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FILE: EAC 03 252 51514 Office: VERMONT SERVICE CENTER Date: JUL 13 2005

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:

[REDACTED]

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 Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter 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. The petitioner seeks employment as a research specialist at the Lighting Research Center (LRC) at Rensselaer Polytechnic Institute. 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] 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 describes the petitioner's work:

[The petitioner] is an extraordinary research scientist who has made significant and substantial contributions to the research on lighting in the United States. His contributions, which have culminated in his two approved patents (U.S. patents 6,586,864 and 6,149,283) and several applications for patents for his discoveries, as well as his prestigious publications in peer-reviewed journals of the field, benefit the nation in terms of energy saving, ensuring traffic safety, and improving the environment.

Currently, [the petitioner] is employed as a Research Specialist at the Lighting Research Center (LRC). His current study on Light-Emitting Diode (LED) traffic signals evaluation will help protecting [sic] U.S. drivers' lives by ensuring good long-term performance of the LED traffic signals. If municipalities and the state department of transportation select LED traffic signals based on his findings, an energy saving of about 2.5 billion KWh (kilowatt hour) per year will be ensured assuming LED traffic signals replace all incandescent signals. The 2.5 billion KWh (kilowatt hour) energy saving translates to a reduction of about 250 million dollars in electricity bills, and it also means air quality improvement for the United States by huge reduction in poisonous gases emitted when generating electricity. . . .

Most recently, as the Principal Investigator, he is also working on a series of government-funded projects, such as "Photovoltaic Systems" project funded by New York State Energy Research and Development Authority (NYSERDA) with a goal of developing an integrated lighting systems [sic] using LED as light source powered by solar energy collected through a new photovoltaic panel system constructed into building façade, and "Smart Roadway Lighting" and "Lighting for Single Point Urban Interchange projects funded by . . . NYSERDA and New York State Department of Transportation (NYSDOT). The goal of "Smart Roadway Lighting" project is to develop an intelligent roadway lighting system that will improve the traffic safety and save energy on lighting for highway and rural roadway [sic]. This proposed intelligent roadway lighting system has two components: an intelligent road marker system and an energy-saving street lighting system. In this project, [the petitioner] is the lead researcher in charge of the development of the intelligent road marker system, which will improve roadway safety by delineating the road at night and providing information about vehicle distance, weather conditions, and road hazards. In addition, [the

petitioner] is the optical designer for the lighting fixture of the energy-saving street lighting system.

The petitioner submits copies of articles, presentation materials and patent documents, demonstrating that he has been active as an illumination engineer. It is not self-evident from these documents, however, that the beneficiary qualifies for a waiver. Generally, the documents submitted appear to be of the type that would normally be generated during the course of an illumination engineer's routine duties. An alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dept. of Transportation* at 221, n. 7.

The petitioner also submits letters from several witnesses. All of the witnesses work, or have worked, at institutions where the petitioner has worked or studied. [REDACTED] director of the LRC, states:

[The petitioner's] skills in lamp photometry and optical design, gained from his previous work experience in GE, have proven to be highly valuable to our goals, including improving the efficacy of light sources and lighting fixtures. . . .

One of the important projects in which he worked with me is "Acceptance and Use of Energy Efficient Lighting Systems" supported by the U.S. Environmental Protection Agency (EPA). [The petitioner's] duty in this project was to study the system efficacy of different fluorescent downlighting fixtures and to develop a new metric [i.e., measurement method] for system efficacy of fluorescent lighting system. . . .

The new metrics we developed are expected to . . . allow people to compare lighting products more easily so they can choose the most energy-saving lighting systems for their particular applications.

[REDACTED] states that the new measuring system "will significantly improve energy efficiency . . . and should save electricity expenditures by as much as \$5 billion annually," once it is implemented. He adds that the new system "should be in place within three years." Prof. Rea does not indicate that the petitioner himself developed the new metric; rather, the beneficiary collected the data that was used to create it. Also, this project did not affect the energy efficiency of any lighting products; the new metric is simply expected to provide a means for selecting the most efficient products, assuming that efficiency is one of the criteria that consumers generally consider when choosing such products.

