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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, 20 Mass, 3/F
Washington, D.C. 20536

MAY 06 2003

File: [REDACTED] Office: TEXAS SERVICE CENTER

Date:

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:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas 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 to classify the beneficiary 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 physicist. At the time of filing, the petitioner was a doctoral candidate at the University of Texas at Austin; the petitioner has since received his doctorate. 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 appears to have disputed that the petitioner qualifies for classification as a member of the professions holding an advanced degree. The director found 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) . . . 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.

At the time he filed the petition, the petitioner had not yet completed his doctorate at the University of Texas. The petitioner did, however, hold a master's degree in Vacuum Physics from the Beijing Institute of Electronic Optical Technology. The wording of the decision is ambiguous, but it appears that the director found that the petitioner failed to submit evidence to show that this degree is comparable to a U.S. master's degree. The director also acknowledged, however, that the University of Texas accepted the petitioner's foreign degree and on that basis admitted him into its doctoral program. There is no indication that the program is a combined M.S./Ph.D. program, rather than a standard post-magisterial doctoral program. Given this acceptance, and given also that the petitioner's master's degree program took four years, considerably longer than many U.S. master's degree programs, it is not clear why the director disputed the petitioner's degree. While a formal evaluation of the petitioner's degree would have added to the record, and presumably resolved the director's doubts, the absence of such an evaluation is not fatal to the petition when the available evidence consistently

indicates that competent authorities (e.g. the admissions authorities at a major university) recognize the petitioner as the holder of a master's degree.

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 the 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 states:

Currently, [the petitioner's] research involves semiconductor heterostructures such as the ordering of semiconductor alloys and semiconductor quantum dots (QDs).

[The petitioner] is the first ever to observe that alloys grown by organometallic vapor phase epitaxy (OMVPE) have a higher degree of ordering than those grown by molecular beam epitaxy (MBE).

[The petitioner's] current research has also revealed important details which are necessary for the correct use of QDs. . . . One of his discoveries has disproved the widely accepted theory that the composition inside QDs is uniform.

Along with documentation pertaining to his field of research, the petitioner submits several witness letters, copies of his published articles, and citation figures for those articles. We will discuss this evidence further below.

The director's notice of decision contains several findings and assertions that must be addressed, as they deviate from or have no correlation with established policy regarding the national interest waiver. Many of these assertions were first set forth in a request for additional evidence that the director issued prior to the denial. Because these same assertions are repeated verbatim in the denial notice, and the remainder of the denial notice consists primarily of an analysis of the petitioner's response to the request, the assertions in the request for evidence are, in effect, the principal grounds for denial.

In denying the petition, the director made several assertions regarding the petitioner's articles. For instance, the director stated "[a]rticles published by a student simply do not carry the weight [of] articles published by a degreed individual already working for a good salary." Counsel observes, on appeal, that the petitioner earned his master's degree in 1988, two years before his first article appeared in 1990. Therefore, the petitioner was indeed a "degreed individual" when he began producing published articles. The petitioner did not begin his doctoral studies until 1996, and therefore any article written between 1988 and 1996 is not the work of a student.

More importantly, the director offers no justification for the assertion that an article published by a student carries less weight than an article by a non-student. Certainly there is a variety of circumstances under which an individual may write or co-write an article, but the content and impact of a given article are unaffected by the academic status of the author(s). Otherwise, a student could increase the "weight" of his or her article simply by withholding its publication until after completion of the degree, which is illogical.

The director observed that the petitioner's "productivity was highest in 1997 with 8 articles but has decreased since 1997 which does not indicate that the self-petitioner's talents are growing." This argument fails because sheer quantity of output is not necessarily a gauge of one's "talents." The reaction of the field to the petitioner's work is of greater importance than its raw quantity. Also, as counsel notes, the drop in the petitioner's productivity coincides with his entry into the doctoral program, and it is not necessarily derogatory to the petitioner that his change in circumstances led to a change in his rate of published output, especially when the change in circumstances is by nature temporary.

With regard the reaction of the field, the petitioner submits evidence to show that his published work since 1990 has garnered an aggregate total of 66 independent citations (not counting self-citations) as of the petition's filing date; that number has since grown. A high citation rate is generally a reliable indicator of the impact of a researcher's work, as it shows that others have relied on the work reported in the cited article. Some of the petitioner's articles continue to be cited several years after their original publication, indicating their continued relevance to the field.

