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Citizenship and Immigration Services

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RS
ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
CIS, AAO, 20 Mass Ave, 3rd Floor
Washington, D.C. 20536

File:

Office: NEBRASKA SERVICE CENTER

Date:

SEP 30 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)

IN 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (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 an alien of exceptional ability and/or a member of the professions holding an advanced degree. As indicated on the Immigrant Petition for Alien Worker, Form I-140, the petitioner seeks employment as a research assistant. The petitioner asserts that an exemption from the requirement of a job offer, and thus 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.

Specifically, the director determined that the petitioner's past record did not justify projections of substantial future benefit that outweigh the national interest inherent in the labor certification process. The director further determined that the petitioner was not the "principal motivator" in his projects, and that the petitioner's contributions were not of greater significance than those of others similarly employed. The director also noted the submission of letters from the petitioner's collaborators, but stated that while the "letters present a strong case regarding the nature and importance of the research in question, [sic] they do not establish that the [petitioner's] work is known... outside his immediate circle of colleagues."

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. -- The Attorney General may, when he 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.

The director found the petitioner qualifies as a member of the professions holding an advanced degree and that the petitioner had established the intrinsic merit and national scope of his work. The sole issue in contention, therefore, 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 Service 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 Service 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 215 (Comm. 1998), has set forth several factors that 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.

Upon initial submission, counsel for the petitioner indicates that the petitioner’s work is “of great significance to the field of applied physics.” Counsel describes the petitioner’s research:

[The petitioner] is engaged in research to discover and understand alcohol’s quenching effects on the light intensity of single bubble sonoluminescence. He discovered that longer-chain alcohol quenched light more quickly than shorter-chain alcohol, and the quenching process of alcohol was much faster than had previously been estimated. He also discovered an exclusive technique for filling these tiny bubbles with gas. His contributions make it possible, for the first time, to study the dynamic quenching effect of alcohol on the light intensity of single bubble sonoluminescence. This study is very important to understanding the interaction of molecular alcohol and bubbles in the time scale of tens of microseconds. Mr. [REDACTED] played a key role in this National Science Foundation (NSF) funded project. His achievement is a breakthrough in the research of

alcohol's role in sonoluminescence. It opens a new window for many researchers to understand how alcohol molecules attach to the wall of the sonoluminescence bubble. The study will also help researchers understand the light-emitting mechanism critical to the study of sonoluminescence and its potential applications.

[The petitioner] is also performing research on the acoustic properties of ultrasound contrast agents (UCAs). This project is supported by the National Institute of Health (NIH). Ultrasonic contrast agents are proving to be invaluable in medical imaging. The acoustic properties of contrast agents are key to the many diagnostic-imaging applications. [The petitioner] has studied several contrast agents and made considerable progress on this project. He discovered that the FDA-approved commercial contrast agent, Optison, does not oscillate very much in the presence of an ultrasonic field...By applying his excellent light scattering technique and using his research skills, he discovered the acoustic properties of the contrast agent Optison under the application of High Intensity Focused Ultrasound (HIFU). This is a great breakthrough in UCA research. [The petitioner] also examined other contrast agents as well, such as Sonazoid. His further research will quantify the pressure threshold required to fragment its shell...The properties are very important, and currently unknown. Knowledge of these properties will prove crucial to understanding the many applications of UCAs, such as ultrasound activated drug delivery, one of the most promising new technologies in medical science.

Counsel asserts that the petitioner's achievements have been "widely recognized, both nationally and internationally" and points to the recommendation letters submitted with the petition as evidence of such recognition. The majority of the letters are provided by witnesses from the University of Washington, where the petitioner is currently employed, and witnesses who have collaborated with the petitioner on past projects. Professor Lawrence A. Crum of the University of Washington describes the petitioner as "a very capable and knowledgeable early-career scientist." Professor Crum further states:

His knowledge and experience are already many years ahead of his contemporaries and I believe that only a few scientists of [the petitioner's] capabilities and knowledge...are available in this country. [The petitioner's] further study in these fields is of crucial importance to maintain our technological lead in the United States, and thus his continued presence in this country is of strong national interest.

