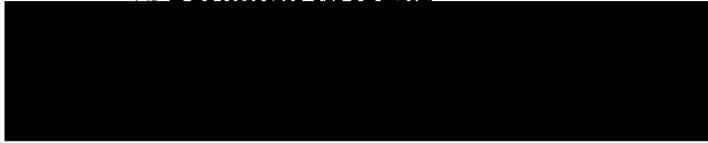


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

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File: WAC 01 277 50762 Office: California Service Center Date:

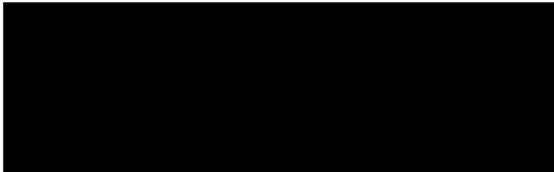
IN RE: Petitioner:
Beneficiary:



MAY - 0 2006

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)

IN 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

It is noted that the petition was originally filed by [REDACTED] on July 31, 2001. On May 3, 2002, [REDACTED] acquired [REDACTED] and became its successor in interest and the petitioner in this case.

The petitioner seeks to classify the beneficiary 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. The petitioner seeks to employ the beneficiary as an Environmental Engineer/Scientist. 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 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 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 regulation at 8 C.F.R. § 204.5(k)(3)(i) states:

To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or

former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The beneficiary holds a Bachelor of Science degree in Environmental Resources Engineering from Humboldt State University in California. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. Furthermore, [REDACTED] the beneficiary's employer since 1995, has provided letters and other evidence showing that he has at least five years of progressive post-baccalaureate experience in environmental engineering. The beneficiary thus qualifies as a member of the professions holding an advanced degree. Correspondence from counsel requests that the beneficiary be classified as an alien of exceptional ability. Because the beneficiary qualifies as an advanced-degree professional, however, an additional finding of exceptional ability would be of no further benefit to the petitioner in this proceeding. The remaining issue 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 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 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.

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 this project must also qualify for a national interest waiver. At issue is whether this beneficiary's contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. The petitioner must demonstrate the beneficiary's past history of achievement having some degree of influence on the field as a whole. *Id.* at note 6.

Counsel states that the beneficiary "has established an impressive track record in the field of environmental science, and has received considerable recognition for his achievements and work in this field."

Along with his professional credentials and documentation pertaining to his projects, the petitioner initially submitted four witness letters. Louis Stout, Senior Program Manager for Department of Defense ("DOD") programs, Western Region, IT Corporation, states:

[The beneficiary] has worked for IT Corporation since 1995. During that time, [the beneficiary] has worked for me on numerous DOD projects under major contracts for the U.S. Army Corps of Engineers and U.S. Naval Facilities Engineering Command. Some of the projects include extensive environmental remediation work at Hamilton Army Airfield, Presidio of San Francisco and Fort Ord for the Army; and North Island Air Field, Alameda Air Field, and Hunters Point Shipyard for the Navy. The nature of this work is critical to the Health and Welfare of the local communities and to the environment within the Western United States.

All of the above-referenced projects are regulated under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). Some of these projects also fall under the Superfund Amendments and Reauthorization Act (SARA) and the Resource Conservation and Recovery Act (RCRA) regulations.

[The beneficiary] provides technical support (in the field of environmental engineering) for IT Corporation. His responsibilities include, but are not limited to, environmental assessment, remediation, design, and construction; preparing project reports and closure plans; and interpreting relevant environmental regulations for large multi-discipline projects. His work is a key contributor to the success of our numerous government contracts.

Dr. [REDACTED] now an Associate Engineering Geologist with the State of California Regional Water Quality Control Board, was employed by IT Corporation during the 1990's. Dr. [REDACTED] states:

[The beneficiary] and I worked in the same small group of environmental scientists and engineers, and we worked together on a number of environmental projects for commercial and government clients.

IT Corporation is a for-profit environmental consulting firm. Scientists employed by companies such as IT provide professional consulting services to other companies, individuals, or government agencies that are responsible for preventing pollution, or for remediation of existing pollution for which those clients are responsible. Such work is generally driven by the need for the responsible party to achieve, or maintain, compliance with State or Federal environmental regulations.... [The beneficiary] and I both participated in the collection of soil and water samples, the interpretation of environmental data, the preparation of investigation workplans and technical reports, and the design and operation of computerized numerical groundwater flow models, among other things. Such work requires a great deal of technical knowledge, problem solving skills, creativity, and versatility.