The citation rate is uneven, with some of the petitioner's articles cited rarely or never, but others have been cited more than a dozen times.

The petitioner has submitted several witness letters in support of the petition. While a number of these letters are from faculty members at the University of Texas, other letters are from more independent witnesses. Dr. [REDACTED] director of the Laboratory for Surface Modification at Rutgers, the State University of New Jersey, states:

[The petitioner] has made several major scientific discoveries. These discoveries concern remarkable new insights in an exciting area, the field of self-assembled semiconductor quantum dots (QD). QDs are a remarkable new form of materials, tiny assemblies of atoms with dimensions only a few atoms wide. QDs are of great importance to the U.S. technological growth. They can be used to improve the performance of new devices (called optoelectronic devices) that will result in cheaper, better computers, and improvements in fiber optics communications. . . .

[The petitioner] is an extremely intelligent, productive and independent research scientist. The research he has carried out at Texas is of the highest quality, and is having an important impact in diverse areas including semiconductor microelectronics, optical communications, and next generation computer technology.

Among his credentials, Dr. [REDACTED] indicates that he has served as the president of two organizations in his specialty, the American Vacuum Society and the International Union for Vacuum Science, Technique and Applications. Given this level of expertise, we ought not to dismiss Dr. [REDACTED] assertions simply because he has personally met the petitioner. The record does not reflect a long-standing close relationship between the petitioner and Dr. [REDACTED] and thus Dr. [REDACTED] estimation of the importance of the petitioner's work would not have been colored by his own involvement in the same projects. Certainly, some questions arise when a given research project is said to be of major importance, but no one outside of the research group itself appears to have heard of the project or to have recognized its claimed significance, but such is not the case here. Even when all the witnesses have some ties to the alien, the evidence must be considered and weighed. There is no simple checklist for adjudicating national interest waiver requests, nor does it appear that such a checklist is possible under the current regulations at 8 C.F.R. § 204.5(k), which are not detailed with regard to the national interest waiver.

Dr. [REDACTED] assistant professor at Ohio University, does not claim to have worked with the petitioner although "we met at a professional physics conference." Dr. [REDACTED] states:

[The petitioner's] research has produced some intriguing results.

Using a high resolution imaging technique called cross-sectional scanning tunneling microscopy, (XSTM), [the petitioner] found that the [quantum] dots are not perfectly homogeneous, but in fact have a non-uniform distribution of atoms. In fact, he found upside-down pyramids of the element indium in the middle of a dot, which was on the whole composed of elements gallium, indium, and arsenic. This

unexpected indium distribution implies that the effective shape of the QD is entirely different than expected, having smaller size (and presumably a higher indium fraction) than would be supposed. Knowledge of the composition distribution is essential for device design and modeling.

The director had stated that the above “letters of recommendation all referred to the self-petitioner’s thesis work, which was performed under the guidance of his doctoral committee and in collaboration with senior researchers.” The same can be said of any doctoral work, but there is nothing in the statute, regulations, or case law that automatically disqualifies student work from consideration when considering a waiver application. The letters do not indicate that the petitioner was simply following basic instructions and performing tasks that his professors assigned to him. Rather, the letters – including several letters from the petitioner’s collaborators and professors – attribute original ideas and contributions to the petitioner.

The director raised various other issues of questionable relevance, such as the assertion that the petitioner “did not show a mature awareness of the competition” or that he had only a B average as a graduate student in China. Counsel has endeavored to answer these findings, but seeing as these assertions form a weak foundation for a denial decision, we need not discuss counsel’s responses in depth here.

It is clear from a review of the notice of decision that it is the product of considerable effort, rather than a “boilerplate” decision consisting of “stock” language. At the same time, however, we cannot ignore that this decision relies on what are, at times, irrelevant or even contradictory standards. The AAO cannot uphold so flawed a decision. In this instance, the petitioner has submitted evidence that his research is influential and has attracted highly favorable attention outside of his circle of mentors and collaborators. This evidence is sufficient to justify approval of the petition and waiver request, and therefore to remand the matter for a new decision would merely delay favorable action toward the petitioner.

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. That being said, the above testimony, and further testimony in the record, establishes that the physics 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. 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.