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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 28 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. At the time he filed the petition, the petitioner was a system design and integration engineer at OptiComp Corporation (OCC), Zephyr Cove, Nevada.[1] 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).

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[1] The petitioner no longer works for OptiComp. In 2007, another employer, [redacted], filed an I-129 nonimmigrant petition on the alien's behalf (receipt number WAC 08 026 51522), and the alien's nonimmigrant visa permitting him to work at OptiComp was revoked in 2008.

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 a statement accompanying the initial filing of the petition, counsel stated:

> [The petitioner] has made outstanding achievements in electrical and computer engineering, especially in research areas related to the development of cutting-edge optical communications technology, with well-documented recognition from peers, governmental entities and professional organizations.
>
> [The petitioner's] most significant scientific contributions lie in several breakthrough achievements with great impact on both basic research and practical application far exceeding those normally expected of qualified members of his profession. . . . For instance, from 1998 to 2001, when [the petitioner] worked at Alcatel Shanghai Bell Co., Ltd., China, he made

> major contributions to several projects involving the design of broadband ATM switches and WDM optical communication systems. . . .
>
> In 2001, [the petitioner's] scientific activities took on a distinct international significance when he was selected to join the Department of Electrical and Computer Engineering at the University of Miami in the United States.

The record shows that 2001 is when the petitioner began studying for his Ph.D. at the University of Miami. By implication, counsel's wording invests the activities of every foreign graduate student with "a distinct international significance." Counsel continued:

> At this major American university, [the petitioner] . . . made a number of breakthroughs. For example, he achieved remarkable success in his scientific efforts to develop optical holographic storage. Unlike both magnetic and conventional optical data storage technologies, holography makes it possible to store information through the volume of a medium instead of just on its surface, and thus it has been considered as a compelling choice for next generation storage and content distribution needs. On such an important topic, [the petitioner] made an important breakthrough by synthesizing and characterizing a new series of azobenzene doped polymers for holographic storage. One significant advantage of [the petitioner's] holographic material is that the real hologram can be recorded on them [*sic*] with out subsequent processing. In addition, [the petitioner] has dramatically enhanced the resolution of the holographic material by using the two-photon technique and thereby significantly increased the information storage capacity per area unit. Different from the traditional two-photon technique, the recording process of [the petitioner's] holographic material can be performed by one beam instead of two beams. Therefore, the recording process has been greatly simplified. . . .
>
> Since joining OCC in December 2005 . . . [the petitioner has worked on] the design and integration of network systems to be deployed in future unmanned combat aerial vehicles (UCAV) and transformational satellite platforms. . . . His optical network design has contributed vitally to eliminating the drawbacks such as centralizing routing control, lack of fault tolerance, high latency and low reliability existing in the current network system of the military satellite and UCAV without compromising the required network bandwidth.

Counsel listed seven articles (one of them still unpublished at the time) by the petitioner, and stated: "It is worth pointing out that the scholarly articles [the petitioner] has published are . . . regarded important enough to be shared by the entire scientific community in the field by esteemed experts." Counsel did not explain the distinction, if any, between "shared by the entire scientific community" and "published." Counsel's characterization of the petitioner's published work appears to be equally applicable to every peer-reviewed scholarly article.

Counsel asserted that, because the petitioner's work has been funded by "major government agencies," "there can be no doubt about the significance of his research to the national interest of the United States." The AAO

does not share the opinion that federal grant funding is presumptive evidence of eligibility for the national interest waiver. Different agencies have different criteria for grant funding, and different priorities for allocation of resources. The AAO will not base its decisions on the identity of the funding agency, the amount of the funding, or the overall goal of a given project. Each project, and each alien's role within each project, must be considered on its own merits.

Counsel stated that the petitioner "has obtained a degree of expertise significantly above that ordinarily encountered in the scientific research in his field." This assertion is taken almost verbatim from the regulatory definition of "exceptional ability" at 8 C.F.R. § 204.5(k)(2). It is clear from the plain wording of the statute that exceptional ability in the sciences does not automatically qualify an alien for a national interest waiver; aliens of exceptional ability are generally subject to the job offer/labor certification requirement. Counsel then put forth the more forceful assertion that the petitioner's "continuing presence in this country [is] indispensable for further success in his field." We now turn to the evidence to see how well it supports counsel's claims.

