

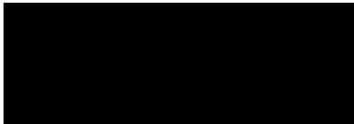
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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

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File: WAC 01 284 53339 Office: CALIFORNIA SERVICE CENTER

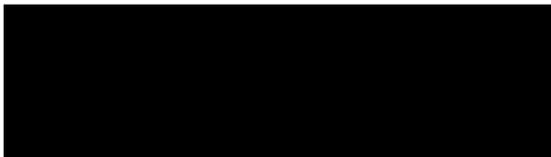
Date: JUL 17 2003

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

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 chief research scientist. At the time he filed the petition, the petitioner was a doctoral candidate at Stanford University. 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.

At the time the petition was filed on September 12, 2001, the petitioner held a master's degree in electrical engineering from Stanford University. He received this degree in June 1996.¹ 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 considered the evidence under the standard for a higher classification than that sought by the petitioner. The director's decision contains several erroneous references to the criteria for aliens of extraordinary ability under section 203(b)(1)(A). In order to obtain a

¹ The petitioner obtained a Ph.D. from Stanford in January 2002.

waiver of the labor certification requirement in the national interest, one need not be one of the small percentage at the top of one's field. While the director subsequently goes on to discuss the evidence under the correct standard and even states that national acclaim is not required for the classification sought, the initial discussion is erroneous.

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 the 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 215 (Comm. 1998), 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 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 petitioner works in an area of intrinsic merit, biotechnology, and that the proposed benefits of his work, advances in microelectromechanical systems (MEMS) used in biomedical applications, 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. *Id.*, at 219, n.6.

The petitioner submits reference letters in support of his petition. The record contains several from academics at Stanford. Representative of these testimonials is a letter from [REDACTED] a professor of electrical engineering at Stanford. Professor [REDACTED] supervised the petitioner's doctoral studies and is named as a co-author on several of the petitioner's articles. He asserts:

I consider [the petitioner] to be a person of exceptional ability in the area of Electrical Engineering, particularly in micromachining techniques, bioMEMS, microfluidics, and semiconductor manufacturing.

* * *

For his Ph.D. research, [the petitioner] undertook a very difficult problem of developing the science and technology for a novel micromachined ejector. This required the solving of very difficult mathematical problems that had heretofore escaped many professionals and professors in many prestigious universities. [The petitioner] solved these problems analytically and elegantly, thus establishing the basis for the design and implementation of these novel ejectors. Next, [the petitioner] followed this with the development of a very important process for the manufacture of micromachined ejectors by integrating silicon processing and piezoelectric thin film deposition technologies. . . . It is rare to solve one of the problems [the petitioner] solved for his Ph.D. work, but to do both theory and experiment at the level he did is truly remarkable and speaks volumes for his potential in the field of micromachining, ultrasonics, bio-fluidic and bio-technology.

[REDACTED] a professor of electrical engineering at Stanford as well as a member of the National Academy of Sciences and the National Academy of Engineering, also commends the petitioner's work and strongly supports his petition. [REDACTED] asserts:

In the course of his work, [the petitioner] made very significant contributions to the field of semiconductor manufacturing; moreover, as often happens with basic research, he found novel applications of his research in the very different areas of biomedicine and biotechnology! The underlying breakthrough was his conception and development of a novel microelectromechanical systems (MEMS) inkjet print head for resist deposition. The technologies and inventions developed by [the petitioner] during his Ph.D. study at Stanford University are attracting considerable commercial interest from the industry, e.g., from Hewlett-Packard and from Microbar Inc.

[REDACTED] a research scientist at the [REDACTED] knows the petitioner's work from his publications and research and invited him to contribute a presentation at a conference of the [REDACTED] states:

[The petitioner's] novel ink jet-based ejector technologies fill a unique gap in the field of dispensing. This technology will be enabling for applications in drug deliver, in high throughout screening of pharmaceutical candidates, and in the field of printing [sic]. His technology is the only one that I am aware of that allows for multi-dimensional droplet ejection on such a small scale. This technology is necessary for reducing the cost and scale of diagnostic reactions characteristic of biomedical screening.

[REDACTED] and [REDACTED] states that he has never met the petitioner, but became aware of his work through a contract solicitation that the petitioner's company, Adeptient, submitted. [REDACTED] describes the need for effective measles vaccination and continues:

[The petitioner's] SBIR proposal suggested the development of a micromachined ultrasound ejector arrays for aerosol-based pulmonary drug delivery. This technology represents a substantial improvement over the aerosol generation method currently employed in the CDC aerosol vaccination device.