* * *

Within IT's environmental engineering group, [the beneficiary] is rightfully recognized as an expert in computer applications, particularly those requiring three-dimensional imaging. On the many projects I worked on with [the beneficiary], I generally served as the hydrogeologist while [the beneficiary] provided computer-based engineering design support.... [The beneficiary's] skills are very much in demand within IT. [The beneficiary] has applied his technical skills to several large U.S. government projects for the Department of Defense...

Through his contributions as a consulting environmental engineer for the past six years, [the beneficiary] has been performing very valuable and important services for the State of California in helping commercial clients achieve compliance with strict State environmental regulations, and for the Federal government in helping the Army, Navy, and Air Force solve several of their most challenging environmental problems.

We note here that any objective qualifications that are necessary for the performance of an environmental engineering position can easily be articulated in an application for alien labor certification. Pursuant to *Matter of New York State Dept. of Transportation, supra*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

Dr. [REDACTED] now a Research Scientist in the Earth Sciences Division at Lawrence Berkeley National Laboratory ("LBNL"), indicates that he worked at IT Corporation as a Senior Project Scientist from 1988 to 1998. Dr. [REDACTED] states that the beneficiary displayed "exceptionally good technical abilities in the field of environmental engineering" and provided "excellent contributions" to IT's U.S. Government projects.

The beneficiary may have benefited various projects undertaken by his employer, but his ability to

impact the field beyond the projects to which he has been assigned has not been demonstrated. The petitioner has not shown how the beneficiary's work on various DOD projects significantly distinguishes him from other competent environmental engineers. None of the above letters indicate that the beneficiary's contributions are especially important to his field, nor do the letters devote much space to the beneficiary's specific activities. The message of the letters instead seems to be that because the industry requires trained professionals to provide expertise in data analysis and computer modeling, the beneficiary serves the national interest by virtue of possessing the required training and skills.

The record contains a Letter of Commendation stating that the beneficiary was selected as a recipient of IT's "1999 National Quality Award" for his work on the "Naval Facilities Engineering Command Southwest Division Remedial Action Contract, Delivery Order 140." This award reflects recognition by his employer, but it does not show that the beneficiary's work is viewed throughout the greater environmental remediation/hydrogeology field as being particularly significant.

A letter from the beneficiary's research supervisor at Humboldt State University describes the beneficiary's research activities from 1990 to 1995, but it does not indicate how the beneficiary's work was of greater benefit than that of others in his field.

Also submitted were two abstracts (listing the beneficiary as a contributor) from the National Ground Water Association's Annual Convention (1998). The record, however, contains no evidence that the presentation or publication of one's work is a rarity in the beneficiary's field, nor does the record contain citation records or other evidence to establish that environmental engineers (outside of the beneficiary's collaborators on various governmental projects) regard the beneficiary's articles as especially significant. While heavy citation of the beneficiary's past articles would carry considerable weight, the petitioner has not presented such citations here.

The director requested further evidence that the beneficiary had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted additional witness letters.

John Sciacca, Senior Geoscientist/Technical Advisor and Director of Geosciences Leads Teams, IT Corporation, states:

[The beneficiary] has exceptional skills specialized in the areas of groundwater flow and transport modeling, computer-aided three-dimensional data analysis and visualization, geographic information systems, and computer programming. [The beneficiary] routinely applies these skills to projects of national significance and his accomplishment in the past are in part reflected in his receipt of The IT Group 1999 National Quality Award for his valuable contributions to the Department of Defense Southwest Division Remedial Action Contract and a letter of commendation from the U.S. Air Force for his contributions to Mather Air Force Base remediation efforts. Moreover, [the beneficiary] has been designated as IT Corporation Geosciences Lead for the West Team to provide assistance with issues in the areas of geologic-based computer applications and Geographic Information Systems....

[The beneficiary's] role as a Geosciences Lead is testimonial of recognition by his peers for of [sic] his exceptional skills and past accomplishments. [The beneficiary's] continued enhancement of his skills with specialized training and past track record are testimonials that he will continue to contribute to the national interest in the future.

