

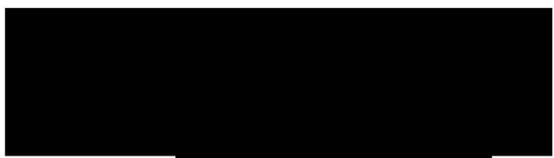


U.S. Citizenship
and Immigration
Services

B5

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



FILE:

SRC 06 181 51165

Office: TEXAS SERVICE CENTER

Date: FEB 25 2008

IN RE:

Petitioner:

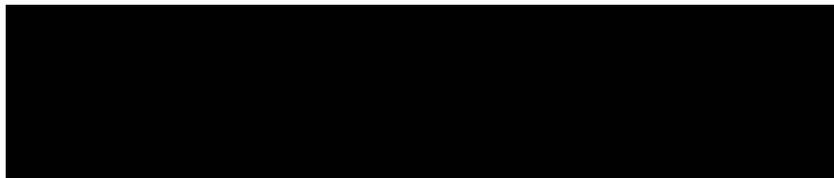
Beneficiary:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained 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 an alien of exceptional ability and as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research fellow at Southern Methodist University, Dallas, Texas. 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:

(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. (An additional finding of exceptional ability would be moot, and the petitioner's claims in this area need not be discussed here.) 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 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 (Commr. 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.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In a statement submitted with the initial submission, the petitioner described his work:

During my Ph.D. studies at Southern Methodist University (SMU) in Dallas, Texas, I researched a wide range of geophysical problems. During this time I became a broadly trained geophysicist interested primarily in interdisciplinary studies in seismology, infrasound and heat flow.

Seismology

The most important tool in detecting a potential underground nuclear explosion is seismology. The current detection techniques make use of arrays of seismometers. . . . My

research focused on array processing techniques and ways to improve the detection capability of those arrays. In particular, I concentrated on the effect of the local geology on the seismic recordings and how to remove the so called "site effects." My research resulted in an alternate way of characterizing the site effects, using infrasound waves which couple locally into seismic waves. . . .

Infrasound

. . . As means to control atmospheric nuclear explosions infrasound arrays are currently deployed all over the world. As part of this effort SMU is installing two new infrasound arrays on Wake and Midway Islands. I was responsible for noise analyses for each site[], and I was actively involved in writing the final technical reports.

After the Columbia Space Shuttle disaster on February 1, 2003, I was part of the SMU team which analyzed the signals associated with the Columbia explosion. Based on the modeling and the shape of the signals, we were able to draw important conclusions . . . as to the cause of the crash. . . .

Heat Flow

One of my primary research interests is regional heat flow. In the past, I characterized the thermal patterns in Texas and I interpreted the heat flow variations in terms of local and regional geology. Several important conclusions resulted from my work. First, a correlation between basement structure and heat flow was inferred and the thermal significance of the Ouachita thrust was revealed. . . . I discovered an area along the Texas/Louisiana border, where due to the high underground temperatures geothermal energy can be extracted. . . .

Additionally, as part of my dissertation . . . I researched the possibility of occurrences of small scale geothermal explosions . . . [at] Yellowstone Lake. . . .

My Future Research

A research project called "Infrasound in the zone of silence" . . . [seeks] to further our understanding of infrasound propagation in the lower atmosphere . . . and to carry out research to characterize explosive sources around the Nevada Seismic Array. . . .

In the future, I will be involved in a two year continuation of the "Calibration at White Sands Missile Range" project. . . . I will also be listed as key personnel on a major research proposal . . . which is aimed at understanding the thermal influence on regional wave propagation, with particular focus on Eurasia.

Counsel asserted:

[The petitioner] has demonstrated valuable expert skills in a variety of geophysical areas ranging from seismic array analysis, infrasound analysis and heat flow research that could lead to the discovery of new renewable energy sources and national defense strategies. . . .

[The petitioner] has had over **seven years of experience** in the field of geophysics. His solid background and excellent training have positioned [the petitioner] on a plane so that he may continue his superb track-record of scientific contributions. [The petitioner's] proven accomplishments illustrate his continued contribution to the U.S. national interest. . . .

[The petitioner] has impressed a number of experts in his field with his skills, knowledge, background and abilities. The experts concur that [the petitioner] is extremely valuable for his rare and unique background and skills and that the loss of [the petitioner's] talent would severely impact the U.S. national interest in science and geophysics.

Several witness letters accompanied the initial filing. We shall consider examples of these letters here. The majority of the initial witnesses are current or former SMU faculty members. Professor [redacted] described the petitioner's most recent work:

I am responsible for the geothermal resource base calculation and the work of [the petitioner] has been critical in the preparation of this analysis. He has also contributed to the deciphering of the small-scale complicated patterns of various geothermal sites, finding the most attractive economical location for the site. . . .

[The petitioner's] unique combination of skills has been critical in his . . . interpretation of both heat flow and seismic data existent for the Yellowstone Lake, Yellowstone National Park, Wyoming. This is probably the most important work he has carried out to this point in his care.

Outside of SMU, one of the witnesses is [redacted] "the leader of the Geothermal Program at the U.S. Department of Energy's Idaho National Engineering and Environmental Laboratory," who stated:

We are currently funding part of [the petitioner's] geothermal research and have [done] so for several years. I can confirm that [the petitioner] is positively and substantially impacting our energy supply crisis. . . .

During his Ph.D. studies, [the petitioner] played a key role in several significant heat flow projects. He analyzed the heat flow in the southwestern United States and discovered a potential economically interesting area at the Texas/Louisiana border. The geothermal program at Southern Methodist University is currently the only group specializing in heat flow related to geothermal resource development and [the petitioner] is one of the leaders in this group.

