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U.S. Citizenship
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Services

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FILE:

[REDACTED]
SRC 07 067 52074

Office: TEXAS SERVICE CENTER

Date:

SEP 17 2008

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, 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 AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

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 civil engineer at the Transportation Department of Manatee County, Florida. 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 (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 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 an introductory letter, counsel stated:

[The petitioner’s] research focuses primarily on the study of granular materials to improve understanding of pavement/transportation engineering. She has made several original contributions to her field over the last several years. Granular materials include soils, concretes, rocks, [and] aggregates and are the most important component in the construction and repair of buildings, highways, bridges and other infrastructure. Through the development and research of more durable and economically feasible materials, future maintenance for recurring problems can be lessened and avoided, thus saving billions of dollars spent annually on short-term repairs necessitated by natural disasters and common human usage.

Although the petitioner seeks to continue her employment with a county-level transportation authority, counsel asserted that the beneficiary’s “work is not limited solely to the repair of individual highways. She

conducts fundamental research that assists engineers all over the United States to build and repair better highway pavements.”

An exhibit list included in the initial submission refers to five “peer-reviewed scholarly publication[s].” Most of the materials so identified and submitted with the petition, however, are the petitioner’s student writings and articles in manuscript form. Of the petitioner’s writings included in the initial submission, the only items submitted in discernibly published form are an abstract of the petitioner’s doctoral dissertation and a Chinese-language article from *Shanghai Geology*. The rest are manuscripts, said to have been submitted or accepted for publication. To identify an as-yet-unpublished manuscript as a “peer-reviewed scholarly publication” is premature, if not outright misleading. Other articles, said to have been published previously, are identified but not submitted.

The same exhibit list identified six witness letters. The initial submission, however, contains only four of the letters so identified. Missing are letters from Professor Emeritus [REDACTED] of Louisiana State University (LSU) and [REDACTED] Associate Professor at the University of Florida. We shall discuss the remaining four letters here

[REDACTED] who served as the petitioner’s doctoral advisor at LSU before becoming an associate professor at Virginia Polytechnic Institute and State University (Virginia Tech), stated:

[The petitioner] has distinguished herself through her research on granular materials, one of the areas of study of the highest importance. . . .

[The petitioner] has made significant contributions to the study of these materials in the context of her research in pavement/transportation engineering. . . .

Specifically, [the petitioner] developed an experimental method to measure the internal properties of construction materials. . . . Understanding the internal properties of these materials forms the basis of knowledge of the damage mechanisms in granular matter. . . . Prior to [the petitioner’s] work, [t]here was no effective method to measure the mechanical properties of individual irregular particles. . . .

[The petitioner’s] utterly original experimental method provides a tool that enables us to better understand and predict the behavior of granular materials in highway and road construction, including, importantly, of the mechanisms of damage at a microscopic level. . . .

[The petitioner] has established herself as one of the top young civil engineers with expertise in granular materials in the United States today.

[REDACTED], Dean of the Civil and Environmental Engineering Department at LSU, stated:

It is my great pleasure to endorse [the petitioner] as one of the brightest minds in civil engineering in my breadth of experience. [The petitioner] is an exceptional researcher who

has made original and important research contributions with her studies on constitutive modeling and damage simulation utilizing digital imaging techniques. Despite the fact that [the petitioner] is at the beginning of her career she has already developed many important methodologies and computer models regarding the treatment of granular materials. . . .

[The petitioner] has invented a timesaving and practical individual particle identification technology for granular materials. [The petitioner's] original approach permits us to accomplish the critical task of identifying individual particles and then to study their behavior and properties under loading prior to use in infrastructure construction. . . .

Another significant contribution [the petitioner] has made to the study of granular materials was in her development of a 3D visualization methodology utilizing X-ray tomography imaging. . . . [The petitioner's] method . . . allowed us to study [single particles'] behavior and properties on a broader scale than had been previously attempted by other researchers and engineers.

[REDACTED], now a geotechnical engineer with the North Carolina Department of Transportation, worked as a research associate at LSU while the beneficiary was a doctoral student there. [REDACTED] stated: "Not only was [the petitioner] the first person to come up with a non-destructive particle identification method for real granular materials, but also she developed the extraordinary digital analysis technology and mathematic model for simulating the behaviors of granular materials on personal computers."

The only initial witness outside of academia was [REDACTED] then Director of the Transportation Department of Manatee County, Florida.¹ Mr. [REDACTED] stated:

We have been fortunate to recruit [the petitioner] as an Engineer Specialist working for our Department. This is an advanced professional civil engineering position involving the design duties as well as field duties on public works and underground utilities projects. [The petitioner] has considerable responsibility for all phases of her projects, including planning, design and construction practices. [The petitioner] is responsible for stormwater drainage and pavement design, both of which are critical in the face of yearly hurricanes. . . .