Dr. Thomas Matula, also of the University of Washington, shares Professor Krum's high opinion of the petitioner and his research. Dr. Matula states:

[The petitioner] has played a critical role in our efforts to study the dynamics of alcohol's quenching effect on sonoluminescence. His remarkable contributions to this research have resulted in a truly significant achievement, for the first time, the dynamic quenching rate of alcohol has been successfully measured. Scientists with the capacity for comprehending such complex systems, are, indeed, rare, and [the petitioner] is one of few. With his combination of knowledge and skills in

electrical engineering, acoustics, and optics, as well as his innovative thought processes and programming ability, he demonstrates he has the potential to make contributions in this field very few others can make.

The fact that many of the petitioner's witnesses indicate that only a few scientists in the entire country possess the skills and knowledge equal to that of the petitioner is an argument against the waiver of the labor certification. Further, while all of the witnesses describe the importance of the petitioner's research, we must note that they have all collaborated with him on various projects in the past. This fact indicates that while the petitioner's work is valued by those with close professional ties, others outside his immediate circle are largely unaware of his research and do not attribute the same importance to his work.

Dr. Ronald Waynant of the Food and Drug Administration (FDA) states that the petitioner's work first came to his attention when the petitioner published his results on near-infrared emissions from bubble sonoluminescence. Dr. Waynant indicates that the NIH had previously funded work on the same subject at the FDA. While Dr. Waynant has not worked with the petitioner in the past, from his statement it would appear that he is only aware of the petitioner's research results because similar research was done previously with Dr. Waynant's employer.

Another witness, Leo Bellantoni, a Robert Wilson Fellow at the Fermi National Accelerator Laboratory, describes the petitioner's research and praises his accomplishments. However, from Mr. Bellantoni's statement, we are unable to gain any insight on how Mr. Bellantoni first became aware of the petitioner and his work. Mr. Bellantoni's witness letter simply states that he met the petitioner in early 1996, but in no way implies that that Mr. Bellantoni met the petitioner or sought him out based upon the petitioner's work.

While the preceding two witness letters are from witnesses outside of the University of Washington, the letters do not establish that the petitioner's work has become widely recognized. Similarly, the fact that there are very few citations to the petitioner's publications indicates that the petitioner's work is relatively unknown outside of his colleagues. While the petitioner has submitted evidence of the publication of papers for conference proceedings and two articles in the journal *Physical Review*, the record only contains two cites to the petitioner's work. Such a citation rate does not show that the petitioner's publications have been especially important or even recognized in his field of endeavor.

The petitioner submits evidence of his membership in Institute of Electrical and Electronics Engineers (IEEE) and the Acoustical Society of America but offers no evidence of the requirements for membership or statements that membership is contingent upon important contributions to the petitioner's field of research. Further, the petitioner's membership in each organization is based upon his status as a student. We also note that the petitioner's membership in the IEEE was only good through December 31, 2002. Therefore, while we find that membership in these organizations is notable, such membership does not establish the petitioner's eligibility for a waiver of the labor certification.

Counsel notes that the petitioner has an invention patent pending for an automobile-based video system as evidence of the petitioner's significant accomplishments. However, the fact that the

petitioner's work has resulted in a patent carries little weight in this case as the petitioner has failed to show that this patent is related to his field of study. While the grant of a U.S. patent document signifies that the innovation is original, not every patented invention or innovation constitutes a significant contribution to the petitioner's field of endeavor. Furthermore, according to statistics released by the U.S. Patent and Trademark Office, which are available on its website at *www.uspto.gov*, the USPTO has approved over one hundred thousand patents per year since 1991. In 2001, for example, it received 345,732 applications and granted 183,975 patents. In this case, we must consider the significance, not just the originality, of the petitioner's inventions. The petitioner has offered no substantive evidence to show that his field views the petitioner's patents as significant innovations in the research of sonoluminescence or research on the acoustic properties of UCAs.

