

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

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date: MAR 17 2003

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:

PUBLIC COPY

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, Nebraska 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. The petitioner seeks employment as a postdoctoral research associate at the University of Utah. 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 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.

Counsel describes the petitioner’s work:

[The petitioner] is one of the world’s top scientists in ecosystem ecology and global carbon cycle research. His work is specifically in the field of monitoring and modeling carbon dioxide exchange between the biosphere and atmosphere.
...

[The petitioner] has successfully developed a biophysical model that combines various principles to research the carbon, water and heat fluxes, sources and sinks, and concentrations inside and above a forested canopy. . . .

His work has been published in leading international journals in the field and has been cited extensively by scientists around the world. [The petitioner] is indeed a well known international figure in his field.

Counsel states that the record contains a citation index, to corroborate the claim that the petitioner’s work “has been cited extensively,” but the record as it now stands contains no such document. The petitioner claims, in a personal statement, that one of his articles has been cited four times, and a second article six times. More than half of these citations (one for the first article, five for the second) are self-citations by the petitioner. Self-citation is a common and accepted practice, but it is not evidence that the petitioner’s work has been cited extensively by

others. Assuming the accuracy of the citation list in the petitioner's statement, the petitioner's work has been cited by others on four occasions, which is not an extensive citation history.

The petitioner has submitted a number of requests for reprints of his articles. While these reprint requests show that the requestors share a common area of interest with the petitioner, we cannot conclude that these requests reflect the requestors' opinions regarding the petitioner's work. By their very nature, the requests suggest that the requestors had not yet read the petitioner's articles. Otherwise, it is not clear why they would require copies. The minimal citation history claimed by the petitioner does not show that a significant number of researchers, after actually reviewing the petitioner's work, have relied upon it in their own research and writings.

Along with copies of his published articles and abstracts of his conference presentations, the petitioner submits several witness letters. [REDACTED] associate professor at Duke University, supervised the petitioner's doctoral research there. [REDACTED] states that the petitioner has made "major contributions" in several areas, and that his findings "are receiving major recognition in the field." Like [REDACTED] most of the witnesses have taught, supervised, or collaborated with the petitioner. Many of these letters focus on general statements about the petitioner's unusually broad educational background, his technical skill as a researcher, and his unusually prolific output of published articles (eleven within two years). [REDACTED] an associate professor at the University of Virginia, has collaborated with the petitioner and co-authored papers with him. [REDACTED] states that the petitioner "has performed exemplary research studies of the interaction between the land surface (biosphere) and the atmosphere with respect to the exchange of greenhouse gases. . . . His work is significant, of high impact and lasting effect." Those witnesses that offer specific information about the petitioner's work indicate that the petitioner has developed a valuable computer model regarding the carbon cycle.

One witness with no evident immediate connection to the petitioner is [REDACTED] of the University of Melbourne, who states that he "was made aware of [the petitioner's] work at meetings of the American Geophysical Union and through his PhD supervisor [REDACTED] [REDACTED] states that the petitioner's work "has been groundbreaking and is very highly regarded internationally. He . . . has already made important fundamental contributions to biosphere-atmosphere interactions."

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 noted that letters from the petitioner's collaborators and mentors "do not establish that the alien's work is known and considered unique outside his immediate circle of colleagues. The letters contain no evidence that the wider scientific community has taken notice specifically of the petitioner's work."

On appeal, counsel states that the director's decision "is one of the most extreme cases of abuse of discretion counsel has seen in over fifteen years." Counsel asserts that the director erred by failing to issue a request for evidence in accordance with 8 C.F.R. § 103.2(b)(8). At this point,

the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence that the petitioner would have submitted in response to such a request. Counsel states that the petitioner was “never given an opportunity to even attempt to answer the issues the examiner raised in the decision.” It is significant that, now that those issues have been raised, the appeal nevertheless contains no new evidence nor any specific rebuttal to the director’s findings. It is, therefore, far from clear what the petitioner would have submitted in response to a request for evidence if one had been issued.

Counsel states that the director relied on irrelevant factors which demonstrate “a lack of reason, fairness, knowledge of the law, and impartiality by the examiner.” These purportedly irrelevant factors generally revolve around the petitioner’s continued ability to work in the U.S. as a nonimmigrant. These factors were not, despite counsel’s claim, “deciding” factors; that is, there is no indication that the director would have approved the petition if not for the petitioner’s status as a nonimmigrant, under provisions that allow a nonimmigrant to work in the U.S. while an application for labor certification is pending on the alien’s behalf. These factors are not entirely irrelevant to the question of whether a waiver of the standard job offer requirement would be in the national interest. The petitioner has chosen an immigrant classification which normally requires a job offer and labor certification. It is entirely proper to inquire as to why these requirements should not apply to the petitioner.

Counsel contends “[t]he record shows that the alien is one of the world’s top scientists in ecosystem ecology and global carbon cycle research. . . . He would not have obtained his research position and status unless he was one of the best of the best. The record is clear that he is indeed.” Counsel professes to be “shocked” at the denial of the petition. Contrary to counsel’s assertion, the record is far from clear that the petitioner “is one of the world’s top scientists” in his field. The only place where such a claim occurs in the original submission is in counsel’s own introductory statement. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The director’s failure to treat counsel’s claims as undisputed facts is not an abuse of discretion, and the petitioner does not shift the burden of proof to the Bureau simply by declaring that the record obviously establishes the petitioner’s eligibility.

Counsel asserts that the petitioner’s “work is of tremendous interest to the federal government.” Counsel bases this claim on the fact that the petitioner’s research is funded by federal grants. The record, however, contains nothing from any federal officials to indicate that the petitioner’s work has attracted more interest than other grant-funded projects, or to show that only top researchers obtain such grants. Counsel asserts that the petitioner’s work has been praised by “worldwide experts in the field,” but nearly all of the witnesses of record are the petitioner’s collaborators. The opinions of such individuals, sincere as they may be, do not demonstrate that the petitioner’s work is held in similar esteem by others in the field.

The director did not declare the petitioner’s work to be insignificant or meaningless. At the same time, however, the record contains insufficient evidence to support counsel’s emphatic claims

that the petitioner's endeavors are among the most important in the entire field. If the petitioner's published work is indeed highly significant and influential, then one could reasonably expect heavy citation by a variety of researchers. Instead, the petitioner has claimed only ten citations, more than half of which are self-citations. Praise for the petitioner's model is not supplemented with direct evidence that research facilities where the petitioner has never worked have actually implemented this model.

The petitioner has clearly inspired significant respect and admiration among those who have trained and worked with him. [REDACTED] letter shows that the petitioner's reputation is spreading among colleagues of the petitioner's mentor, [REDACTED]. Viewed as a whole, however, the evidence of record simply does not live up to counsel's rather hyperbolic claims. The petitioner is clearly dedicated to his work and the promise shown in his early work may yet bear fruit of great significance, but at this stage the waiver request appears to be, at best, premature.

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.