[REDACTED] also notes the petitioner's involvement in the Program for the Evaluation and Analysis of Residential Lighting (PEARL), and states: "This program will ensure the growth of compact fluorescent lamps in place of incandescent lamps." [REDACTED] does not specify what the petitioner has been doing in the PEARL project apart from measuring the light output from various lamps. [REDACTED] adds that the petitioner "is currently the principal investigator of the 'Light Emitting Diode (LED) Traffic Signals Evaluation' project" and "recently began to play a pivotal role in a few new collaborative research projects" with NYSDOT and NYSERDA, but Prof. Rea provides no details about these projects.

[REDACTED] senior research scientist and head of the Transportation Lighting Group at the LRC, discusses the LED traffic signal evaluation project:

Currently there are about 30 manufacturers in [the] U.S. making LED traffic signals. . . . The purpose of this project is to evaluate the performance of LED traffic signals made by different manufacturers. [The petitioner's] research in this project will reveal the quality problems, if any, of the LED traffic signals from different manufacturers, therefore it will protect municipalities from using bad-quality LED traffic signals. . . .

[The petitioner] has shown that different types of LED traffic signals from different manufacturers vary drastically in their performance, and some of the LED traffic signals do not meet the Institute of Transportation Engineers (ITE) requirements under certain conditions. . . .

These outstanding findings were made possible by [the petitioner's] exceptional knowledge and experience in design of experiments, which he gained from his previous Six-Sigma training in General Electric Company (GE). There, [the petitioner], using his exceptional knowledge in design of experiments, came up with the methodology of selecting a few representative LED lamps and measuring these LED lamps without affecting the traffic signal's performance by monitoring the individual LED lamp's light output using an on-board instant measurement box that [the petitioner] made by himself. This revolutionized the field by avoiding unsoldering each LED lamp from the circuit board, and risking permanent damage to the traffic signal. . . .

[The petitioner] is continuing with the second phase of the experiments in this project . . . to check if the LED traffic signals from different manufacturers will still meet the Institute of Transportation Engineers (ITE) requirements after a long-time use.

The above descriptions indicate that LED traffic signal technology exists quite independently of the petitioner's efforts, which, here, appear to be limited to product testing and comparisons. Dr. Van Derlofske states that the petitioner's work "will ensure the energy saving of about 2.5 billion kWh per year assuming all traffic signals in U.S. use LED as light sources." There is no evidence that jurisdictions that would have rejected LED technology have instead embraced it largely due to the petitioner's efforts. However much conversion to LED traffic signals may serve the national interest, it does not follow that involvement in background research automatically translates into waivers for alien researchers.

Tianji Zhao, senior optical physicist at GE, described the petitioner's work at that company's Lighting Division headquarters in Nela Park, Ohio:

[The petitioner's] mastery of the Nela Park photometry lab equipment . . . is a very rare skill. . . . Only 2 to 3 high level researchers out of about 600 of [the petitioner's] colleagues in Nela Park are capable of mastering the Nela Park photometry lab equipment. . . .

During this time, he also developed his remarkable skills in Six Sigma quality control. . . . [The petitioner] was awarded the "GE Certified Green Belt" title in May 2001, a prestigious award given to GE professionals who have demonstrated an in-depth knowledge of Six Sigma tools and techniques.

Tianji Zhao describes various projects that the petitioner undertook at GE, such as modifying PAR30 lamps to increase their efficiency and longevity and creating "a new perforated optical alignment system to allow of [sic] maximum flexibility in MR16 lamp alignment process."

Assertions about the value of the petitioner's Six Sigma training from GE appears to say more about that training program than about the petitioner as an individual. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Matter of New York State Dept. of Transportation* at 221. In this instance, Six Sigma is a training methodology offered not only by GE but by numerous other employers in the United States as well.

Marsha Walton, project manager at NYSERDA, describes the projects the petitioner has undertaken for that entity:

The "Intelligent LED Road Marker System" that [the petitioner] is leading delineates the road at night and dynamically guides drivers based on different road conditions. . . . [The petitioner's] skill in reflector design and his knowledge of lamp optics, make him the extremely well-qualified [sic] to solve these design problems. . . . Without [the petitioner's] valuable contributions . . . the "Smart Roadway Lighting" project would not have achieved the significant progress it has to date.

The director denied the petition, stating that there is no evidence that the petitioner's work has attracted significant attention outside of his circle of employers and collaborators, or that other researchers have cited the petitioner's published work. The director also found that the petitioner does not automatically merit a waiver by virtue of holding patents.