Other witnesses offer general praise for the petitioner's expertise and contributions, without discussing those aspects in detail.

The petitioner's initial submission also included background documentation as well as examples of the petitioner's published and presented work. A printout from <http://scholar.google.com> indicated that one of the petitioner's papers has been cited twice, both times being self-citations by the petitioner and/or his collaborators.

In a request for evidence issued November 7, 2006, the director acknowledged the intrinsic merit and national scope of the petitioner's field of endeavor, but stated that the petitioner had not yet "shown that the labor certification process would adversely affect the national interest." The director stated that it cannot suffice simply to attribute "unique skills" to the petitioner, and that the petitioner had not established independent recognition that would set him apart from other competent researchers in his field. The director requested "evidence of the extensive and frequent citation of" the petitioner's published work, to allow an objective distinction between the petitioner's work and that of others in the same field.

In response, the petitioner submitted additional letters, articles, and other materials. The petitioner did not claim wide citation of his published work. Instead, the petitioner submitted letters from various witnesses (including a journal editor) who indicate that the beneficiary's work in infrasound is not widely cited because there are few researchers in the field and their work generally appears in government reports rather than scholarly journals, and that the beneficiary's heat flow studies are not widely cited because relatively few papers appear in that field and the beneficiary's papers have not existed long enough for many citations to appear.

Principal Analyst, Nuclear Treaties at the United States Department of Defense (his letterhead reads "Assistant to the Secretary of Defense"), stated in a January 4, 2007 memorandum that the petitioner "is engaged in research and development of direct interest to the Department of Defense (DoD) nuclear arms control and nonproliferation programs."

Professor [redacted] Director of the Jamie L. Whitten National Center for Physical Acoustics at the University of Mississippi, stated that the petitioner's research relating to the Columbia disaster exposed a discrepancy in existing formulas for "the standard yield frequency relationship used for many years. . . . This is a case where a young mind new to the field successfully challenged ideas (actually an equation) which has [*sic*] been accepted by the gray beards in the community for many years. We really need [the petitioner] in our field."

Regarding the petitioner's work involving heat flow, [redacted], Editor of *Natural Resources Research* and a Professor Emeritus at Wichita State University, stated that "citations during a researcher[']s first few years may be low" owing to the low number of "publications where geothermal research is published." Regarding one of the petitioner's recent heat flow papers [redacted] stated:

There are two major accomplishments present in this paper. The first is related to the temperature-at-depth maps in three dimensions for the temperature field for the entire U.S.

... I believe that the temperature-at-depth maps will be widely cited in the geothermal community because the high-temperature areas are the target of the geothermal exploration.

There is also a second major implication of this paper. The amount of the potential geothermal power is larger than previously thought. . . . In addition, recent technological advances . . . make electrical power generation from low-temperature (90°C) geothermal waters economical. Research and development of this new type of resource, combined with technological advances, are critical to the U.S., and [the petitioner's] studies will be the basis for a major change in energy policy and energy future for our country.

[REDACTED], Jr. of the University of North Dakota stated:

I became aware of [the petitioner's] research through his presentations at the American Geophysical Union Fall Meeting and through the opportunity to review two of his papers on enhanced geothermal resources in the U.S. for the Editor of *Natural Resources Research* (NRR).

In his most recent submittal to NRR, [the petitioner] evaluated the geothermal potential of enhanced geothermal systems of the coterminous U.S. The paper is the first detailed, large-scale study that addresses the EGS potential of the entire United States. [The petitioner's] approach to computing the amount of energy available required development of a three-dimensional model of the subsurface temperature field of the U.S. Such a complex calculation of temperatures at various depths had not previously been attempted at a continental scale . . . due to the complexities of lateral variations in critical rock properties such as thermal conductivity and radioactive heat generation. [The petitioner] not only attempted, but also succeeded in computing the temperature with a high degree of accuracy.

... [The petitioner's] paper is unique in that it addresses the applied field of geothermal energy and geothermal engineering. The temperature maps that [the petitioner] presented in his paper are excellent representations of the geothermal resource potential of the U.S., and I believe this paper will become a cornerstone for new geothermal research and geothermal development.

The director denied the petition on January 30, 2007, quoting from the various letters but concluding that the petitioner had "not shown how the beneficiary has influenced the field as a result of his research" or "how the labor certification process would adversely affect the national interest."

On appeal, counsel argues that the director ignored some witness letters and took quotations from others out of context. Counsel further contends that the director "solely relied on citations" when rendering the decision, without considering other evidence of the petitioner's influence in the field such as government reports.

Upon consideration, the AAO concurs with counsel's arguments. The petitioner has not established wide citation of his work in professional journals, but the petitioner has presented credible explanations from

knowledgeable experts (including a journal editor) to account for the low citation rate of the petitioner's work. The petitioner has presented credible statements from a number of independent witnesses, demonstrating that experts outside of the petitioner's own circle of collaborators and mentors consider his work to be especially important within the field. The witnesses have attributed to the petitioner significant developments, findings and innovations in several different areas of inquiry, with implications ranging from national defense to domestic sources of clean energy. The AAO finds that the petitioner's contributions in these areas go considerably beyond the routine work products of a researcher in a small field with few researchers. Also significant is that many of the independent witnesses were already aware of the petitioner's work; they did not learn about it for the first time when they were asked for letters in support of the petition.

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 evidence in the record establishes that the scientific community recognizes 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 appeal is sustained and the petition is approved.