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

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



File: WAC-02-202-52128 Office: California Service Center Date: OCT 8 - 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)

PUBLIC COPY

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 Citizenship and Immigration Services (CIS) 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 a member of the professions holding an advanced degree. 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 had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

The director's decision includes several references to the regulatory requirements for aliens of extraordinary ability. Nevertheless, on page nine, the director acknowledges that national or international acclaim is not required for this classification and that the petitioner need not demonstrate that he is one of the very few at the top of his field. The remaining analysis uses the correct standard. Further, the director raised legitimate concerns, which will be discussed below, that counsel has not addressed on appeal. Thus, while we withdraw any inference from the director's decision that a petitioner need demonstrate national or international acclaim, we find that, in light of the remaining discussion, the director's use of such language is not reversible error.

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 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 of filing, the petitioner was only a doctoral candidate but held a Master's degree in Engineering from Nanjing University of Posts and Telecommunications. 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 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 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 Dep't. of Transp., 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.

We concur with the director that the petitioner works in an area of intrinsic merit, electrical engineering, and that the proposed benefits of his work, improved technology for wireless communications, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than 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 this project 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.

Dr. [REDACTED] an associate professor at the University of Hawaii at Manoa in whose research group the petitioner worked, explains that low density parity check (LDPC) codes are receiving increased attention for use in wireless communications because of the good performance and reduced power consumption that can be achieved using such codes. Dr. [REDACTED] asserts that he obtained a grant from the National Science Foundation (NSF) to pursue LDPC code research "partly based on [the petitioner's] preliminary work on near optimum universal BP-based decoding of LDPC codes." Dr. [REDACTED] further notes that the project also received support from the Hawaii Center for Advanced Communications (HCAC). Dr. [REDACTED] continues:

[The petitioner] has proposed two new algorithms for the decoding of LDPC codes, namely the normalized BP-based algorithm and the offset BP-based algorithm. These algorithms are the first LDPC decoding algorithms to achieve the decoding performance of the optimum algorithm with requiring very low decoding complexity. [The petitioner] also applied a cutting-edge analysis method of the theory on iterative decoding to determine the best decoder parameters of these two algorithms for many LDPC codes. With these two algorithms, the VLSI design of the LDPC decoder is greatly simplified and LDPC decoders with high speed can be implemented on hardware. [The petitioner's] continued research will benefit many areas, such as space communications, wireless communications and military communications, as there is no doubt that LDPC codes are the trend for communications systems and data storage systems of the next generation.

In a subsequent letter, Dr. [REDACTED] provides more information regarding the importance of the petitioner's area of research, asserting that the other researchers in this area are focusing on the hardware for implementing such codes as opposed to the decoding algorithms. The petitioner submitted additional letters from the faculty at the University of Hawaii at Manoa who provide similar information.

Dr. [REDACTED] a senior member of the technical staff at Tyco Communications, discusses the petitioner's employment at that company. Dr. [REDACTED] asserts that the petitioner's project allowed Tyco "to catch up with the cutting-edge development in the coding area and led Tyco to a successful and important research accomplishment." Subsequently, Dr. [REDACTED] states, "[the petitioner] performed some pioneering work on applying LDPC to the optical transmission environment while with Tyco and the results are expected to have very wide application."

Dr. [REDACTED] Technology Director at Tyco Telecommunications, provides more specifics regarding the petitioner's work at that company. According to Dr. [REDACTED] the petitioner developed "a novel approach for theoretical prediction of the error performance as the concatenated Reed-Solomon (RS) codes." Dr. [REDACTED] asserts that the work was important to

Tyco because Tyco uses RS codes in its current communication systems. Dr. [REDACTED] further states that the petitioner's work on LDPC "will benefit optical communications in the U.S. in the near future as our company (and many others) is considering LDPC codes as a promising candidate for the coding scheme in optical communication systems of the next generation." Neither Dr. [REDACTED] nor Dr. [REDACTED] provide details regarding the nature of the petitioner's contribution to Tyco's current communications systems. The assurances that the petitioner's contributions to LDPC will prove significant appear speculative.

Dr. [REDACTED] whose laboratory collaborated with the petitioner, provides similar information to that discussed above and asserts that the petitioner "is at the forefront of research in this area worldwide, and will have an enormous impact on the future implementation of LDPC codes." Dr. [REDACTED] does not provide examples of the petitioner's past history that justify such a prediction.

In response to the director's request for additional documentation, the petitioner submitted a letter from [REDACTED] a research scientist at Mitsubishi Electric Research Laboratories, discussing the petitioner's work at that company after the date of filing. Mr. [REDACTED] states:

First, [the petitioner's] current research is helping to ensure our world-leading position in the study of LDPC codes and other error control codes, such as turbo codes and Reed-Solomon codes. Second, his research results made on the decoding of LDPC codes and turbo codes will boost the application of such codes in foreseeable years. Finally, with his strong academic background in coding theory, [the petitioner] is uniquely suited to develop new decoding algorithms and promote their applications.

Mr. [REDACTED] assertions are general and merely attest to the potential benefits of the petitioner's work. Mr. [REDACTED] does not identify any specific accomplishments that justify the projections in his letter.

While letters from colleagues are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole. Moreover, the above letters are mostly general, with few examples of specific contributions and how they have influenced the field.

