

PUBLIC COPY

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

**identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy**

B5

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

File: WAC 01 276 51553 Office: CALIFORNIA SERVICE CENTER

Date: **JUL 03 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)

ON 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 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

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 (AAO) 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 a staff research associate in telecommunications. At the time he filed the petition, the petitioner was a postdoctoral staff research associate in the electrical engineering department of the University of California, Los Angeles (UCLA). 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 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.

The petitioner received a master's degree in physics in 1994 from the University of Southern California (USC) and obtained a Ph.D. from the University of Wisconsin in 1999. 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 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.

We note that the director's decision contains several erroneous references to the criteria for aliens of extraordinary ability under section 203(b)(1)(A) of the Act. In order to obtain a waiver of the labor certification requirement in the national interest, one need not establish national or international acclaim. While the director subsequently discusses the evidence under the correct standard and even states that national acclaim is not required for the classification sought, the

initial discussion is erroneous, and those portions of the director's decision are withdrawn. Because the decision also correctly analyzes the evidence under the statutory requirement of section 203(b)(2) and the precedent decision, *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), the decision will be upheld.

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 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, supra, has set forth several factors that 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 United States 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.

The director does not contest that the petitioner's field of endeavor in telecommunications, data transmission, and video compression research has substantial intrinsic merit, and that the proposed benefits of his work would be national in scope. It remains to determine whether the petitioner has established that he will serve the national interest to a substantially greater degree than would an available U.S. worker with the same minimum qualifications.

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 it 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 he seeks. 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 reference letters in support of his petition. Professor [REDACTED] supervises the petitioner's work in his laboratory at UCLA. He states that the petitioner has made important contributions in the development of international communications standards, particularly in the area of "reversible variable length codes and data partitioning." Professor [REDACTED] praises the petitioner's laboratory skills and credits him with inventing a "special algorithm that optimizes the efficiency of communication of real-time data over the Internet and wireless transmission channels" and which has drawn interest and collaboration from communications companies such as Samsung, KDDI, and Intel.

[REDACTED] a professor of computer science at UCLA, also submits a letter in support of the petition.

Professor [REDACTED] asserts that the petitioner's skills are being utilized as part of an important government funded research project to study and develop "ad-hoc wireless networks in order to facilitate communication of real-time audio/video multimedia information on the future battlefield." He asserts that this project requires the uninterrupted involvement of the petitioner. While the Bureau acknowledges the undoubted importance of research devoted to improving communications in a battlefield, the overall importance of a given project is insufficient to demonstrate eligibility for a national interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification.

[REDACTED] a professor of electrical engineering and mathematics at USC, also conducts research in the field. He states:

Our group has performed independent verifications of the data-partitioning proposal at ITU, for which [the petitioner] was one of the main advocates. The result was very promising, and that proposal is now Annex V of ITU video coding international standard H.263++. [The petitioner's] recent work in robust transmission of real-time data and his proposals at IETF and ITU are very nice works and have great potentials on improving video communication over packet-switched networks, including Internet and 3G wireless networks.

[REDACTED] an associate professor in the electrical and computer engineering department at the University of Wisconsin, collaborated with the petitioner on a research project and coauthored a paper with him. Professor [REDACTED] characterizes the petitioner as having made "significant contributions in video compression technologies, which is the information technology foundation for audio/video multimedia applications."

██████████ is a software design engineer for Microsoft and chairman of the ITU-T Video Coding Experts Group (VCEG). Dr. ██████████ states that it recently completed the third version of "Recommendation H.263," which is the current standard for "robust and high-compression video coding." The petitioner participated in this project. Dr. ██████████ describes the petitioner's designing, editing and organizing contributions as "exceptional."

██████████ is an employee of Samsung Electronics, a chairman of the working group "C1.2 (Video Services)," and is shown as a coauthor on several of the petitioner's publications. Mr. ██████████ states:

[The petitioner] is one of the key persons in developing the video technologies that fit the cdma2000 wireless environments. Currently, we are close to finalizing the standard specifications for '3G Video Streaming Services.' He has been leading the development of the specification for that work, and is the editor of the standard document.

██████████ a voice systems architect with Cisco Systems, Inc., knows the petitioner from their mutual work on the "H.323 related standards activities within the ITU-T." Mr. ██████████ relates that the petitioner serves as the editor of "Annex I to H.323 which will specify how to employ the techniques that he has invented." He characterizes the petitioner's role as having been instrumental in "the area of specifying and defining how to build communications systems that will operate in very 'noisy' environments."

We note that all of the testimonials submitted in support of the petition appear to be from individuals from the petitioner's past and present educational institutions or who have directly collaborated with him. Letters from those with direct connections to the petitioner certainly have value, because such persons have knowledge of the petitioner's contributions to a specific research project; however, their statements do not show, first-hand, that the petitioner's work has already influenced the wider scientific community as a whole, as might be expected with research findings that are especially significant. Independent evidence that would have existed whether this petition were filed, would be more persuasive than the subjective statements from individuals selected by the petitioner.

Although the record shows that the petitioner is a member of the Institute of Electrical and Electronics Engineers (IEEE), the American Physical Society (APS) and the Materials Research Society (MRS), there is no evidence provided that establishes the criteria for membership. While such evidence could reflect membership in a professional association requiring outstanding achievements from its members, this would only represent one regulatory criterion for aliens of exceptional ability, a classification that normally requires a labor certification as set forth in 8 C.F.R. § 204.5(k)(3)(ii) enumerating the criteria for an alien of exceptional ability.

The evidence in the file also indicates that the petitioner has received awards from various educational institutions. Academic awards are not professional recognition. Even if they were considered as recognition for achievements and significant contributions to his field, that is another possible criterion to establish eligibility for exceptional ability. We cannot conclude that satisfying two requirements or even the requisite three requirements for this classification makes one eligible for a waiver of the labor

certification process.

The record contains copies of three published articles in which the petitioner was the lead author and one that he co-authored. The record also contains copies of several of the petitioner's technical papers and drafts, as well as evidence that the petitioner's work has been presented at scholarly conferences. The evidence shows that the petitioner has also submitted written drafts to scholarly journals that have not yet been published. Unpublished articles may be an indicator of the petitioner's diligence in his field, but he must establish eligibility at the time of filing the petition. A petitioner may not establish eligibility for the visa classification by relying on an achievement attained after the filing date of the petition. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

We also note that the record contains no evidence indicating that publishing or presenting research findings is rare in the petitioner's field. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgment that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." 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. If an alien is pursuing research which he and his immediate circle of colleagues consider to be critical, but which other researchers do not view as particularly significant, then the extent of the alien's influence is not established. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work.

In this case, the record contains no evidence that independent researchers have cited the petitioner's work. We cannot conclude that the petitioner's work has already influenced his field to any significant degree.

In part 3 of the notice of appeal, counsel notes several specific objections to the director's decision. The notice of appeal, dated June 24, 2002, also indicates that counsel will submit a brief and/or evidence to the AAO within 30 days. To date, almost 12 months later, the record reveals no subsequent submissions.

The petitioner's documentation of his achievements and projections of future contributions may support the argument that the petitioner has exceptional ability in telecommunications research, but do not overcome the statutory mandate of a labor certification for this occupation. We cannot conclude that the benefit that the petitioner presents to his field "greatly exceeds the 'achievements and significant contributions'" contemplated in 8 C.F.R. 204.5(k)(3)(ii)(F) for an alien of exceptional ability. *See Matter of New York State Dept. of Transportation*, at 218. 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.

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.