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

BS



FILE: WAC-02-062-52944 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2004

IN RE: Petitioner: [Redacted]
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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on motion. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

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. 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 does not qualify for classification as an alien of exceptional ability and that he had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

In a decision dated May 6, 2003, the AAO found that while the petitioner did qualify as an advanced degree professional, he had not established that a waiver of the job offer was in the national interest.

As stated in the AAO's decision, *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.

Neither the AAO nor the director contested that the petitioner works in an area of intrinsic merit, engineering, and that the *proposed* benefits of his work, converting the kinetic energy of the ocean into electricity, would be national in scope. The only issue in contention is whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The AAO concluded that the petitioner's academic achievements and degrees, his engineering license, his professional memberships, an employer letter listing his projects, a magazine article about the professional success of the petitioner and his wife despite their marriage as teenagers was not evidence that set the petitioner apart from other qualified professionals in his field. The petitioner does not contest this part of the decision on motion other than to submit average monthly wages for various professions in the Philippines. While this information suggests that the petitioner may have enjoyed a higher than average salary, that is simply one criterion for aliens of exceptional ability, a classification that normally requires a labor certification. As stated in our previous decision, meeting one of the criteria for exceptional ability does not warrant a waiver of the job offer requirement in the national interest.

As stated by the AAO, the petitioner's eligibility claim rests on his research proposal. Specifically, the petitioner submitted a research proposal to design a technique for harnessing ocean movement, which, as the AAO noted, discusses efforts to harness the tides as an energy source by the French and Russians. The petitioner intends to harness both the tides and the "natural movement of the ocean." While the petitioner asserted that he "already has the idea of how the device will work" he acknowledged that "further study and refining is still needed." The AAO noted that the petitioner's schedule for developing such technology reflects that the first two years will be devoted solely to "familiarization with the existing regulations, engineering standards, market behavior and existing competition in the electricity industry." Year three will be spent on the "formulation of theoretical basis," and only in year four will the petitioner begin

“computational studies” and “pilot-scale testing.” The petitioner asserts that no funding will be required until pilot-scale testing begins.

In support of his qualifications to undertake this project, the petitioner submitted a self-serving statement of his accomplishments including his secondary school accomplishments, the raising of a family while completing his education, his engineering degree, his work at an electric company, his professional memberships, the magazine story featuring his family, his business degree, and his son’s achievements. The AAO noted the conspicuous absence from this list of any recognized contributions towards designing systems to harness tides or other ocean movements.

The AAO acknowledged that while working for Meralco in the Philippines the petitioner was involved with “the review and creation of standards for overhead transmission and distribution lines, underground distribution lines, and substations.” A manager at Furukawa Electric Company, another of the petitioner’s employers, asserts that the petitioner supervised the construction of a transmission line and the installation of ducts for a fiber optic cable and direct-buried cable. As noted by the AAO, none of these projects involved the conversion of water movement (tides or otherwise) into electricity.

The AAO stated 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.

The AAO continued that 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. *Matter of New York State Dept. of Transportation, supra*, at 219, n. 6. The petitioner was specifically advised of this requirement in the director’s request for additional documentation and again in the AAO’s decision.

The AAO concluded that the proposition that the petitioner could accomplish his proposed project is entirely speculative. Specifically, the AAO noted that the record contains little evidence that the petitioner has ever worked on the type of research he proposes to undertake in the United States. The AAO questioned whether the petitioner’s bicycle water pump and chemical water pump, which won awards at student science fairs, relate to his proposed project. Regardless, the AAO determined that the record contains no evidence that the petitioner continued to work on hydrodynamics or hydroelectricity after college, where he admittedly took a few courses in hydrology and hydraulic engineering. Regarding whether the petitioner has already influenced research into harnessing the ocean’s energy or any other area of engineering, the AAO noted the lack of letters from researchers pursuing this goal (in France, Russia, or elsewhere) discussing the petitioner’s

influence on the field in general or their own work specifically. Further, the AAO noted the lack of patented innovations¹ or published articles by the petitioner in peer-reviewed journals.²

On motion, the petitioner asserts that his project cannot be compared with projects aimed at harnessing the ocean's movement being conducted by the French and Russians. Rather, the petitioner claims that his project will be more similar to wind powered generators. While the petitioner concedes that experience in hydrology "would help," he asserts that his experience in transmission distribution and substation would be equally important. Based on this assertion, the petitioner argues that his work at Meralco is relevant. The petitioner concludes:

Furthermore, the researcher had already done a similar research which is generating electricity from sea waves (see attached picture). He intends not to disclose it before for property/intellectual rights reason. It is also his intent to patent such device during the first three years that is why the first phases of the research are self-funded. It may look very ambitious but if you compare it with how a wind powered generator works one could easily deduce that it is possible and could be started with a device built only in a house garage.

The petitioner attaches a photograph of himself with a small-scale model and a diagram. It is not within our area of expertise to evaluate the feasibility of the petitioner's proposal. Rather, it is the petitioner's burden to demonstrate that he has a track record of success such that we can conclude that the proposed benefits of his work are more than mere speculation. The AAO was not attempting to compare the petitioner's work with that taking place in France or Russia. Rather, the AAO was focusing on the lack of attestations from others in the field regardless of nationality. It is clear from the AAO decision that it named France and Russia as examples of places where this research is taking place according to the petitioner's own assertions. It is not simply that the record lacks evidence from researchers in these two countries, but that the record lacks evidence from any researcher pursuing harnessing the ocean's kinetic energy or high-level officials at relevant government agencies, such as the Department of Energy.

While the petitioner may have experience in transmission distribution, he has still not established that he has any experience with research and development of technology. We affirm our previous finding that an alien seeking a national interest waiver as an inventor must have some track record of success as an inventor. While we recognize the petitioner's concerns about protecting his property rights, we are less concerned that his current work has yet to result in a patent than the fact that he has no past record of patenting any innovations, let alone a record of patenting successfully licensed or marketed inventions.

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

¹ As stated by the AAO, a patent is not in and of itself evidence that a waiver is warranted, but could help in supporting the petitioner's claim that he can accomplish the project on which the petition is based.

² While the record contains no evidence that the petitioner has authored articles in his field, we note articles by themselves, without objective evidence of their influence, such as evidence that they have been widely cited, are not persuasive evidence of the author's impact in the field.

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 AAO's decision of May 6, 2003 is affirmed, the petition is denied.