While the beneficiary may have been responsible for GIS and Geological-Based Computer Applications for IT Corporation's West Team, it has not been shown that the beneficiary ever served as its team leader/coordinator, or that he has led regional or national projects in the same manner as [REDACTED]

[REDACTED] The petitioner has not established that the beneficiary's past accomplishments set him significantly above his peers such that a national interest waiver would be warranted.

[REDACTED] Rapid Response Project Manager, U.S. Army Corps of Engineers, Omaha District, has collaborated with the beneficiary on a soil and groundwater remediation project. His observations are similar to those of [REDACTED] states:

[The beneficiary's] superior environmental skills are derived from his unusual background. [The beneficiary] has an unusual combination of skills in the fields of oceanography and environmental engineering. This combination of skills is rare, and makes him an environmental engineer who is much more valuable to the United States than other experienced environmental engineers. Even the best environmental engineers in the nation lack [the beneficiary's] unusual background that has allowed him to develop a unique understanding and approach to solving hydrogeology problems. [The beneficiary] allows us to address Superfund sites with a more holistic approach, and to identify more readily all of the potential problems that a contaminant plume may lead to in a particular location.

The above statements emphasize the beneficiary's objective qualifications and educational background, which are amenable to the labor certification process. It cannot suffice for the petitioner's witnesses to state that the beneficiary possesses "rare skills" or an "unusual background." As has been observed in *Matter of New York State Dept. of Transportation*, a plain reading of the statute and regulations shows that aliens of exceptional ability and members of the professions holding advanced degrees are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one's field of endeavor does not, by itself, compel the Bureau to grant a national interest waiver of the job offer requirement. In this matter, the alien must demonstrate that he has already significantly influenced his field of endeavor.

[REDACTED] further states:

I have worked with [the beneficiary] on two phases of a project of national importance, which has been listed as high priority by the federal government. The project is the Selma Treating Company Superfund site where soil and groundwater contamination have been identified. The U.S. Environmental Protection Agency (USEPA) contracted the U.S. Army Corps of Engineers (USACE) Rapid Response Division and [the beneficiary's] employer, IT

Corporation (IT) to conduct remediation efforts at this site. The first phase of the remediation effort included site characterization of the groundwater contamination, modeling, and design and construction of a groundwater extraction and treatment plant. [The beneficiary] was critical to the success of this effort. He analyzed the data and designed the site hydrogeologic conceptual model, from which all of the engineers at the USACE and IT Corporation used to conduct our clean up efforts. He also performed preliminary analytical element modeling and provided 3D visualization of subsurface geology and contaminant plumes. This information was incorporated into a numerical groundwater model (MODFLOW) which allowed us to optimize and design a network of groundwater extraction wells.

In the second phase, [the beneficiary] and I are working to further characterize and improve remediation efforts at the Selma Treating Company Superfund site. This effort is a nationwide project guided by the USEPA Technology Innovation Office and the Office of Emergency and Remedial Response. This effort seeks to identify sites that can benefit from optimization and computer modeling optimization tools. Toward this end, [the beneficiary] has been evaluating historical hydrogeologic and analytical data to update groundwater flow and contaminant plume maps and analyze trends. He has used this information to update and recalibrate the existing numerical groundwater flow model, and expand the modeling effort to include fate and transport modeling (MT3D) of the contaminant plume. Model simulations will be used to optimize pump and treat systems. Experiences learned from [the beneficiary's] efforts in this project will allow us to more effectively treat contaminated sites throughout the nation.

Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for the national interest waiver. The second phase of the beneficiary's work described in the preceding paragraph relates to events that came into existence subsequent to the petition's filing. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Bureau held that aliens seeking employment based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

██████████ now a Senior Engineer and Project Manager at Balsland, Bouck & Lee, was a project engineer at IT Corporation from 2000 to 2002. He states: "[The beneficiary's] modeling capability allows for thorough evaluation of contaminant distribution which in turn allows for more complete evaluation of strategies to remediate hazardous waste sites." The petitioner, however, has not established that any of the beneficiary's conceptual models have been adopted nationally (beyond use in IT Corporation's projects) or that his work has been the subject of articles appearing in reputable engineering journals.