* * *

We awarded the contract to Adeptient . . . [The petitioner] is the engineer best suited to continue this work. The fact that he holds the intellectual property rights to the technology, through the U.S. patent system, indicates to me that we cannot proceed in our joint development project without his participation.

Although [REDACTED] letter is dated March 2002, it is unclear when the contract was under consideration or awarded to the petitioner. We note that a petitioner may not establish eligibility through achievements attained after the filing date of the petition. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

[REDACTED] became aware of the petitioner's work through a research contract which the [REDACTED] was prepared to award to the petitioner's company. [REDACTED] states:

[The petitioner's] proposal submitted to [REDACTED] . . . proposed to use a micromachined ultrasound ejector arrays for aerosol-based pulmonary drug delivery system to deliver a discrete dose of volatilized drug intermittently to a sniff port after a nose poke response by a mouse. . . . As a result of this work, [the petitioner] has filed three patent applications . . . and has presented 10 papers on this technology at international meetings.

* * *

The development and application of such a technique will eliminate difficulties associated with maintaining intravenous catheters in mice, provide a long term preparation to study the full range of behaviors related to drug addiction, and simulate a popular method for self administering drugs of abuse in humans.

* * *

The scientific review panel noted that the technology developed by [the petitioner] would permit, for the first time, sufficient number of drug particles to reach the lung of the mouse and might make it possible for mice to self-administer drugs of abuse through inhalation. This would be a breakthrough for the field of addiction because other methods to volatilize and deliver drugs of abuse through inhalation in mice have failed. . . . The other proposals reviewed by the committee were found to be lacking in scientific merit.

[REDACTED] a professor of psychology at Boston University, was contacted by the petitioner to collaborate on pulmonary delivery of abusive drugs to mice [REDACTED] conducts pre-clinical studies aimed at medications development for drug abuse, targeting craving and relapse. She is impressed by the petitioner's knowledge and patent-pending technology and asserts that their collaboration offers the opportunity to advance the development and application of miniaturized aerosol-based drug delivery devices applicable in research in drug abuse.

Several of the petitioner's reference letters contained in the record are from his mentors or collaborators or who are connected to Stanford. Letters from those with direct ties to the petitioner certainly have value, because such persons have direct 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. That said, we note that [REDACTED] standing as a member of the National Academy of Sciences entitles his endorsement to considerable weight. We further note that the petitioner's connection to [REDACTED] first emerged as a result of the petitioner's work having attracted favorable notice from the [REDACTED] respectively. While it does not follow that every researcher eligible for a government grant inherently serves the national interest to an extent which justifies a waiver of the job offer requirement, the comments of these individuals, both of whom are outside of the petitioner's immediate circle of professional associates and in leadership roles at their respective institutions, carry significant weight.

The record contains evidence that the petitioner's company holds one patent and has two patent applications pending. A national interest waiver is not secured by simply demonstrating that an alien holds a patent. Whether a specific innovation serves the national interest is decided on an individual basis. *Matter of New York State Dept. of Transportation* at 221, n.7.

The record also contains evidence that the petitioner has made several presentations and is the lead author of three articles that were published prior to the filing date of the petition. Additionally, the record includes several more articles that were submitted for publication prior to the time of filing the petition in September 2001, but had not yet been published. Similarly, the petitioner has submitted copies of several articles that were published after the filing date. As noted above, eligibility for the visa classification must be shown at the time of filing the petition. A petitioner's reputation may not be retroactively established through articles published subsequent to the filing date of the petition. See *Matter of Katigbak, supra*.

We also note that the record contains no evidence indicating that presenting or publishing one's work is unusual 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.

Excluding self-citations by the petitioner or his colleagues, the citation index submitted by the petitioner shows that independent researchers had cited his articles twelve times by the filing date of the petition on September 12, 2001.

The director concluded that since the petitioner's credentials and expertise could be articulated on an application for labor certification, the petitioner had not demonstrated that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

On appeal, counsel asserts that very few researchers among the petitioner's peers can claim his level of achievement in such a short time. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). While a certain level of achievement at the beginning of a career may be compared favorably to others who are at the same stage, it does not follow that it is in the national interest to waive the requirement for a labor certification, when this requirement also applies to aliens who have long since completed their educational training. Members of the professions holding advanced degrees (including scientists) as well as aliens of exceptional ability in the sciences are generally subject to the job offer/labor certification requirement.

Nevertheless, we find that the totality of the record, including the petitioner's reference letters together with the citations to his published articles, adequately establishes that this petitioner has a track record of achievement with at least some degree of influence on the field as a whole.

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 field of research, rather than on the merits of the individual alien. In this case the record shows that the community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.