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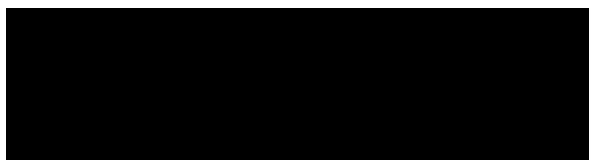
FILE: WAC 04 121 50139 Office: CALIFORNIA SERVICE CENTER Date: **FEB 22 2006**

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office 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 process engineer employed as a developer at [REDACTED]. 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 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 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.

Apart from examples of the petitioner’s technical writings, such as journal articles and conference presentations, the initial submission consists predominantly of witness letters, examples of which we shall consider here. [REDACTED] of the University of California, Santa Barbara (UCSB) states:

[The petitioner] joined my research group shortly after she started her PhD studies at UCSB in 1997. I had the pleasure of serving as her Ph.D. supervisor. . . . While working as a PhD student, she performed innovative research in several key areas of process control, namely, decentralized control systems, the statistical robustness analysis of multivariable systems, and PID controller design and tuning. . . .

Process control plays a critical role in process industries such as Chemical, Petrochemical, Pulp & Paper, Oil & Gas, Pharmaceutical, Food & Beverage, Municipal Water/Sewerage Facilities, and Power & Utility. . . . The first necessary requirement of a control system is its stability. . . . Model uncertainty can have a severe effect on control structure selection and control system stability. Therefore, it is very important to know how sensitive the obtained control structure is to model uncertainty. . . . In [the petitioner’s] research, she has developed analytical expressions for control structure selection based on two general types of process model uncertainty, worst case bounds and statistical uncertainty descriptions, and she also has proposed a new robust stability analysis method. The analysis method and the formulas developed by [the petitioner] can be used to determine the stability of a system and the validity of a control structure selection under the circumstance of model uncertainty, [and] thus help to build more robust control systems. . . .

[The petitioner] also made contributions to the research on control system performance in a series of papers. . . . [The petitioner] has developed two new design methods for decentralized PI/PID controls systems that can guarantee the stability of the control system and provide good performance for a wide range of processes. She has also devised a novel single loop PID design approach based on the Direct Synthesis approach and disturbance rejection that is used to implement and provide better performance than existing methods. . . .

Currently [the petitioner] is working at OSI Software Inc. . . . a leading global supplier of solutions and products for managing information in process control for the process manufacturing industries. She is responsible for product research and development in process control, tailored to the needs of the process industries. While continuing research on process control, [the petitioner] designs and develops process control solutions and systems to be used in plant decision-making and control for leading [corporations] . . . such as ChevronTexaco, ExxonMobil, Shell, Pfizer, Merck, Eastman Chemicals, Dow Corning, Cal ISO, PG&E, etc.

Most of the witnesses are from academia rather than industry, although the value of the petitioner's work is said to lie in its industrial applications. For example, [REDACTED] of the University of Texas at Austin states that the petitioner's "work . . . is pioneering and innovative. She has made great breakthroughs" regarding "accommodating the statistical model uncertainty for robustness analysis and analyzing the effect of model uncertainty on control structure selection." Prof. Edgar does not specify how he came to be familiar with the petitioner's work.

Professor Sigurd Skogestad of Norwegian University of Science and Technology is an editor of the journal *Automatica*, and in that capacity [REDACTED] encountered an article that the petitioner had written for the journal. [REDACTED] states that the petitioner "has extended the robust control research regime from hard bounded uncertainty to statistical uncertainty. Her revolutionary research has explored a new area for robust control research, thus it has significant impact on robust control and control structure design."

[REDACTED] a consulting engineer with ChevronTexaco, observes that ChevronTexaco is a client company of OSIsoft, but he does not mention any specific work that the petitioner has done on behalf of ChevronTexaco in that regard. Rather, [REDACTED] like the other witnesses, discusses the petitioner's student and postdoctoral work in detail, and with regard to her more recent work offers only the more general assertion that the petitioner is a highly skilled process engineer who makes valuable contributions in her work for OSI Software (and, by extension, its clients). Therefore, these witness letters offer no clear idea of the extent to which the petitioner's work has actually affected the industries that are said to depend on her work.