On appeal, counsel argues that CIS should have issued a request for evidence to give the petitioner an opportunity to establish eligibility prior to the issuance of the denial. While we agree with counsel that the director should have made such a request prior to the denial, at this point, the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence which the petitioner would have submitted in response to such a request.

The only evidence submitted on appeal is a new witness letter from Dr. Matula. The remainder of the documentation submitted on appeal consists of copies of the petitioner's Form I-94, printouts from the Department of Labor on labor certification processing times, the receipt notice for the petitioner's Form I-485, and copies of minutes from a meeting between CIS and AILA.

The letter submitted on appeal from Dr. Matula contains no direct evidence that the wider education community has taken specific notice of the petitioner's work. For instance, the petitioner has not submitted any additional evidence to show that the citation rate has increased. As such, counsel's assertions of the petitioner's national and international recognition is not supported by direct evidence in the record.

On appeal, counsel for the petitioner asserts that subsequent to the filing of the original petition, the petitioner has completed research on one of the two frontier areas of his endeavors. Counsel further asserts one of the petitioner's articles has been accepted for a presentation and another article has been submitted to the *Journal of Physical Review E*. However, as this evidence was not in existence at the time of filing, it cannot now be used to establish eligibility retroactively. See *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which CIS held that beneficiaries seeking employment-based immigrant classifications must possess necessary qualifications as of the filing date of the visa petition.

Counsel for the petitioner also argues that the director's decision was based on incorrect applications of law and CIS policy. Specifically, counsel argues:

By using the standard of a select group of U.S. workers "also making contributions to that field" instead of the NYSDOT standard of minimum qualified U.S. workers, the officer substantially increased the standard required by [CIS].

We note that in every instance, other than the one sentence noted by counsel, the director appropriately compared the petitioner to “competent and available U.S. worker[s],” and “others similarly employed.” We also note several instances in *Matter of New York State Dept. of Transportation*, where the AAO also viewed the petitioner in relation to “others in the same field” and “the majority of his or her colleagues.” As such, while the director inappropriately qualified his statement with the words, “also making contributions,” we do not feel that the ultimate decision of the director hinged upon these words or resulted in the application of a higher standard.

Counsel further argues that the director’s reference to the petitioner’s continued employment as an F-1 or H-1 nonimmigrant “also misapplied the elements of NYSDOT.” However, we do not find that the director’s reference to other nonimmigrant categories was a misapplication of *Matter of New York State Dept. of Transportation, supra*. Instead, the director’s reference to other nonimmigrant categories was used to question the assertions made by the petitioner’s witnesses which indicated the need for the petitioner to obtain a waiver of the labor certification in order to continue his research. Many of the witnesses emphasized that the petitioner is an indispensable part of projects underway, but did not explain why the petitioner’s continued involvement is contingent upon his receiving permanent immigration benefits. In his decision, the director was making the point that the petitioner could continue on his current research projects without obtaining permanent immigration status while he was still an F-1 student or by changing to H-1 nonimmigrant status.

The record amply establishes the overall importance of the petitioner’s research. The available evidence, however, includes no independent support for the assertion that the petitioner’s specific contributions in this area have outweighed those of other researchers in the specialty. It is not sufficient for the petitioner and his witnesses to simply describe the work undertaken by the petitioner and then to state that it has had an impact. Instead, the petitioner must demonstrate that his individual contribution has had a disproportionately greater effect as compared with the efforts of other researchers in his field. 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.

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.

The dismissal of this appeal has no effect on the petitioner’s lawful nonimmigrant status, nor is it in any way prejudicial toward any future application for labor certification or any petition based on such certification. This decision does not mean that the petitioner must not be allowed to work in the United States under any other approved visa; it means only that the petitioner has not demonstrated that he qualifies for the special benefit of an exemption from a requirement, which, by law, normally attaches to the visa classification sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. §1361. The petitioner has not sustained that burden.



ORDER: The appeal is dismissed.