Six witness letters accompanied the petitioner's initial submission. We shall discuss examples of those letters here. Professor [redacted] of the University of Miami stated that the petitioner "has been one of the most capable, motivated and well-rounded researchers in the field," and that the petitioner's "work has benefited and will continue to benefit our country by helping [the] USA gain a competition edge in the area of information storage technologies."

[redacted], OCC's Vice President of Engineering, stated:

> Opticomp Corporation (OCC) is a contractor to the U.S. Air Force for several major projects aimed at developing advanced optical networking technologies for the Air Force's strategic Military Networking Technology for Global Information Exchange program. . . . Jointly with Boeing and the Air Force, OCC is currently developing the next generation of more robust and high-performance optical network systems for military Satellites (T-Sat) and unmanned combat aerial vehicles (UCAV) applications. In addition to optoelectronic technology development, the focal point of this effort is also on the network system design and integration engineer, who plays a critical role in designing and implementing the next generation on-board network system. . . .
>
> Since joining OCC, [the petitioner] has already achieved significant success in applying his unique combination of knowledge and skills to the design and integration of network systems to be deployed in future UCAV and Transformational Satellite platforms. . . . [The petitioner] has made substantial progress towards realizing a platform-based optical network using OCC's N^3/N^4 architecture by carrying out both the hardware and software design implementations. . . . Because of the critical role that he is playing, and the significant contributions that he has already made to this project, [the petitioner] is considered to be very critical, and therefore irreplaceable to the successful implementation of these important Air Force projects without disruption.

Witnesses from Boeing and the Air Force Research Laboratory echo assertion that the petitioner's continued participation is vital to the project described above. These arguments are moot, because the petitioner has already left OCC to work for a different United States employer.

The initial witness who appears to have the least demonstrable connection to the petitioner is [redacted], Senior Hardware Engineer at Intel Corporation, who stated:

> After evaluating his research activity and reading his publications I am convinced of [the petitioner's] exceptional expertise and contributions in the field of optical holographic storage, photonic devices, and optical network systems. He has acquired a degree of expertise significantly above ordinarily encountered in the scientific research of our field. He has established a past record of specific prior achievements far exceeding those normally expected of qualified members of our profession, which justifies projections of future benefit to the national interest. I believe that [the petitioner] will continue to have a significant impact in this area. . . .
>
> In my opinion, [the petitioner] has made breakthrough contributions to optical information storage technology and optical network technology.

[redacted] described the petitioner's work in technical detail, and concluded: "Few experts today possess such extraordinary expertise, and have had such a profound impact on the course of information storage technology and optical network technology in this country."

While we take assertions under advisement, we must determine the extent to which the objective **documentation in the record supports those claims.** The petitioner submitted copies of several of his published articles and conference presentations, but the very existence or publication of these articles does not establish their importance or their influence on the field. The petitioner did not submit evidence to show, for instance, that other researchers have heavily cited his published work, or that his technical innovations have been put into production and significantly replaced older technologies.

On January 18, 2008, the director issued a request for evidence, acknowledging the intrinsic merit and national scope of the petitioner's work, but calling for documentary evidence to show the extent to which other researchers have relied on the petitioner's work. In response, the petitioner submitted evidence of 18 independent citations of works by the petitioner. Counsel asserted that the documented citations "are merely examples and are by no means exhaustive," because "it is practically impossible to get the precise number of citations."

The petitioner also submitted additional witness letters. For example, [redacted], Associate Professor at Lehigh University, who claimed to know of the petitioner "only through his outstanding research achievements . . . and through the praises of his work from many other researchers," stated that the petitioner "is one of the few scientists who have made breakthrough contributions in the research of optical network communication such as photonic devices." [redacted] asserted that, as a result of the petitioner's work with "an

optical waveguide between two chips . . . the realization of super computer will be more likely to come true with an affordable cost."