While the petitioner has submitted copies of her published articles, the record contains no documentation of widespread independent citation of these articles, nor other objective documentary evidence to establish the extent to which others have relied upon or been influenced by her work. The articles, by themselves, show that the petitioner has been a prolific researcher, but published output is not, by itself, *prima facie* evidence of eligibility for the waiver.

The director instructed the petitioner to submit additional evidence to meet the guidelines published in *Matter of New York State Dept. of Transportation*. The director requested evidence from “significant organizations” to establish the impact that the petitioner’s work has had, and is likely to continue to have, on a national level. The director noted that general assertions about the importance of process engineering could not suffice to show that one particular process engineer deserves the waiver.

In response, the petitioner submits documentation of her continuing involvement in professional gatherings. This evidence establishes that the beneficiary is an active contributor in her field, but it does not show that the petitioner serves the national interest to a greater extent than other active contributors.

Counsel states that the petitioner has submitted “[e]vidence that peer researchers have shown interest in the Beneficiary’s research work.” This evidence consists of two electronic mail messages from researchers who share common areas of interest with the petitioner. The record does not show that such communications are so unusual that their very existence demonstrates eligibility; the content of the communications does not set the petitioner apart from others in her field.

The petitioner’s response to the director’s notice also includes three additional letters. [REDACTED]

[REDACTED] describes the petitioner’s role at the company:

[The petitioner] has developed novel design methods for PI control system and devised innovative statistical algorithms for control system stability analysis. . . .

As a developer in OSIsoft, [the petitioner] is responsible for product research and development, tailored to the needs of the company’s clients in the process industries. . . . She has been involved in distribution organizations, paper mills, and pharmaceutical companies. She has been involved in designing and developing interfaces that communicate with different foreign data sources . . . and retrieve data from these sources and send them to the PI system. . . . [The petitioner] developed new and original interfaces between network infrastructure and the PI System for OSIsoft’s IT Monitor product. The interfaces expose new details about networked devices and provide complete visibility of the infrastructure, [and] thus enable engineers to respond more accurately and rapidly to help maintain the best possible service level on which the critical applications [rely]. . . . Since the first release of IT Monitor two years ago, it has been widely used by many of our customers in the process industries. In particular, customers from the power industry . . . rely on our IT Monitor to monitor cyber security assets for compliance with [industry standards]. . . . In addition to our users in the process industries, the IT Monitor is also applied at over 80 bases by the U.S. Army to monitor their network infrastructure across the nation. The contribution that [the petitioner] has made to this project is significant and her valuable knowledge is the key factor. Because of her excellent performance, last year she was promoted to the PI server group, the most important development group in our company.

Much of the detailed discussion of the PI project is in regard to goals that the company hopes to attain at some future point. A waiver cannot be approved based solely or primarily on what the petitioner hopes to accomplish in the future; there must be an existing track record upon which to base expectations of future benefit. See *Matter of New York State Dept. of Transportation* at 219 and *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition, and that material changes after the filing date cannot establish eligibility if the petition was not already approvable.

██████████ states: "The publication of her work in accredited journals speaks highly of the quality research work done," but he does not clarify the extent to which the petitioner's published articles have had a wider influence on the field of process engineering. Process engineering benefits the United States not through theory but through application. The record offers no picture of how process industries have benefited at the national level through work that the petitioner has done, beyond the standard duties that would be expected of any competent process engineer. As a process engineer, it is the petitioner's basic occupational function to facilitate various industrial processes. The fact that the petitioner has been fulfilling that function speaks to the intrinsic merit of process engineering but it is not a strong argument for granting a waiver.

██ states:

[The petitioner's] breakthrough research and consulting enables excellent work leading to significant reductions in energy usage, improvements in process efficiency and minimization of environmental impacts and promises to afford the US process industry a tremendous opportunity for competitive advantage. . . .

[The petitioner] is a key researcher and developer at OSIsoft Inc., a leading vendor of real-time performance monitoring solutions and process control systems for process industries. She is responsible for product research and development in process control and performance monitoring tailored to the process industries. One of [the petitioner's] proposed projects is researching and developing performance monitoring algorithms and tools for the PI system. The PI system is the heart of an enterprise-wide real-time information infrastructure, Real-time Performance Management Platform (RtPM), which transforms real-time data into operation intelligence and integrates production information with enterprise business systems.

