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**U.S. Citizenship
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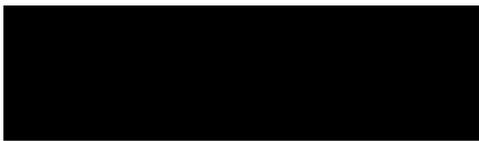


FILE: EAC 99 222 52366 Office: VERMONT SERVICE CENTER Date: **MAR 25 2004**

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)

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont 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. At the time of filing, the petitioner was a doctoral candidate at George Mason University (GMU); he had already accepted an assistant professorship at the University of Maryland, Baltimore County (UMBC), effective upon completion of his doctorate. 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 has 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services (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.

The petitioner describes his research:

Information warfare is the offensive and defensive use of information and information systems to exploit, corrupt, or destroy, an adversary's information and information systems, while protecting one's own. Such actions are designed to achieve advantages over military or business adversaries. . . .

The United States and other high tech societies are especially vulnerable to Information Warfare attacks. . . .

Owing to the vulnerability of US information infrastructure to information warfare attacks, and the increasing importance of information warfare to the national security, the military, the intelligence community, and the business world, the United States [has] made substantial efforts on information warfare. . . .

The project I am working on, named "Trusted Recovery from Information Attacks," is one of the critical research projects that are sponsored by the US Air Force to enforce its plan in information warfare. . . . The goal of the project is . . . to enhance the capacity of information systems to prevent, recover and survive from information warfare attacks. From the point of view of information warfare, the goal is to develop defensive information warfare weapons.

In addition to copies of his published work and unpublished manuscripts, the petitioner submits several witness letters. Professor Sushil Jajodia, chair of GMU's Department of Information and Software Engineering, states:

The main motivation for [the petitioner's] thesis work . . . is derived from a defensive information warfare perspective which assumes that in spite of our best efforts preventive measures will sometimes fail to deflect malicious attacks and, therefore, attackers will succeed in achieving partial, but not complete, damage. [The petitioner] works in the database context and considers recovery from malicious but committed transactions.

Traditional recovery mechanisms do not address this problem, except for complete rollbacks, which undo the work of benign transactions as well as malicious ones. . . .

[The petitioner] has developed several algorithms to restore only the damaged part of the database. He identifies the information that needs to be maintained for such algorithms. The initial algorithms repair damage to quiescent databases; subsequent algorithms increase availability by allowing new transactions to execute concurrently with the repair process. Also, via a study of benchmarks, he shows practical examples of how offline analysis can effectively provide the necessary data to repair the damage of malicious transactions.

Several other GMU faculty members praise the petitioner, calling him “an excellent and dedicated researcher” whose “research on information security and information warfare is *crucial* to the national interest of the United States.” Dr. Anhtuan Q. Dinh, who, as an adjunct professor at GMU, taught a course that the petitioner attended, states that the petitioner “is an irreplaceable and indispensable member of Professor Jajodia’s research team. His loss will set this project back by two or three years while a replacement is trained.” In the same letter, however, Dr. Dinh acknowledges that the petitioner was, at the time, only a few months away from beginning his new position at UMBC. Thus, the petitioner’s departure from Prof. Jajodia’s group at GMU was already a foregone conclusion before the petition was even filed, and a national interest waiver would have no effect on Prof. Jajodia’s need to replace the petitioner.

Because all of the initial letters were from individuals who had taught the petitioner at GMU, those letters do not establish that the petitioner’s work is viewed as particularly significant outside that one university.

The director requested additional evidence to demonstrate that the petitioner meets the guidelines published in *Matter of New York State Dept. of Transportation*. In response, counsel argues that the petitioner’s work is of such “urgency . . . that the lengthy labor certification process will compromise the national interest of the United States.”¹

Counsel asserts that the petitioner “has made major advances in the field,” and cites documentation of a “Grant Award to [the petitioner] by The Defense Advance Research Project Agency.” A grant award does not recognize past contributions, but rather provides funding for future work. Furthermore, the grant was not approved until several months after the petition’s filing date, by which time the petitioner had already assumed his assistant professorship at UMBC. If the petitioner was not already eligible on the filing date of the petition, subsequent events cannot retroactively establish the petitioner’s eligibility. See *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Subsequent material changes cannot establish eligibility where it did not already exist. The same case law applies to new witness letters that describe research that the petitioner has undertaken since the petition’s filing date.