On appeal, counsel states that the petitioner "is a shy person" who felt uncomfortable approaching strangers for evaluations of his work, and that the petitioner's letters do not "lose their luster" merely because the witnesses know the petitioner. The issue of witness acquaintance depends, to a significant extent, on the nature of the claims being made. If an individual claims to be widely known as a top scientist, for instance, such a claim cannot stand without objective evidence of recognition.

In this particular case, it is claimed that the petitioner will benefit the national interest because the implementation of LED traffic signals will decrease energy consumption, thus saving money and reducing pollution. Witnesses have specified that the very large figures cited are contingent on the replacement of *every* incandescent traffic light in the country with LED fixtures, with no discussion as to how widely or seriously such total replacement has been considered. Given the scope of this claim, it is reasonable to expect evidence that traffic authorities throughout the United States do, in fact, intend to install LED traffic signals, but will do so only if the petitioner is involved with the project. As noted above, the petitioner's involvement with this project appears to be limited to third-party quality control and product testing. Thus, the assertion that the petitioner will be personally responsible for billions of dollars in energy savings and a significant reduction in pollution seems to be exaggerated.

As for the petitioner's past work at GE, where counsel states the petitioner established the track record that demonstrates his eligibility for the waiver, the petitioner was clearly involved in inventing new products and improving existing products, but it is not clear how this differs from the usual duties of an illumination engineer. The director observed: "The record as it stands now lacks evidence that the technology patented by the beneficiary has been or will be widely licensed or marketed. In short it has not been established that the beneficiary's inventions will have a substantial impact on the field of endeavor." In response, counsel states: "Recent events have unfolded that will refute this criticism." Denis A. Lynch, Jr., a systems manager at GE, states that one of the petitioner's patented inventions "has been accepted by GE management for

incorporation into product manufacturing” because the petitioner’s “invention improves GE HIR PAR30 lamp efficacy by about 20%, and at the same time it also extends the lamp life by about 30%.”

Mr. Lynch’s letter is dated December 16, 2004, over three weeks after the date of the director’s decision. New evidence of this kind cannot “refute” the director’s findings regarding “The record as it now stands,” i.e., as it stood at the time of the decision. We acknowledge that GE is implementing the petitioner’s design, but at the same time we note that the petitioner created this design while on GE’s payroll. It is not clear why GE would go to the trouble of securing patents on designs that the company had no intention of using. Rather, it seems axiomatic that GE would intend to make use of inventions and innovations created within the company.

Counsel states: “In the time since he filed his original petition, Appellant’s work has generated more interest from others in his field.” The examples listed include citations by the petitioner’s collaborators at the LRC and references to the petitioner’s patents in subsequent patents.

Counsel also states that one of the petitioner’s papers, available via the National Lighting Product Information Program (NLPIP) on the World Wide Web, “has been distributed and referred to by more than 6000 individuals and companies or groups.” The evidence submitted does not show who, if anyone, has “referred to” the site. The “more than 6000” figure derives from the fact that the web site has had 6,310 “hits” as of November 4, 2004. The 6,310 “hits,” however, do not correspond to “more than 6000 individuals and companies or groups.” Rather, there have been 1,166 “unique visitors,” who, on average, have each visited the site five times. A bar graph indicates that roughly 2,000 copies of the petitioner’s report have been distributed. On its face, this contradicts counsel’s “more than 6000” figure. The evidence, therefore, clearly does not support counsel’s interpretation of that evidence, and we must rely on the evidence itself rather than on counsel’s characterization of that evidence. Absent an objective frame of reference, we cannot determine the significance of the fact that the web page has had over six thousand “hits.” The bar graph shows the distribution of 37 reports; the petitioner’s report shows the sixth-highest distribution, with about 2000 copies; the next three reports are not far behind. The lowest distribution is in the low hundreds; the highest distribution approaches 12,000. The petitioner’s report appears to consist of a comparison between different MR16 lamps.

Some of the materials submitted on appeal regard the petitioner’s now-completed work with GE, where he was modifying various types of lamps. There is no indication that he is still performing this kind of work. The record does not persuasively demonstrate that the nation’s transition to LED traffic lights is contingent, to any significant extent, on ensuring that the petitioner, rather than another competent illumination engineer, is the one who tests and compares different LED assemblies (created by other people).

The record shows that the petitioner is a skilled, accomplished and dedicated engineer, but we are not persuaded that it is in the national interest to ensure that the petitioner need not face the labor certification process as is normally required, by law, for the immigrant classification that the petitioner has chosen to seek.

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. 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 appeal is dismissed.