[redacted], Assistant Professor at the State University of New York, Buffalo, stated:

> I came to know [the petitioner] through his much-cited publications. Although I have never worked with him before, I am confident that [the petitioner's] achievements on both **optical information storage technology** and **photonic device technology** are quite substantial and are of great significance. . . .
>
> [The petitioner's] results have had a broad positive impact on the research of other researchers. For example, the results of optical holographic storage that were included in his papers are widely adopted and utilized by several other laboratories/companies throughout the world, which clearly indicates that his research results are influencing the research of many others.

[redacted] did not identify any of the "several other laboratories/companies," and the record contains no evidence from these unnamed entities to confirm the widespread adoption of technology developed by the petitioner. [redacted] assertion that the petitioner's published work is "much-cited" is also debatable, given the evidence. Vague attestations of widespread impact cannot carry the same weight as specific, objective documentation.

The petitioner submitted a July 2006 online article from http://fibresystems.org, identifying the petitioner as one of three individuals who developed "an all-optical-controlled VOA based on a photochromatic sol-gel material." The article did not indicate the extent, if any, to which this innovation had been implemented in electronic devices.

The director denied the petition on April 22, 2008, stating that the petitioner's citation record did not establish significant impact in the petitioner's field, and that the witness letters "fall short of demonstrating the petitioner's required impact."

On appeal, the petitioner states that the director failed to consider "that my work has been reported in some major media such as FibreSystem (Exhibit S23) and Cafenegros (Exhibit A1) [*sic*]." The AAO has already addressed the *FibreSystems* article. Exhibit A1 was not submitted until the appeal. The petitioner, therefore, faults the director for failing to anticipate the petitioner's future submission of that article. The newly-submitted article appeared at http://www.cafe-negro.net in 2006. The text of the printout in the record matches, exactly, the first sentences of the *FibreSystems* article. The article's masthead reads "cafenegro / Feeding you the web." After the quoted paragraph appear two links marked "go to feed" and "visit website." It appears, therefore, that *cafenegro* is essentially a compendium of links to articles on other sites, rather than a site that independently generates original content. The petitioner has not demonstrated that either *FibreSystems* or *cafenegro* constitutes "major media" as claimed, nor has the petitioner established that those media sources cover "only the research results with revolutionary breakthrough or innovation in a specific research area." The petitioner does not explain why his "revolutionary breakthrough" appears to have

garnered coverage in only one publication (repeated verbatim by *cafenegro*). The petitioner simply claims, without evidence, that the *FibreSystems* article is of great significance. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

The petitioner submits copies of electronic mail messages, showing that he has reviewed manuscripts submitted for journal publication. The petitioner has not shown that participation in peer review is a rarely-granted privilege, rather than a professional obligation widely shared throughout the field.

The petitioner states "the citations of my work can not fully reflect the research community's reaction [to] my work," and states that the director should, instead, have taken into consideration that the petitioner's "papers have been published in high-ranked journals." The journals' rankings, however, derive from the citation rates of articles in those journals. The petitioner, in effect, has asked that the citation rates of other articles in those journals be taken into account in lieu of his own work. This argument does not persuade the AAO to reverse the director's decision.

The petitioner asserts that the director did not give sufficient weight to awards that the petitioner received as a student. We note that recognition of this kind constitutes part of a claim of exceptional ability, under 8 C.F.R. § 204.5(k)(3)(ii)(F). By statute, exceptional ability is not grounds for a waiver; aliens of exceptional ability are generally subject to the job offer requirement. *See* section 203(b)(2)(A) of the Act. Therefore, an award that would provide only partial support for a claim of exceptional ability is not presumptive evidence of eligibility for the waiver. Such awards compare the petitioner only to other current students or researchers in one department at one university, and the petitioner has not shown that the awards are any more significant than awards presented at countless other universities. For the most part, the petitioner's arguments on appeal follow the same general pattern: the petitioner claims that his evidence is more significant than the director concluded, but he does not provide any objective evidence to support these claims.

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.