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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 17 2008

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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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 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 researcher in the field of environmental engineering. 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:

> (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 (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 the initial filing, the petitioner did not identify any current employer. He indicated that he had worked at Florida Institute of Technology (FIT) first as a research assistant from November 2000 to March 2002 (while he was a doctoral student there), and later as a visiting assistant professor from February 2005 to January 2006.

In an introductory statement, counsel stated that the petitioner

> has employed his considerable expertise to . . . the area of water pollution management research. . . . Nonpoint source pollution (NPS) has been widely identified as a major source of pollution of surface water bodies. Examples of NPS include soil erosion from farm land and construction sites, rural and urban pesticide and fertilizer runoff, failing septic systems, animal waste, motor oil, antifreeze and salt applied to roadways. . . . Often, Best Management Practices (BMPs) are designed and implemented to mitigate the environmental impact of

> NPS pollution. . . . [The petitioner] has made important contributions in this area as reported in a number of scientific journal papers, conference presentations and technical reports. . . .
>
> [The petitioner] has made significant advances in BMPs for dealing with water pollution, including the highly promising BMP known as a Wet Detention Basin (WDB) (also known as a wet detention pond). Although numerous researchers have studied to determine the efficiencies of a WDB . . . , data from previous studies was unable to uncover any long-term efficiency values for WDBs. . . . [The petitioner] has developed a cutting edge model, WEANES (Wet Pond Annual Efficiency Simulation Model), for predicting long-term pollutant loadings of a WDB. . . . Due to its proven effectiveness, WEANES has attracted great attention in [the petitioner's] field including interest from several Florida Water Management Districts and Florida Department of Transportation.

(Emphasis in original.) We must judge the record by the evidence submitted, rather than by counsel's claims. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Despite the reference to "a number of scientific journal papers," the list of submitted exhibits includes only one published paper, which appeared in the *Journal of Korean Society of Environmental Engineers* in 1995 (the article appears to be an expansion of the petitioner's master's thesis, which shares the same title). Two other papers are named, one shown as "Submitted" and the other as "Will Be Submitted." As of the petition's filing date, the petitioner's work in the United States had not yielded any published journal papers. The primary medium through which the petitioner has disseminated his recent work has been conference presentations, the most recent of which was in May 2005.

The petitioner's initial submission documented two citations of the petitioner's work, one of which appeared in "Annotated Bibliography of Urban Wet Weather Flow Literature from 1996 through 2004." This document does not appear to have singled out the petitioner's work; rather, its title indicates a comprehensive overview of nearly a decade's worth of literature. Reinforcing this conclusion, the alphabetized list of cited references begins on page 282, and the petitioner's article (of which the first author was Prof. [redacted]t) appears on page 408 (listing 25 articles with first authors F[redacted] through [redacted]y). The "Annotated Bibliography . . . " clearly encompasses several thousand articles. The second citing article briefly mentions simple nonpoint source runoff models, citing one of the petitioner's models among the examples.

Several witness letters accompanied the petitioner's initial filing. We shall discuss examples of these letters here. FIT Professor [redacted]t stated:

> As his former professor and a member of his dissertation advisory committee, I have interacted with [the petitioner] on a regular basis. His Ph.D. research is state-of-the-art work and has resulted in six proceeding papers in reputed national and international conferences as well as a technical report to the St. Johns River Water Management District. . . . [The petitioner] played a leading role in every research project [with] which he was involved.

> . . . His research will undoubtedly lead to new NPS pollution treatment that can greatly improve the water quality of the United States.
>
> [The petitioner's] other outstanding work on NPS pollution is estimating long-term (multi-year) or annual NPS pollutant loads using . . . a Continuous Annual Load Simulation model.
>
> Furthermore, [the petitioner] has been studying numerical groundwater modeling. . . . His proposed study is focused on a coupled-model, flow and contaminant transport, using . . . a three-dimensional finite element ground water model.

The record does not indicate that this "proposed study" has taken place. The petitioner's relocation to Suwannee, Georgia, presumably precludes his day-to-day involvement some 450 miles away at FIT, where the petitioner himself does not claim to have worked since January 2006.