Other witnesses who have worked with the beneficiary state that his unique skills benefit various environmental restoration programs funded by the U.S. Government. We generally do not accept the argument that a given project is so important that any alien qualified to work on that project must also qualify for a national interest waiver. Information concerning the overall importance of the beneficiary's environmental restoration efforts may establish the intrinsic merit and national

scope of the beneficiary's work, but such general arguments would not suffice to show that the beneficiary's individual accomplishments are of such an unusual significance that he qualifies for a waiver of the job offer requirement. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule. Thus, statements pertaining to the undoubted importance of environmental remediation efforts fail to distinguish the beneficiary from other competent engineers involved in that same specialty.

Dr. [REDACTED] now a Research Chemist at the National Oceanic and Atmospheric Administration, taught the beneficiary several courses at Humboldt State University. He repeats the assertions of previous witnesses and cites several of the beneficiary's academic achievements. University study, however, is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The beneficiary's scholastic achievement may place him among the top students at a particular university, but it offers no meaningful comparison between the beneficiary and experienced environmental engineers who have long since completed their educational training.

Other than letters from individuals with direct ties to the beneficiary (such as his instructors, supervisors, and project collaborators), the petitioner has provided no evidence to show that the greater environmental engineering community views the beneficiary's individual work as particularly significant. In this case, the petitioner must demonstrate not only that the beneficiary is a particularly well-qualified environmental engineer, but that his work has had a national impact beyond the scope of duties intrinsic to his profession.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director acknowledged the intrinsic merit and national scope of the beneficiary's work, but found that the beneficiary'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 indicated that the petitioner had not shown that the beneficiary's "work has been of greater significance than that of others in the field."

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. For example, pages four and five include a discussion of the lack of national prizes and participation as a judge. Prizes and judging experience, however, are not required for the classification sought by the petitioner. Erroneous references to the "regulatory criteria" and national acclaim appear several times in the first few pages of the director's decision. By discussing the lack of evidence regarding national acclaim, the director erred in the initial portion of his analysis. Therefore, we withdraw the director's initial findings pertaining to the regulatory criteria for the extraordinary ability classification.

The director's decision subsequently goes on to discuss the evidence under the correct standard and even states that national acclaim is not required for the classification sought. While the director's decision contains flawed statements, we find that the decision is not so flawed as to undermine the grounds for denial. The Bureau notes its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within the power of the Service to formulate. *Helvering v. Gowran*, 302 U.S. 238 (1937); *Securities Comm'n v. Chenery Corp.*, 318 U.S. 86 (1943); and *Chae-Sik Lee v. Kennedy*, 294 F.2d 231 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 926 (1961).

On appeal, counsel argues that the beneficiary has met the eligibility factors set forth in *Matter of New York State Dept. of Transportation*. Counsel's brief offers a general discussion of the published precedent and then goes on to cite several AAO decisions approving national interest waiver petitions. Counsel's attempt to apply statements from previous AAO findings to the current case is flawed. There can be no meaningful analysis of these decisions to determine the applicability of the same reasoning to other cases. Additionally, the approvals in question do not represent published precedents and therefore are not binding on the Bureau in other proceedings.

Counsel cites the witness letters attesting to the beneficiary's computer modeling capabilities. As noted by the director, the petitioner's witnesses consist entirely of individuals having direct ties to the beneficiary. Several of the witnesses discuss the beneficiary's potential capacity for future contributions, and discuss the role that the beneficiary plays in various DOD projects. Their letters describe the beneficiary's expertise and value to IT Corporation's specific projects, but they fail to demonstrate his influence on the field beyond his work for that company. For example, the witnesses do not indicate the extent to which the beneficiary's work has influenced Superfund projects with which he is not directly involved, as would be expected if he had provided indispensable new computer modeling methods that affect not only the beneficiary's specific projects, but his field and the larger area of environmental remediation. While letters from those close to the beneficiary certainly have value, the letters do not show, first-hand, that the beneficiary's work is attracting attention on its own merits, as we might expect with environmental engineering innovations that are especially significant.

The beneficiary has plainly earned the respect and admiration of his superiors and collaborators in the particular projects in which he has been involved. It appears premature, however, to conclude that the beneficiary's work has had and will continue to have a nationally significant impact on the work done in his field.

In sum, the available evidence does not persuasively establish that the beneficiary's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

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 the 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.

ORDER: The appeal is dismissed.

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