Contrary to the director's implication, the petitioner did submit letters from more independent sources. Dr. [REDACTED] an associate professor at the University of Arizona and Chairman of the session at the 2001 Globecom conference where the petitioner presented his work, indicates that the petitioner's presentation was "excellent." Dr. [REDACTED] discusses the importance of the petitioner's area of work and states that the petitioner has "made great progress in this area by proposing new decoding algorithms which are excellent in terms of tradeoff between complexity and performance." More specifically, Dr. [REDACTED] asserts that the petitioner's research is "an important facet of LDPC codes, and it is particularly valuable to the hardware implementation of

these codes.” Dr. [REDACTED] does not, however, indicate that his own research group, which focuses on the same issues, has relied upon or been influenced by the petitioner’s work.

Dr. [REDACTED] an assistant professor at Carleton University, provides similar information. Dr. [REDACTED] that the petitioner’s results are important theoretically and practically. Dr. [REDACTED] concludes that the petitioner’s work could have an impact “in the near future,” which would in turn “improve the performance of digital communication and storage systems.” These statements are highly speculative.

Dr. [REDACTED] an assistant professor at Texas A&M University, asserts that the petitioner’s “novel work has resulted in new simplified LDPC decoding algorithms which greatly facilitate the implementation of LDPC codes.” While Dr. [REDACTED] asserts that the petitioner’s research “has made a huge impact on the study of LDPC codes,” he provides no examples of this impact and does not assert that the petitioner has influenced his own work.

Dr. [REDACTED] an associate professor at San Jose State University, confirms that the petitioner’s work has theoretical and economical value. Dr. [REDACTED] continues that the petitioner’s LDPC research required expertise and originality. Dr. [REDACTED] also praises the petitioner’s work on turbo codes and Reed-Solomon codes. Dr. [REDACTED] does not, however, provide examples of the petitioner’s influence on the field. Dr. [REDACTED] Sundberg, Senior Scientist at Sundcom, provides similar information, asserting that the petitioner’s impact “is” nationwide but, in the same sentence, stating that this impact is due to the fact that “*prospective* beneficiary systems exist all over the country.” (Emphasis added.)

The remaining evidence in the record does not support the general assertions of the petitioner’s position of importance in the field. In response to the director’s request for additional documentation, the petitioner submitted evidence that subsequent to the date of filing, he co-invented an innovation for which a patent application has been filed. First, as stated in *Matter of New York State Dep’t. of Transp., supra*, at 221, n. 7, a petitioner cannot demonstrate eligibility for the national interest waiver simply by demonstrating that he holds a patent. The petitioner must demonstrate the significance of the innovation. The record contains no evidence that the innovation has been successfully marketed. Regardless, the innovation was invented after the date of filing and is not evidence of the petitioner’s eligibility as of that date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The record contains evidence that the petitioner is a member of the Institute of Electrical and Electronics Engineers (IEEE), has received tuition waivers for his doctoral studies at the University of Hawaii at Manoa, and has reviewed articles for publication in *IEEE Communications Letters*. The record contains no evidence that membership in IEEE is notable in the field. In addition, the record contains no evidence regarding the basis for the tuition waiver. Academic performance alone is insufficient to establish the petitioner’s ability to benefit the national interest. *Matter of New York State Dep’t. of Transp., supra*, at 219, n.6. Regardless, professional memberships and recognition from one’s peers are two of the regulatory criteria for exceptional ability, a classification that normally requires an approved labor certification. We

cannot conclude that meeting two or even the requisite three of the criteria warrants a waiver of the labor certification process.

Regarding the article review requests, the first three e-mail requests for the petitioner's assistance in reviewing these articles are from [REDACTED] at "hawaii.edu." Being requested to review an article by one's own colleague is not evidence that the petitioner's influence extends past his immediate circle of colleagues. Subsequently, the petitioner received a fourth request to review an article for the same journal from [REDACTED] at "tamu.edu" and a request from [REDACTED] at "cityu.edu.hk" to review papers submitted to the IEEE Global Telecommunications Conference 2002. The record contains a letter from Mr. [REDACTED] discussed above. Attached to that letter is Mr. [REDACTED] curriculum vitae (C.V.). The C.V. reveals that Mr. [REDACTED] is another reviewer for IEEE. He does not claim to be on the editorial board. It remains, we cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field. Without evidence from the editors indicating that the petitioner was specifically selected as a possible reviewer by the editorial board based on his prior contributions to the field, we cannot conclude that the requests are evidence of the petitioner's recognized influence in the field.

The petitioner submitted three published articles, two articles submitted for publication, an unpublished report, and seven conference papers and presentations. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, sets forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are the acknowledgement 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." This report reinforces CIS's position that publication of scholarly articles is not automatically evidence of influence; we must consider the research community's reaction to those articles. At the time of filing, one of the petitioner's articles had been cited twice and another one had been cited once. Such minimal citation is not evidence that the petitioner's articles have had an impact on his field.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or other research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who obtains a Ph.D., is published, or is working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. The record does not establish that the petitioner's work represented a groundbreaking advance in electrical engineering. For example, the record contains no evidence that telecommunications specialists have begun adopting the petitioner's algorithms in developing LDPC codes. Further, while several of the references discuss the importance of the petitioner's work to communications within the military, the record does not contain any letters from high-level officials in the military confirming their interest in the petitioner's algorithms. Thus, we

concur with the director's conclusion on page seven of his decision that the record does not establish that the petitioner's past record supports the generalized projections of future benefits presented in the reference letters.

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.