The primary reason we recruited [the petitioner] is due to her superlative record of research accomplishments, which are a strong predictor of her bright future in transportation engineering. [The petitioner] has a comprehensive understanding of pavement materials and infrastructures after years of research, and she is able to help us achieve an economical while safe pavement design and a valid while cost-effective transportation improvement. . . .

Indeed, we have already benefited much from [the petitioner's] unique abilities, as well as her vast research and project experience. [The petitioner's] digital image analysis technology has

¹ [REDACTED] resigned his position on May 18, 2007. Source: <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20070331/NEWS/703310342> (visited August 4, 2008).

been successfully applied to our raster image design of drainage structures and pavement geometrics. Using [the petitioner's] original image analysis method, we are able to accomplish our design based on existing as-built maps, avoiding the time and expense of sending out surveyors.

All of the witnesses named above have close ties to the petitioner. Their letters and the petitioner's unpublished manuscripts do not establish that the petitioner has had and will continue to have an especially significant national impact on the field of civil engineering. On September 4, 2007, the director issued a request for evidence, instructing the petitioner to submit further documentation to establish that the petitioner meets the guidelines set forth in *Matter of New York State Dept. of Transportation*. Specifically, the director requested evidence that would permit a meaningful, objective comparison between the petitioner and other qualified professionals in her field. In response to the notice, counsel stated "we are resending all the initial evidence with this submission." Exhibit 3 was identified as the letter from [REDACTED] missing from the initial submission. Exhibit 3, however, consists only of a biographical sketch of Prof. Tumay and an online *curriculum vitae* of [REDACTED]. The response also includes a letter attributed to [REDACTED] but the letter is unsigned, and therefore of minimal evidentiary value.

The petitioner submitted six additional witness letters. One of these is from [REDACTED], Assistant Director of the Manatee County Transportation Department, who credited the petitioner with "important findings that have impacted pavement engineering throughout the U.S." The five remaining letters are described as "independent advisory opinions" from faculty members of various universities. These individuals claim to be familiar with the petitioner's work despite having no personal or professional connection to her. They essentially repeated prior assertions to the effect that the petitioner is an expert on the study of the properties of granular materials, and that this expertise is valuable not only in transportation but in numerous other fields where the physics of granular movement is important (such as soil analysis by Mars probes). For the most part, these witnesses focus on the petitioner's graduate research, with little mention of her current work in Manatee County, Florida apart from general descriptions of her duties. The letters did not identify specific instances of non-local uses of the petitioner's methods.

The petitioner submitted a proof copy of an article co-authored by the petitioner and others at Virginia Tech. Although not published until early 2008, the article was first submitted for review on June 1, 2005, and was among the pending submissions listed in the petitioner's initial submission.

The petitioner also submitted documentation showing that one of her articles was published in 2003 and subsequently cited twice. Both times, the article was cited by [REDACTED] named as one of the petitioner's initial witnesses although the letter contains no signed statement from him.

The director denied the petition on December 4, 2007, stating: "The list of papers that [the petitioner] has written has not been published in any scholarly journals. Therefore, the beneficiary's research had no impact on the field." The director added: "The letters of support submitted by the petitioner are vague and do not provide any specific information about the past achievements of the petitioner. The letters of support are from the petitioner's current and former coworkers."

On appeal, counsel asserts that “[b]oth of these statements are verifiably false/in error,” because some of the petitioner’s articles had been published, and the petitioner had submitted “**five independent advisory letters** from experts across the country **who do not know her personally and have not worked directly with her**” (counsel’s emphasis).

The AAO finds merit in counsel’s objections. The stated grounds for denial rest on only two factual claims, and the record contradicts both of them. The director’s decision, as issued, cannot stand. Nevertheless, the record as it now stands does not support a finding of eligibility. The petitioner has not persuasively established that her intended work will have a significant impact outside of Manatee County, Florida, or that it is in the national interest to ensure that the petitioner, rather than a qualified U.S. worker, holds that position. The director must issue a new decision that more accurately reflects the facts of the proceeding and explains why the petitioner’s evidence is inadequate.

Therefore, this matter will be remanded. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s decision is withdrawn. The record, however, does not currently establish that the petition is approvable. The petition is therefore remanded to the director for further action in accordance with the foregoing and entry of a new decision which, regardless of the outcome, is to be certified to the Administrative Appeals Office for review.