identity [illegible] to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 04 2005
EAC 02 173 52505

IN RE: Petitioner: [redacted]
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:

[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.

Mari Johnson

For Robert P. Wiemann, Director
Administrative Appeals Office

JAN0405_01B5203

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 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 a member of the professions holding an advanced degree. 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 requirement 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 petitioner holds a Ph.D. in Physics and Mathematics from Moscow State University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue 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 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 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 Dep't. of Transp., 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.

We concur with the director that the petitioner works in an area of intrinsic merit, optics and oceanography. Despite the letters submitted in response to the director's request for additional evidence explaining the national and, in fact, global implications of the petitioner's area of research, the director concluded, without explanation, that the proposed benefits of the petitioner's work would not be national in scope. We disagree. Improved sensor technology for aquatic environments would be national in scope, providing results related to climate change and the overall health of our oceans. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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. *Id.* at 219, n. 6.

The petitioner worked as a research associate and then an assistant scientist for [redacted] at Brookhaven National Laboratory from May 1995 to June 1998, whereupon he followed Dr. Falkowski to Rutgers University. According to [redacted] the petitioner "developed Single-Celled fluorescent techniques and realized instrumentation revolutioniz[ing] our understanding of how different populations of marine phytoplankton respond to changing environmental factors, including the impact of human activity." [redacted] asserts that this instrumentation "is now being used in multiple American oceanographic programs sponsored by the U.S. government."

[redacted] further explains that the petitioner worked on developing optical techniques for identifying man-made objects in shallow coastal waters as part of the Coastal Benthic Optical Properties (CoBOP) project for the U.S. Office of Naval Research. In that project, the petitioner managed most of the field and laboratory experiments and was "a lead designer and constructor of SCUBA-based Fast Repetition Rate

(FRR) fluorometers, developed for the U.S. Navy." continues that the petitioner recently started to work on a large multi-institutional project to investigate the role of iron limitation on ocean biota and its relationship to global warming. The National Science Foundation and the U.S. Department of Energy are funding the project, known as the Southern Ocean Iron Fertilization Experiment (SOFeX). Finally, Dr. Falkowski asserts that the petitioner is listed as a principal investigator on a proposal submitted to the Strategic Environmental Research and Development Program (SERDP). SERDP approved the initial planning letter and, at the time of filing, a full proposal was under consideration. The petitioner submitted a copy of the proposal, confirming that he is listed as a principal investigator based on his work as a "lead designer and constructor of SCUBA-based FRR fluorometers." The petitioner is to be "responsible for the biophysical part of the project and development of bench scale prototypes of advanced FRR fluorosensors."

a former research professor at the Brookhaven National Laboratory currently working at the National Aeronautics and Space Agency (NASA) Goddard Space Flight Center, provides similar information. In addition, asserts that while at the Brookhaven National Laboratory, the petitioner collaborated with NASA, playing a "critical role in technology and algorithm development for an Airborne Oceanographic Lidar system now being employed for assessing variability in coastal and open ocean phytoplankton biomass and productivity." project scientist for the Lidar system, asserts that he invited the petitioner to give a talk at his laboratory at the Wallops Flight facility and to discuss "future collaboration." discusses the Lidar system and asserts that the petitioner has "skills that directly relate to our research."

Chief Scientist of the CoBOP project, asserts that the petitioner is the first author of three of the 14 peer-reviewed articles reporting CoBOP results and a co-author of two more. asserts that this number "is the highest total for any of the participating Principal Investigators." Other letters from CoBOP collaborators affirm the petitioner's abilities in general terms.

The petitioner also submitted letters from several researchers who participated, along with the petitioner, in a six-week ocean expedition relating to SOFeX. The expedition monitored the results from fertilizing a patch of ocean with iron. professor at the University of California, Santa Barbara, asserts that the petitioner's "measurements were able to provide some of the very first information on how the photosynthetic apparatus of the phytoplankton improved as a result of the iron addition." adds that the petitioner "was able to use a special submersible SCUBA-based FRRF of his own design to make the first accurate prediction of a coral bleaching event." Chief Scientist for SOFeX, asserts that the project monitored phenomenal growth as a result of the iron fertilization, providing "conclusive proof that phytoplankton growth in this vast stretch of ocean is controlled primarily by the availability of the essential element iron." notes the importance of this finding to climate research.

As stated above, the letters submitted in response to the director's request for additional evidence attest to the national implications of the petitioner's area of research and his skills. Those letters have been considered above as evidence of the intrinsic merit and national scope of the petitioner's area of research.

The petitioner is the author of 47 publications in peer-reviewed journals. Thirty-one other articles cite the petitioner's work.[1] In her final decision, the director dismissed the petitioner's citations because "scientists

[1] The only evidence in the record to support the petitioner's publication and citation history is the attestations of the petitioner and his references and two articles submitted on appeal. The director issued two requests for additional evidence, neither of which requested objective evidence supporting the petitioner's alleged

are legally and ethically required to cite any other researchers['] work." The director does not explain how a scientist's obligation to cite the work on which he relies diminishes the evidentiary value of citations. Frequent citation, in fact, is valuable objective evidence that other researchers in the field are applying and relying upon the petitioner's work.

The director dismissed the letters of support without any consideration of their content. Rather, the director appears to dismiss the letters because some references were associated with the petitioner and the remaining references had not documented that they were "considered leading experts in the beneficiary's field of endeavor."

Letters from independent experts are more persuasive of an alien's influence beyond his collaborators than letters from those collaborators. Similarly, letters from high-level experts are more persuasive than letters from novices in the field. That said, letters from collaborators provide valuable evidence regarding the alien's role on particular projects. Moreover, the director did not explain why letters on official letterhead listing a job title and including an attached curriculum vitae are insufficient evidence of the author's level of expertise.

Overall, we find the record sufficient to establish that the petitioner has a track record of success with some degree of influence on the field as a whole. While not sufficient evidence by itself, the requests from three separate peer reviewed journals soliciting reviews by the petitioner is consistent with his influence in the field.

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 the 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.

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