

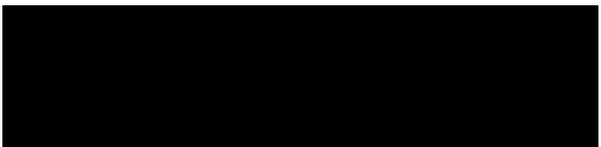
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**U.S. Citizenship
and Immigration
Services**



FILE: WAC 02 223 50034 Office: CALIFORNIA SERVICE CENTER Date: **JAN 21 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The director certified the decision to the Administrative Appeals Office for review. The director's decision will be withdrawn and the petition will be approved.

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 seeks employment as a research engineer at DoCoMo Communications Laboratories USA, Inc. (DoCoMo USA Labs). 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) . . . 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 director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention 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 the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now CIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a

showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel states that the petitioner “has achieved an international reputation for his major research contributions to cutting edge Internet technologies and wireless telecommunications, especially with respect to improving the speed and security of data and voice transmissions over the Internet and through wireless communications.”

Counsel states that the petitioner’s “petition is supported by letters from *six* national and international experts – *four* of whom are completely *independent* of [the petitioner]. According to these experts, [the petitioner] has made a substantial impact on the field as a whole.” Of the four witnesses who state that they have never met or worked with the petitioner, the first is Dr. Harlan B. Russell, an assistant professor at Clemson University, who states:

Based upon my independent review, I believe [the petitioner] is an outstanding scientist and clearly an expert in Internet backbone technology. . . . Among his major achievements during his Ph.D. period, [the petitioner] developed a novel dynamic bit-loading and resource provisioning scheme for asymmetric digital subscriber line (ADSL) networks. . . . Furthermore, [the petitioner] also developed an Internet backbone infrastructure model for next generation wireless communications. . . . While he was at DoCoMo USA Labs, [the petitioner] has also been substantially contributing to the international research effort to increase the security of wireless communication and to develop international standards for safe and robust wireless Internet access. . . .

Based on the breakthroughs and major discoveries he has made over the last several years, I believe [the petitioner] is a scientist who has already made a significant impact on this field and is substantially more likely to continue to positively impact this field than the majority of other advanced-degree researchers.

Dr. Robert W. Heath, Jr., is an assistant professor at the University of Texas at Austin. While counsel collectively refers to the petitioner’s witnesses as “national and international experts,” Dr. Heath does not claim to be a

national or international expert. He completed his Ph.D. in November 2001, only a month before the petitioner completed his own doctorate and six months before he wrote on the petitioner's behalf in May 2002. Dr. Heath states:

I am familiar with [the petitioner] through his breakthrough work on dynamic bit-loading and resource provisioning scheme for asynchronous digital subscriber line (ADSL) networks. Unlike other researchers, he developed an approach for bit-loading on the physical communication layer that optimized the network performance of the communication link. This is ground-breaking work and is the first of its kind that I have seen. Simulated performance gains of up to 15% have been observed. . . .

[The petitioner] is among the best in his generation.

Professor Ophir Frieder at the Illinois Institute of Technology states:

[I]t is my professional opinion that [the petitioner's] expertise at the intersection of Internet infrastructure technologies and wireless telecommunications is of substantial national interest to the United States and that [the petitioner's] individual track record of achievements in this field . . . has influenced and will continue to influence his area of expertise nationally, if not internationally.

Prof. Frieder, like the above witnesses, focuses on the significance of the petitioner's work with ADSL networks. Dr. Aura Ganz, associate professor and director of the Multimedia Networking Laboratory at the University of Massachusetts, Amherst, states "I believe [the petitioner's] overall level of expertise and achievement and ability to impact this field certainly are substantially higher than most advanced degree researchers in the field. . . . [The petitioner] made several major advances in research aimed at improving the speed and robustness of high-speed Internet networks."

