this particular area.

Professor [REDACTED] of Syracuse University served on the petitioner's doctoral oral examination committee. He states that the petitioner was one of the two or three best doctoral students that he has seen in the last ten years. Professor [REDACTED] praises the petitioner's abilities as a teaching assistant and as a researcher and notes that the petitioner continues to contribute to the development of electronic security technology.

[REDACTED] a professor of the Institute of Mechanics of the Chinese Academy of Sciences, became acquainted with the petitioner when he was a graduate student in 1983. Dr [REDACTED] asserts that the petitioner was a critical researcher in China in various significant projects. Dr [REDACTED] confirms that the petitioner's exceptional research expertise and experience in material sciences and computer technology led him to publish four articles in scholarly international journals, and considers the petitioner's knowledge and ability significantly beyond the majority of his colleagues in the information technology field.

[REDACTED] a research manager for the San Diego Super Computer affiliated with the University of California at San Diego, asserts that the petitioner has unique expertise in the field of Internet security and information technology. Dr [REDACTED] states that the petitioner's abilities at Trintech enabled him to improve "the capabilities of SET products to satisfy the high performance transaction systems and evaluate innovations in an electronic commerce environment." He contends that the petitioner's innovative contributions to the high performance secure payment technologies will directly benefit the

country and "will become the prototype of technical specifications in the key areas" such as cardholder authentication and encryption methods for payment card transactions. Dr. [REDACTED] does not indicate how he became acquainted with the petitioner's work at Trintech.

[REDACTED] a senior Unix engineer at the Bristol-Myers Squibb Company, echoes the praise of the other references and states that the petitioner's work has been national in scope. Dr. [REDACTED] claims that the project of eIssuer that the petitioner worked on at Trintech extends Internet security and reduces online shopping risks. Dr. [REDACTED] does not indicate how he is familiar with the petitioner's work.

[REDACTED] a senior Unix system administrator at Merrill Lynch, asserts that the petitioner is an active and productive researcher and developer in the area of electronic payment security technology. He contends that the petitioner is the "key developer and designer of the innovative wireless Internet project mAccess to deploy the best infrastructure solutions that ensure the wireless Internet access security and electronic secure payment with ease and confidence." Dr. [REDACTED] concludes that the petitioner is "strongly committed to the research in innovate technologies for improving the internet security technology, which would be adversely affected if [the petitioner] were not granted permanent residency [sic]." [REDACTED] does not state how he became acquainted with the petitioner's work.

[REDACTED] a principal engineer at ABS, the petitioner's current employer, addresses the petitioner's employment as a research engineer. Dr. [REDACTED] explains that ABS is a non-profit ship classification society designated by the federal government as the agency to classify United States government vessels. The ABS Safehull System is computer software introduced in the early 1990's that allows engineers to design and evaluate ship structures for strength, safety and durability. All new tankers, bulk carriers and container ships are required to comply with the Safehull System. Dr. [REDACTED] provides:

[The petitioner] was hired specifically to improve and modify the system based on his extensive background in Computer programming, Material and Structural Engineering and Internet distributed security technology. He has been working on the ABS *Safehull System* for almost half year now and has already made great strides on his work, and added some excellent new features to the *Safehull System*.

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[The petitioner's] initial project was to improve the *Safehull System* by adding a quick-sorting component on the elements and material ordering system. This component is designed to reorder the system internal node, plate, beam and material, etc. elements to improve the *Safehull system's* performance by using quick-sorting algorithms. [The petitioner] conducted research to investigate the *Safehull System* and determine which components were appropriate to incorporate into the *Safehull System*. . . . Ultimately, he also modified the software based on the results of those tests. He has completed this project and it will soon be released for use within ABS.

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Currently, [the petitioner] is improving the *Safehull System* in another way by joining the development of a new system called *Safehull Express System*. . . . The new system, *Safehull Express System* will merge the Phase A and Phase B into a more efficiently organized software product and add the powerful internet distributed design feature to the system. [The petitioner] is conducting the *Safehull Express System* architecture design and investigating the product security of distributed communications and computations over Internet.

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[The petitioner] is currently in the investigating and developing phase of this project and we are hopeful that it will be available within ABS soon.

On appeal, counsel submits an additional ABS letter from [redacted] Mr. [redacted] is the manager of the Safehull Dept. of ABS. His letter is extremely similar in language to Dr. [redacted] but he updates the petitioner's work record at ABS. Mr. [redacted] confirms that the petitioner made software modifications to the Safehull System by optimizing the system executing procedures, which have been presented in the ABS Safehull System release. He also states that the petitioner has developed a core XML communication software program so that the use of internet will facilitate the availability of the Safehull Express System. Mr. [redacted] also asserts that the petitioner's contributions have been widely recognized.

Other than Dr. [redacted] and Mr. [redacted] we note that the record contains no evidence from authorities in the shipping industry that the petitioner's accomplishments at ABS have generated recognition in the field. The evidence indicates that the petitioner had no connection to the shipping industry at the time of filing the petition, and thus cannot establish that he was influential in this field through his accomplishments at ABS. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

We also note that Dr. [redacted] and Mr. [redacted] contend that the labor certification process is not appropriate to an individual like the petitioner who has unique skills and extensive expertise. They assert that it would be extremely difficult to recruit and hire a replacement. Nevertheless, exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in 8 C.F.R. 204.5(k)(3)(ii)(F) for an alien of exceptional ability. It is not sufficient to state that the alien possesses unique training or is engaged in promising research. The labor certification process exists because it is in the national interest to protect jobs and employment opportunities of United States workers having the same objective minimum qualifications as the alien seeking employment. The alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process. As long as the requirement of a labor certification remains in the law, it is not persuasive to argue that the process is inherently flawed and time consuming and therefore should be waived in the national interest.

In this case, several of the petitioner's reference letters generally focus on the petitioner's work while he was at Trintech, but do not persuasively distinguish him from other skilled software engineers in the industry or explain why a comparably qualified individual could not be recruited through the labor certification process.

It is also noted that many of the petitioner's witnesses appear to be from his immediate circle of past and present colleagues, mentors, collaborators or supervisors. This does not detract from the value of their opinions, as they are in the best position to describe the details of the petitioner's work. However, the record would be more persuasive if it were supported by evidence from independent authorities that recognize or rely upon the petitioner's accomplishments, demonstrating that his contributions to the field are of such unusual significance as to merit a national interest waiver, rather than letters solicited for the purpose of facilitating the approval of the visa petition.

The petitioner submits copies of three published articles in which he was the lead author and copies of four co-authored articles. The record does not indicate that the presentation or publication of one's work is unusual in the petitioner's field. When assessing the influence and impact that the petitioner's 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 can be viewed as a more accurate indication that the petitioner's work has attracted widespread interest or authoritative recognition.

In this case, the record contains evidence that the petitioner's work has been cited eleven times. Three of these cites appear to be self-citations by the petitioner or his colleagues. While this is certainly an acceptable and common practice, it does not show that the petitioner's work has attracted wider scientific notice. We cannot conclude that eight citations establish that the petitioner's work has garnered significant attention from other researchers throughout the scientific and engineering community.

On appeal, along with Mr. [REDACTED] letter, counsel submits additional background material discussing the importance of the electronics economy. As noted earlier, the intrinsic merit of the petitioner's general field of expertise is not disputed. However, based on the evidence contained in the record, we cannot conclude 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 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 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, 8 U.S.C. § 1361. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.