Professor [redacted] of Inha University, Incheon, South Korea, stated: "Although I don't know [the petitioner] personally, I became aware of his research when I attended his presentation at the Korean Water Resources Association Conference, in Korea last May. I was extremely impressed by his presentation and his great achievements in the area of stormwater BMPs." Prof. [redacted] asserted that the petitioner's simulation models "have brought rare insight for the development of a new TMDL [total maximum daily load] model to improve or protect water quality through the use of strategies," and that the petitioner's "work has deeply influenced one of my research areas." Prof. [redacted] contends that "success in this area will be very unlikely if [the petitioner] were to be replaced," but because the petitioner has not identified a current employer, it is not clear in what sense the petitioner would be "replaced."

Most of the remaining witnesses are involved in environmental engineering efforts in central Florida, in the general vicinity of FIT. For example, Dr. [redacted], Director of Science Education at Dynamac Corporation, consults on environmental engineering at Kennedy Space Center north of FIT's campus. Dr. [redacted] asserted that the petitioner's WEANES model "is a first-rate, user-friendly model that can easily be utilized as a permitting and planning tool by engineers and government regulators." The only remaining witness outside of Florida is Professor [redacted] of Utah State University, who based his comments on the petitioner's "resume."

On April 30, 2007, the director issued a request for evidence, instructing the petitioner to submit additional documentary evidence to establish that the petitioner has had a particularly significant impact on his field. The director also requested information regarding the petitioner's current and intended future employment in the United States, noting that the petitioner had initially claimed no employment after January 2006.

In response, counsel stated: "we present evidence that [the petitioner] will be employed as a post-doctoral researcher for the Florida Institute of Technology." The aforementioned evidence consists of a new letter from Professor [redacted] who stated: "I plan to hire [the petitioner] for a post-doctoral position for conducting a new research project which is expected to start in January 2008." In light of the petitioner's subsequent

relocation to northern Georgia, it does not appear that he ever began working in this post-doctoral position in central Florida. The record is silent regarding the petitioner's activities in Georgia.

The petitioner also submitted another letter from a witness in central Florida, consulting engineer Gordon England of Cocoa Beach, who declared the petitioner's WEANES model and its underlying theory "to be . . . exceptionally valuable guides for the stormwater pollutant modeling required my grant applications and project designs."

The director denied the petition on September 20, 2007, acknowledging the intrinsic merit and national scope of the beneficiary's profession, but stating that the record lacks evidence of the petitioner's impact or influence on his field relative to other qualified professionals in the same field. On appeal, the petitioner argues that his prior submissions "show that I have made great accomplishments that have significantly influenced my field." The evidence indicates that the petitioner has developed useful models, but that same evidence shows that the petitioner is far from alone in this respect. The record does not establish widespread implementation of these models, nor does it show that a significant sector of the environmental engineering community has embraced those models as being significant improvements over other models already in use.

Regarding his low output of published work, and the low citation rate thereof, the petitioner states: "The publication record and citation number are not universally mandatory in every [national] interest waiver case." This statement is uncontroversial, as many fields of endeavor do not involve publications or citations at all. Nevertheless, in science and engineering, publication is a principal means by which a researcher disseminates his or her findings, and if a researcher's published output has been minimal or nonexistent, then the petitioner must use alternative methods to establish influence in the field.

The petitioner has been able to identify individuals who approve of his work, and cite it as an influence on their own. We have considered this evidence, but in the context of the record as a whole, the witness letters do not distinguish the petitioner from others in his field of endeavor. The record indicates that the petitioner's professional reputation is largely (but not entirely) confined to part of Florida, and there is some indication in the record that the petitioner's models are in fact tailored to conditions in Florida and would require adaptation to be of use elsewhere (which may limit the national scope of the petitioner's work).

The record establishes that the petitioner is a qualified and competent environmental engineer, but it offers little that would allow a meaningful comparison between the petitioner and other qualified environmental engineers. Therefore, the petitioner has not established that he qualifies for the waiver, which is a special benefit otherwise unavailable to most environmental engineers holding advanced degrees.

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.