The petitioner submits peer review comments regarding his published articles. Peer review is a routine step in the publication of scholarly articles, and thus the very publication of these articles generally infers that they passed the peer review process. Counsel states that these reviews are from “distinguished authorities” in the

¹ CIS records show that the petitioner’s employer subsequently obtained a labor certification on the petitioner’s behalf; the process was completed in less than nine months. Any arguments regarding the cumbersome nature of the labor certification process are now moot.

field, but the peer reviews are anonymous, as is customary. Counsel does not explain how these anonymous reviewers are known to be “distinguished authorities.”

In addition to the peer reviews, the petitioner submits the preface to the published proceedings of a 1998 professional conference. The preface offers capsule summaries of several different presentations, including a one-sentence reference to the petitioner’s presentation. The author states that the petitioner and his co-authors “argue that since preventive measures are not always successful in thwarting attacks on information systems, research is needed to develop trusted recovery and continued service mechanisms.” This is a summary, not an “evaluation,” as the petitioner labels it.

The director denied the petition, stating that the documentation in the record does not significantly distinguish the petitioner’s work from that of others in the field. There is no evidence that counsel participated in the preparation or filing of the appeal. On appeal, the petitioner argues that his tenure-track appointment at UMBC is *prima facie* evidence that he is a top researcher, because “only outstanding applicants can get a tenure-track position from UMBC.” Generally, documentation of a job offer is poor evidence of eligibility for a waiver of the job offer requirement. The petitioner points to his publication record, but provides no evidence (such as citation records) to establish the influence or impact of his published work.

The petitioner asserts that “DARPA only funds truly outstanding research proposals,” but does not document this claim, and once again the petitioner’s DARPA grant did not exist as of the filing date. The petitioner repeats the prior argument that his work would be delayed if his employer sought a labor certification, but he does not explain why he could not continue to work under an H-1B nonimmigrant visa while the application for labor certification was pending. (As noted in footnote 1, subsequent events have invalidated any objection to the labor certification process.)

The Form I-290B Notice of Appeal instructs appellants to specify whether or not they will submit any supplementary brief or evidence. The form also indicates that additional time beyond 30 days “[m]ay be granted only for good cause shown,” consistent with 8 C.F.R. § 103.3(a)(2)(vii). On the Form I-290B in the record, the petitioner did not request additional time. Instead, the petitioner indicated “I am *not* submitting a separate brief or evidence.” Some nine months later, the petitioner submitted information regarding “new academic achievements” and “new publications.” Because the petitioner did not request an extension in advance, or show good cause for such an extension, we need not examine this evidence in depth. Furthermore, the evidence deals with developments that took place several months after the filing of the appeal. Pursuant to the case law cited elsewhere in this decision, these new exhibits can only be considered in the context of a new petition.² Therefore, we have considered only the original, timely appellate submission.

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

² Computerized CIS records show that, shortly after submission of the supplementary materials, a U.S. employer filed a new immigrant visa petition on the beneficiary’s behalf. The petition sought the same classification as the petition in the present proceeding. As noted in the previous footnote, the petition included an approved labor certification (which, in turn, was filed within days of the filing of the appeal). The petitioner has since filed an application to adjust status, which is currently pending. Thus, the standard job offer/labor certification process was demonstrably adequate to secure an approved immigrant visa petition on the petitioner’s behalf.

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 any proceedings arising from the subsequent, approved petition filed by the alien's United States employer. There is no question as to the petitioner's eligibility for the underlying immigrant classification.

ORDER: The appeal is dismissed.