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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

PUBLIC COPY



Date: JUN 12 2003

File: WAC 02 141 51347 Office: CALIFORNIA SERVICE CENTER

IN RE: Petitioner: [Redacted]
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:



Identifying data deleted to
prevent identity compromise
Investigative Services

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 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 an alien of exceptional ability in the sciences. The petitioner seeks employment in integrated circuit design and semiconductor process technology. At the time of filing, the petitioner was a circuit design engineer at T-RAM, Inc. 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 petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has 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 requirements 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 director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The petitioner claims eligibility as an alien of exceptional ability. Because he readily qualifies as an advanced degree professional, however, an additional finding of exceptional ability would be of no further benefit to the petitioner. 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.

Neither the statute nor the 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now the Bureau] 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.

To describe his work and its importance, the petitioner has submitted several witness letters with the initial filing. Nearly all of these initial witnesses have taught or collaborated with the petitioner, the most common connection being through Stanford University’s Center for Integrated Systems (CIS), where the petitioner studied for his master’s and doctoral degrees. For example, Professor Krishna C. Saraswat was the petitioner’s doctoral advisor. Prof. Saraswat states:

The research [the petitioner] conducted at CIS garnered strong industry attention.

...

He is well known for his work on developing models and simulation methodologies for etch processes with dual use in VLSI and Micro-Electro-Mechanical Systems (MEMS) manufacturing. He is currently applying his exceptional abilities to developing better technology for the internet, and has had tremendous success already. He has developed a new design for packet search engine chips that shows great promise in solving the speed vs. size vs. power problem. He holds a U.S. Patent for High Speed Low-Power CAM-Based Search Engine, technology that could revolutionize the design of the search engine chips.

Other witnesses who worked with the petitioner at Stanford state that the petitioner's patented invention "provides the best of everything" and "addresses the problem of network congestion at the core of the internet." Christoph Warner, a senior member of the technical staff at Siemens, states that Siemens provided a corporate fellowship to pay for the petitioner's degree program at CIS because the petitioner's work "represents a major advance in semiconductor technology." Several witnesses echo Prof. Saraswat's assertion regarding "strong industry attention," although these witnesses generally had existing connections with the petitioner; they do not, themselves, represent major figures in the industry who know of the petitioner primarily through the importance of his work.

The witnesses describe the petitioner's work as "revolutionary," but discuss that work in the context of what "could" result rather than by describing any demonstrable existing results or concrete impact that the petitioner's efforts have already had on the industry.

Regarding the assertion that the petitioner "holds a U.S. Patent for High Speed Low-Power CAM-Based Search Engine," the documentation in the record shows only that the petitioner has applied for such a patent. The record contains no evidence that the application was subsequently approved.¹ Nevertheless, counsel, in quoting excerpts of the submitted letters, repeats the assertion that the petitioner not only applied for a patent, but actually holds the patent. Counsel emphasized this assertion with bold type. The application documents reflect the request that the patent application be unpublished, but it does not appear that this request would have prevented the Patent Office from notifying the petitioner of the issuance of the patent. Given this lack of evidence, there is no credible support for the claim (repeated with emphasis by counsel) that the petitioner "holds a U.S. Patent." Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The only initial witness who does not appear to have taught, supervised, or collaborated with the petitioner is Van Lewing, business development manager at PMC-Sierra, who states:

I met [the petitioner] this past year in regards to the network forwarding engine that he co-invented. I have been helping him by facilitating the meetings with key industry players. The development and availability of fast network co-processors that are dense and can operate at low power is a very high priority for the networking industry. [The petitioner's] invention focuses on the most important barriers in developing these high-density co-processors. . . . [The petitioner] is instrumental in the development of a revolutionary technology that is very much in the national interest of the United States.

¹ A search of the U.S. Patent and Trademark Office's online database at <http://www.uspto.gov> does not report the approval of any patent bearing the title, application serial number, or inventor name shown on the application.

The petitioner submits copies of four published articles he has written, along with documentation showing the impact factors of the journals that carried those articles. Impact factors are calculated based on the citation rate of articles appearing in the journals. By submitting this information, the petitioner demonstrates awareness of the importance of citations in showing the impact of a publication. Regarding his own work, however, the petitioner shows only that one of his articles has been cited three times.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted additional letters and documentation, with a cover letter from Prof. Saraswat. Prof. Saraswat notes that the petitioner has submitted evidence of further citations of the petitioner's publications, "documenting the strong & continued interest in his work." This documentation shows that the petitioner's one cited article has now been cited six, rather than three, times. The petitioner has not persuasively demonstrated that a total of six citations over the course of three years indicates major interest. This averages out to two citations per year, which only slightly exceeds the impact factor of the average article in the journal in which it appeared, and this average does not take into account the petitioner's other articles which appear not to have been cited at all.

