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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AA, 20 Mass., 3/F
495 Street, N.W.
Washington, D.C. 20536

[REDACTED]

File: [REDACTED]

Office: Texas Service Center

Date: **SEP 29 2003**

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)

IN BEHALF OF PETITIONER:

[REDACTED]

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, Texas Service Center. The director reopened the matter on the petitioner's motion, and denied the petition again. The matter is now before the Administrative Appeals Office ("AAO") 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. At the time of filing, the petitioner was working as a Senior Mechanical Engineer for Medex, 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 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 petitioner holds a Ph.D. in Engineering Mechanics from Clemson University ("CU"). 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 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 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 sought. 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 note 6.

Along with documentation pertaining to his field of endeavor, the petitioner initially submitted several witness letters.

██████████ Manager of Research and Development, Medex-Atlanta, states:

[The petitioner] has an excellent background in mechanical engineering.... In August of 1997, [the petitioner] joined our R&D group in Atlanta as a senior mechanical engineer.

* * *



Our company is a leading supplier for high-precision, syringe infusion delivery systems. Our products are used in hospitals throughout the United States and the world. [The petitioner's] current project is the mechanical design of a new infusion pump intended for use in critical care and neonatal intensive care areas which require precisely controlled infusion rates. This new infusion pump is intended to improve the accuracy and safety of syringe infusion delivery for Neonatal Intensive Care, Pediatric Intensive Care, and Adult Intensive Care in the hospital.

Critical care and neonatal intensive care areas require a high degree of safety and reliability in their equipment. [The petitioner's] solid mechanical background and his unique mechanical system analysis abilities will provide our design team with the knowledge to insure the safe and reliable design of our infusion systems. During his short time with Medex, [the petitioner] has played a key role in our project. His static and kinematics analysis of the mechanics of our new delivery system designs will provide accurate data to make the design more efficient and reliable. His finite element analysis of the case and plastic structures will improve our understanding of the stress distribution and reduce the possibility of failure. His creative work on the syringe force transducer, which is critical to the patient's safety, may reduce the design complexity while improving system performance. With his exceptional skills, [the petitioner] can make significant contribution to the development of our health-care products which will improve the quality of health-care delivery in our country.

The objective qualifications described above can 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, experience, or education that could be articulated on an application for a labor certification.



Vice President, Technology and Business Development, Medex, Inc., states:

As our company is a leading supplier for high precision Electro-mechanical devices that deliver therapeutic fluids and pharmaceuticals to critical patients, our research and development teams continually explore new ways to improve the standard of healthcare in the US and abroad. In fact, we are currently involved in several exciting projects and [the petitioner] plays a key role as a member of our mechanical engineering group in driving these efforts forward. It is our goal that through the introduction of these new technologies we will improve patient care while significantly reducing cost. If optimally successful, the products which [the petitioner] and our group is involved in, have the potential to contribute to reducing the direct healthcare related costs for the patients in all Intensive Care areas of the hospital and for those individuals requiring general anesthesia on a national and international scope.

Significant portions of the letters from [redacted] and [redacted] pertain to the expectation of future results rather than addressing how the petitioner's past engineering accomplishments have

already influenced the greater field. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which CIS held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. An alien seeking a national interest waiver must demonstrate that his work has already significantly influenced the field.

Dr. [REDACTED] Professor of Mechanical Engineering at CU, states:

I was part of a five-member faculty research group working in the area of mechanics of composite materials and structures during [the petitioner's] Ph.D. studies at Clemson. My graduate students and I interacted with him frequently during this time. I was also one of four faculty members serving on his Ph.D. research advisory committee.

* * *

The research done by the petitioner has far reaching impact on our country in many areas as indicated by the wide range of financial support it received. It is fundamental to understanding and predicting how composite materials resist forces and how they either survive or fail.... [The petitioner] is now applying his knowledge of mechanics in developing medical equipment.

* * *

In nontechnical terms, [the petitioner's] work involves determining at what load levels cracks in composites and multi-material junctions will grow and the effects of material nonlinearities on this growth. The modeling he has done to predict this behavior is mathematically and physically rigorous and requires complex mathematical and numerical solutions. Although focused on composite materials, the methods are also applicable to simpler homogeneous materials. While the national security has benefited and will continue to benefit from his research through applications to military aircraft and spacecraft, perhaps of even more importance is its use in civil applications. The first that comes to mind is the issue of our aging commercial aircraft fleet. His work has direct application to crack management and repair/replace decisions for commercial as well as military aircraft. The economic impact of associated grounding, repairing, or replacing these aircraft is clear. As composite materials begin to see increased use for primary civil aircraft structure, [the petitioner's] research will also have increased impact on this important part of the U.S. economy.