The director requested additional evidence to show that the petitioner meets the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted copies of several appellate decisions. Only one of these decisions, *Matter of New York State Dept. of Transportation*, is a published precedent; the remaining decisions are not binding in the context of other proceedings. Counsel quotes one such decision, indicating "the Service must defer to independent experts in areas where it cannot pretend competence." We clarify here that the immigration authorities must rely on outside descriptions and explanations of an alien's work. At the same time, independent witnesses whose expertise lies outside of immigration law and policy cannot pretend competence to decide the outcome of immigration proceedings. Deference to outside experts does not, and should not, extend to the point where we relinquish our discretion and approve a petition only because witnesses with no expertise in immigration law declare that the petition should be approved. The proper role of independent witnesses is to offer candid opinions, which can serve as guidance to assist adjudicators in making discretionary decisions.

Counsel observes that the standard, as stated in *Matter of New York State Dept. of Transportation*, is that "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." Counsel stresses the word "minimum." The word "minimum" derives from the standards for labor certification.

Another term that deserves emphasis is the word “substantially,” in the phrase “substantially greater degree.” *Webster’s Ninth New Collegiate Dictionary* defines “substantial” as “significantly large.” An employer choosing between two job applicants would naturally tend to favor the applicant with a higher grade point average, more experience, and so on, but this degree of difference is not necessarily “substantial.” An alien does not meet this test simply by showing that he or she possesses qualifications that exceed the absolute minimum that are acceptable for the position. We note that the labor certification process does not require a U.S. employer to hire the least qualified individual from a pool of candidates. We cannot conclude that Congress intended the statutory job offer requirement to apply to only the most minimally qualified workers, with all others receiving national interest waivers.

The petitioner has also submitted new letters from witnesses who assert that they have never worked or collaborated with the petitioner. Like the earlier witnesses, the new witnesses maintain that the petitioner has already had a substantial impact on his field.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner’s work, but finding that the petitioner has not shown that it would serve the national interest to waive the job offer requirement that, by law, applies to the classification the petitioner chose to seek. The director acknowledged the petitioner’s submission of independent letters, but stated that the petitioner failed to submit “unequivocal evidence . . . in the form of letters . . . from the National Science Foundation, American Association for the Advancement of Science, Institute of Electrical and Electronics Engineers and/or Association for Computing Machinery.” Therefore, the director determined, the petitioner failed to submit evidence from any “independent institution or agency that is qualified to speak on behalf of the national interest of the United States.”

The director correctly observes that witnesses offering letters of support have no explicit authority to speak “on behalf of the United States,” but their letters are not offered in such a spirit. We note that the statute and regulations also do not authorize top officials of national organizations to speak on behalf of the United States. Even the august National Academy of Sciences, chartered by Congress, serves only in an advisory capacity and has no authority to set national policy, despite comprising the nation’s top scientific minds.

The director asserts that the petitioner’s witness letters are not “documented evidence of a national level.” The director states that, if these witnesses are qualified to write on the petitioner’s behalf on the basis of their training and expertise, then by the same logic the petitioner himself “is qualified to write . . . on his own behalf and needs no other support.”

Case law already exists to establish that a petitioner’s own statements cannot meet the burden of proof. *See, for example, Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Also, the director’s argument fails to take into account that independent witnesses clearly lack the petitioner’s direct interest in the outcome of the petition.

Independent evidence of the importance of the petitioner’s work can take a variety of forms. Letters from top officials of national organizations or agencies, written on behalf of those entities, would obviously carry significant weight. It would be arbitrary, however, to require that independent evidence must take the form of endorsements from national bodies or government offices. Depending on a given alien’s field of endeavor, other evidence can satisfactorily show impact in the field. If the alien has written scholarly articles, heavy independent citation (as opposed to self-citation) of those articles would be objective evidence that other researchers have relied upon the alien’s work. For an alien who holds one or more patents, evidence of

significant implementation of the patented innovation should be considered. Generally, in the absence of specific statutory or legislative guidance, we must allow reasonable latitude with regard to the form the petitioner's evidence takes. Obviously, this is not to say that all evidence carries equal weight, or that a given piece of evidence must be as compelling as a petitioner or attorney claims it is.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that experts in the petitioner's field recognize the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The petition is approved.