Of the five new letters submitted in response to the request for additional evidence, three are faculty members at Stanford University, where the petitioner studied. The other two witnesses are a vice president of the company that employs the petitioner, and a venture capitalist who has invested in that company. Perhaps the most accomplished witness is Stanford University Professor R. Fabian W. Pease, whose honors in the field include election as a Fellow of the Institute of Electronic and Electrical Engineers and membership in the National Academy of Engineering. Prof. Pease's credentials are not in question here. Prof. Saraswat states that Prof. Pease "has not worked with [the beneficiary], but knows of [the petitioner] because of [the petitioner's] outstanding research work." Prof. Pease himself does not specify the extent of his interactions with the petitioner.

Prof. Pease states that the petitioner's work "can facilitate significantly faster packet processing in the IP routers and ethernet switches," and that the petitioner's "approach is a most promising alternative" which "should significantly benefit the competitive position of the United States in both the military and civilian fields." While Prof. Pease repeatedly discusses ways in which the petitioner's work might one day have a positive effect on the industry, he does not indicate that the petitioner's endeavors have already had a discernible practical impact on the field. Other witnesses similarly discuss the benefits that "will" result from the petitioner's work, or the impact that the petitioner is "in a position" to have.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director's decision contains several references to criteria set forth at 8 C.F.R. § 204.5(h)(3). These criteria apply to a different visa classification, for aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. This analysis was in error. Nevertheless, the

director's decision does not rely on these criteria to the exclusion of more appropriate criteria relating to the national interest waiver. The decision as a whole contains sufficient relevant findings to support the outcome of that decision. For instance, the director notes that the witnesses are tied to the petitioner's employers or to ASU, and that the petitioner's work is discussed in the context of what might eventually result from it, rather than from realized results.

On appeal, the petitioner submits arguments from counsel but no further evidence. Counsel argues that the petitioner "has developed a revolutionary technology." While some witnesses have indeed used the term "revolutionary," the record contains nothing to show that the petitioner's work has in fact revolutionized the field. The witnesses have tended to couch their statements in terms of future impact, speculating that the petitioner's work will one day prove to have been revolutionary, rather than pointing to significant developments in the field as a whole that have arisen chiefly because of the petitioner's efforts. If the petitioner chooses to advance the claim that his work is "revolutionary," the director is permitted to examine that claim.

Continuing in the above vein, counsel asserts that the petitioner has "created a revolutionary technology for network co-processors that overcomes a major barrier in increasing the Internet backbone's data capacity, and has generated tremendous industry interest." The record reflects some degree of interest in the petitioner's work, but the petitioner has not shown this degree to be "tremendous," nor has the petitioner provided figures to show an actual increase in "the Internet backbone's data capacity" coincident with the implementation of the petitioner's innovations. The assertion that such an increase is certain eventually to occur cannot suffice, nor can the observation that the "start-up" corporation where the petitioner now works has received venture capital. Counsel states that the petitioner's continued involvement "is essential to commercializing this technology," which had not yet been commercialized as of the time of the appeal, let alone the filing of the initial petition. Despite a witness' reference to the technology already being patented, the record shows only that the petitioner had initiated the patent application process.

Counsel discusses the petitioner's coveted Siemens Fellowship Award and other achievements. This evidence can provide strong support for a claim of exceptional ability, but it is clear from the language of the statute that aliens of exceptional ability in the sciences are typically subject to the job offer requirement. It follows that documentation of exceptional ability is not presumptive evidence of eligibility for a national interest waiver.

Counsel asserts that the petitioner has met the standard of "some degree of influence on the field as a whole." Counsel observes that the petitioner's "work has been cited by others" and therefore "his work . . . has had an influence on the field." Unless we make the overly broad finding that every cited paper is influential enough to merit waivers for its authors, we must consider the frequency of citations. As noted above, the petitioner has provided citation data for only one paper, which had been cited three times as of the petition's filing date, and three more times afterwards.

We acknowledge what experts consider to be the promise of the petitioner's work, but we nevertheless concur with the director's contention that the waiver application appears to be premature. The record

relies primarily on assertions regarding what may one day result from the petitioner's work, rather than existing, demonstrable results from that work.

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, 8 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.