The record, however, contains no statements from any official representatives of the U.S. military, the U.S. aircraft manufacturing industry, or the National Aeronautics and Space Administration confirming the importance of the petitioner's individual contributions. A significant portion of Dr. [REDACTED] letter is devoted to the overall benefits associated with composite materials rather than addressing how the petitioner's work was of greater benefit than that of others in his field. We generally do not accept the argument that a given field is so important that any alien qualified to work in that field must also qualify for a national interest waiver. 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. Witness statements and documentation pertaining to the undoubted importance of developing methodologies applicable to composite and nonlinear materials may establish the intrinsic merit and national scope of the petitioner's work, but such evidence would not suffice to show that an individual working in that field automatically qualifies for a waiver of the job offer requirement.

Dr. [REDACTED], Associate Professor of Mechanical Engineering, CU, states:

The quality of [the petitioner's] work is evidenced by the acceptance of two papers in peer-reviewed journals. In addition to these two papers, [the petitioner] has one refereed conference proceeding, and four other journal papers currently in review.... Such a large number of papers is evidence of his hard work, and also of the quality of his work.

The record, however, contains no evidence that the presentation or publication of one's work is a rarity in the petitioner's field, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's findings in their research. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were 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." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work. The petitioner, however, has presented no evidence showing that his research papers have been heavily cited.

Dr. [REDACTED], Principal Member of Technical Staff, Sandia National Laboratories, states:

I met [the petitioner] at an American Society of Mechanical Engineering Conference held in Evanston, Illinois in June of 1997. I attended his paper presentation, and also had the opportunity to discuss his work in detail during an extended private meeting. I have also carefully read his doctoral thesis.

[The petitioner's] thesis topic is aimed at developing a new, finite element approach for determining the singular stress fields found at the tip of an interfacial crack or wedge embedded within one or more ductile materials that exhibit nonlinear behavior. This research area is one that

I have published extensively, and I am in a good position to comment critically on his work. [The petitioner's] thesis is of the highest quality, and is a very significant contribution to the field. To my knowledge, this is the first time that a finite element eigenanalysis method has been developed to perform an asymptotic stress analysis in nonlinear materials. Note that the nonlinear material problem is much more complicated than the linear case, and the literature on this important topic is relatively sparse. This work is directly applicable to the development of failure theories for high performance composite materials, coatings, and layered materials.

While the petitioner's approach has captured the attention of Dr. [REDACTED] it has not been shown that a substantial number of researchers from throughout the engineering community view the petitioner's work as so unusual that it merits the special benefit of a national interest waiver.

Other than the letter from Dr. [REDACTED] who indicates that he met the petitioner at an engineering conference, the petitioner's initial witnesses consisted entirely of individuals from institutions where the petitioner has studied or worked.¹ While letters from those close to the petitioner certainly have value, the letters do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might expect with research that is especially significant. Independent evidence that would have existed whether or not this petition was filed, such as heavy citation of the petitioner's published findings, would be more persuasive than the subjective statements from individuals selected by the petitioner.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted additional witness letters and further documentation pertaining to his field of endeavor (such as his American Society of Mechanical Engineers membership card and a recently published journal article).

In a letter that is virtually identical in content to his initial letter, Dr. [REDACTED] provides no new information other than asserting that the petitioner has "proved himself an invaluable researcher at Medex Corporation" and noting that the petitioner has now had three papers accepted in peer-reviewed journals.

[REDACTED] Director of Global Technology, Medex, Inc., states:

Not only has [the petitioner's] work been pivotal to achieve the launch of a new anesthesia pump this summer, but his ongoing work will allow additional models of this product to be released in the coming months and years.

* * *

The skills required to design and analyze the mechanical reliability of these systems are quite

¹ On motion to the director, counsel states that the petitioner "collaborated with scientists from... the Sandia National Labs."

rare as evidenced by the difficulties we are currently experiencing in building our product development staff. [The petitioner] possesses the experience and skill that can only be acquired through design participation in specific medical device fields, and which is currently possessed by relatively few people in the United States.

Pursuant to *Matter of New York State Dept. of Transportation*, a shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.

In his second letter [redacted] states:

As Research and Development Manager, I recognize that in order to develop high quality, reliable as well as low cost healthcare products, we must recruit and retain the most talented and dedicated, knowledgeable professionals. During the past two years' employment with Medex, [the petitioner] has proven to be this kind of engineer and scientist. [redacted] possesses over twelve years of experience in research and development of advanced composite material structural analysis. His expertise in this area can be demonstrated by his many publications in peer-reviewed journals. With his expertise, we are able to use advanced engineering plastics for our new generation of infusion pumps, resulting in excellent cost reduction and performance improvement.

[The petitioner] is a key member in the mechanical design of the Protégé 3010 Syringe Pump, which is just entering into production in Medex-Atlanta... With his exceptional skills [the petitioner] has made significant contributions to the development of our new product.