With regard to the petitioner's past work, ██████████ states that the petitioner "has worked on many important projects including the IT Monitor." The IT Monitor is the only past project that ██████████ discusses in any detail:

She is one of the main developers for the IT Monitor project. She has developed interfaces that collect data from various devices and sources, and has implemented data analysis and display utilities that help the users evaluate their networked control systems, devices, machines and computers. Since its release, the IT Monitor has been used by many customers to collect data from their network infrastructure. . . . The users of the IT Monitor are beyond

the traditional process industries. The U.S. Army has deployed the IT Monitor on over 80 sites nation wide to monitor their computer network. [The petitioner's] contribution in the IT Monitor project is irreplaceable by anyone else. Without [the petitioner's] extensive knowledge and skills, it is not likely to release the IT Monitor product in such a short period of time.

The meaning of the last sentence is not clear. It seems to imply that the IT Monitor has not yet been "released," but [REDACTED] in his letter, referred to "the first release of IT Monitor two years ago," and [REDACTED] himself asserts that several clients are already using it. Given this prior release, the reference to "such a short period of time" appears to indicate that, in the petitioner's absence, the release of the IT Monitor would have been delayed but would eventually have taken place nonetheless. The record contains no first-hand documentation to establish that the IT Monitor has had a substantially greater impact than other process engineering products aimed toward similar needs, or that this impact is due to the petitioner's work and not to the properties that would have been intrinsic to the IT Monitor whether or not the petitioner had been involved.

It is not clear how [REDACTED] who works for Umetrics in New Jersey, came to know so much about the petitioner's past and ongoing projects at OSIsoft in California.

Dr. Ashish Singhal is a senior research engineer at Johnson Controls. The record indicates that [REDACTED] studied at UCSB from 1997 to 2002, and co-authored several papers with [REDACTED] Seborg during that time. Most of [REDACTED] letter concerns the PI system, which allows users real-time access to data from automated control systems, thereby greatly benefiting quality control. The petitioner did not create the PI system; rather, writes [REDACTED] "The PI System is the most commonly used data acquisition historian in the process industries. . . . There are more than 10,000 PI Systems installed all around the U.S." [REDACTED] states that the petitioner will benefit the United States by "enhancing the performance of the PI System."

The director denied the petition, stating that while the petitioner has demonstrated the intrinsic merit and national scope of her work, the petitioner has not shown that she, in relation to others in her field, has made such "substantial" contributions that a waiver of the statutory job offer requirement would outweigh the national interest inherent in protecting the employment opportunities of other qualified process engineers who are already permanently in the United States. The director also found that "the petitioner has not established that there is any real urgency to her entry into the United States in an immigrant status."

On appeal, counsel notes, correctly, that the law has no "urgency" requirement with regard to the waiver. This, however, was not the sole basis for the denial. Counsel also quotes from previously submitted witness letters and argues that these letters show the petitioner to be "much more superior than most of her peers in terms of accomplishments and impact in the field."

Like the director, we take notice of the letters in the record. These letters offer a description of what the petitioner does, and why her work is important, but there is no objective or empirical comparison between the petitioner and other workers in her field. Simply being a process engineer is not grounds for a waiver. Also,

given the wording of the statute (which imposes the job offer requirement on aliens of exceptional ability), being an exceptional process engineer is not, by itself, grounds for a waiver.

On the research side, the petitioner has published her findings, but the record does not show that these publications stand out in the field (for example, through heavy independent citation), or that the petitioner herself has devised methods which greatly improved upon existing methods and which are now in widespread use. On the more practical, applied side of the petitioner's work, the record shows that she has undertaken projects on behalf of clients around the country, but this is to be expected of an employee at a firm with a national clientele. There is no statutory or regulatory justification to infer presumptive eligibility for employees of large or national corporations. The record does not contain sufficient information to allow us to conclude with any confidence that the petitioner's personal impact as a process engineer at a national level (not just within the one company where she works) has been, and is likely to be, at a level that justifies a waiver of the job offer/labor certification provision that, by law, normally attaches to the immigrant visa classification that the petitioner has chosen to seek.

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.