The letters from the petitioner's superiors at Medex emphasize the petitioner's educational background and technical expertise. Such qualifications, however, would be amenable to the labor certification process. [redacted] and [redacted] state that the length of time involved and the inconvenience associated with the labor certification process would disrupt their company's ongoing projects. However, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. A petitioner seeking a national interest waiver must still demonstrate that he will serve the national interest to a substantially greater degree than other qualified professionals in his field. The petitioner may have benefited various product development projects undertaken by his employer, but his ability to significantly impact the field beyond his company's projects has not been demonstrated.

Further, while the petitioner's published findings from his doctoral program at CU may have added to the general pool of knowledge, it has not been shown that the greater engineering community views the petitioner's work as unusually significant. Further, there is no consensus among the petitioner's witnesses as to how his past work was of greater benefit than that of others in his field. Assertions from various witnesses as to the petitioner's potential to make future contributions cannot suffice to

demonstrate eligibility for a national interest waiver. Such statements fail to persuasively distinguish the petitioner from other capable professionals.

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 petitioner's work, but found 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 stated that the petitioner had failed to establish that he would serve the national interest to a substantially greater degree than others in his field.

On motion to the director, the petitioner submitted another letter from Dr. [REDACTED] and a letter from an editor of *Engineering Fracture Mechanics* requesting that the petitioner and his co-authors make revisions to a research paper submitted to that journal for publication.

In a third letter that contains several passages identical in content to his previous two letters, Dr. [REDACTED] expands on how the petitioner applied a mathematical methodology learned from a mathematics course at CU to solving nonlinear problems. Dr. [REDACTED] states:

This new method will allow for the practical solution of many problems related to nonlinear fracture mechanics and fracture and failure analysis. What makes his approach so powerful is that it is more efficient, more versatile and more accurate than all of the existing methods for the general solution of nonlinear eigenvalue problems.

Dr. [REDACTED] also elaborates on another mathematical method presented by the petitioner in "two peer-reviewed papers":

In addition to his method for solving nonlinear problems, [the petitioner] has also had other outstanding ideas for the solution of related problems. ... [The petitioner] very clearly showed what type of mathematical solutions exist for a certain category of problems referred to as "wedge paradox" solutions. His work made it possible for us to understand these problems, which led to a significant contribution to the literature, which corrected errors made by others. This contribution shows that [the petitioner] is capable of performing analytical work, as he is at performing computational work.

Once again, Dr. [REDACTED] concludes his letter by stating that the quality of the petitioner's work is evidenced by the acceptance of his papers in peer-reviewed journals. Publication, by itself, is not a strong indication of impact in one's field, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the petitioner himself has cited sources in his own articles. Numerous independent citations would provide firm evidence that other researchers have been

influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the larger research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work would have, if that research does not influence the direction of future research. The petitioner, however, has presented no evidence showing that his scientific papers were heavily cited by other researchers in his field.

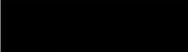
Also submitted on motion was a letter from the *Lexington Who's Who Registry*, dated September 22, 1999, informing the petitioner that he will be included "in the upcoming 1999/2000" edition of the directory. The letter further states that the petitioner is to be "listed among thousands of accomplished individuals." This evidence came into existence subsequent to the petition's filing date. See *Matter of Katigbak, supra*. Even if we were to consider this evidence, it has not been established how inclusion in this vast directory of professionals would distinguish the petitioner from other capable engineering researchers.

Counsel argues that because the petitioner's research projects at CU were federally funded, this shows that he is a "major contributor" to his field. The existence of documentation indicating that a research project led by Dr. [REDACTED] received federal funding would carry little weight in this matter. The assertion that contributing to a project which was awarded funding by the federal government would somehow elevate the petitioner above other competent researchers is flawed in that it would apply equally to all researchers who receive governmental funding for their studies. We note here that the U.S. Government routinely provides millions of dollars in research grants to many thousands of scientists and research institutions on an annual basis.

The director again denied the petition, finding that the evidence presented on motion "failed to overcome the grounds of denial."

On appeal, counsel requests that the AAO review "the Motion to Reopen/Reconsider filed with the Service." Based on our review of the documentation presented and the above discussion of the evidence, we find that the record supports the director's determination.

Clearly, the petitioner's superiors have a high opinion of the petitioner and his work, as does Dr. [REDACTED] who knows the petitioner from an encounter at a scientific conference. With regard to the witnesses of record, many of them refer to the petitioner as a "highly specialized, knowledgeable" engineering researcher, and discuss what may, might, or could one day result from his work, rather than how the petitioner's past efforts have already had a discernable impact beyond the original contributions expected of most doctoral graduates from a respected university. The petitioner's approaches and innovations do not appear to have yet had a significant influence in the larger field. While numerous witnesses discuss the potential of his methodologies, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the petitioner's mathematical approaches may eventually have practical applications does not persuasively distinguish the petitioner from other competent engineering researchers. Similarly,



assertions as to the future benefits associated with the medical devices that the petitioner is seeking to develop and improve upon for his current employer would also fail to distinguish him from others in his field.

In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement that, 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.