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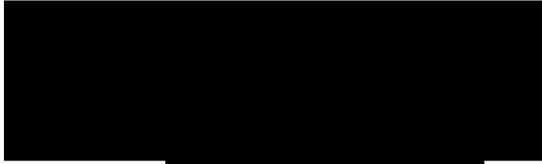
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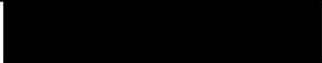
U.S. Citizenship
and Immigration
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **APR 23 2008**

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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.

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 she filed the petition, the petitioner was a doctoral student at Worcester (Massachusetts) Polytechnic Institute (WPI). 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.

The petitioner’s initial submission includes copies of her published and presented work and several witness letters. The petitioner’s scholarly writings establish that she has been active in the field of mechanical engineering with respect to combustion systems, but these writings do not inherently establish eligibility. We must consider the reaction of experts in the field to the petitioner’s work, as expressed in the witness letters.

Professor Hamid Johari has supervised the petitioner’s doctoral studies at WPI. He stated:

[The petitioner’s] research focus is the study of fully modulated turbulent puffs to identify a compact, economical and energy efficient combustor that could be used in various terrestrial and space applications. She has immense knowledge on the dynamic behavior of large scale turbulent flow structures. Her expertise lies in utilizing thermal and fluid science engineering in improving pulse combustion systems targeting the reduction of emissions (pollutants) and increasing the energy efficiency. She is as far as I am aware . . . one of the very few who

have successfully studied the behavior of fully modulated turbulent flow experimentally in both normal gravity and microgravity. . . .

Emissions associated with diffusion flames provide a key indicator of the history of oxidizer/fuel mixing and temperature in the flame. Measurements conducted by [the petitioner] have provided quantitative information on the level of stable emissions associated with pulsed turbulent diffusion flames. This information, combined with her other data, helped [the petitioner] build a new and improved picture of the flow and combustion processes operative in turbulent diffusion flame puffs.

Two letters are attributed to [redacted] of WPI and [redacted] of the National Center for Space Exploration Research. The petitioner acknowledged that the two letters are “very similar.” In fact, apart from biographical paragraphs about those two individuals, the two letters are identically worded. (The petitioner later claimed that she provided a copy of [redacted]’s letter to [redacted] as a template.) [redacted] of the U.S. Army Research, Development, and Engineering Command at Natick Soldier Center admitted that his “area of expertise is not combustion research.”

[redacted], identified as “a NASA employee,” stated that he has “been collaborating with researchers at the Worcester Polytechnic Institute (WPI) on research in microgravity combustion science since 1997,” several years before the petitioner became involved in such research in 2001. This indicates that it is the research *project* that is important, and that the petitioner happened to be one of a number of researchers brought into the project after it was already in progress.

Witnesses attested that the petitioner possesses hard-to-find expertise in particular laboratory methods and equipment. Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221.

On March 1, 2007, the director issued a request for evidence, making some of the points set forth above and instructing the petitioner to “submit evidence of the number of published citations of [her] work” and other objective, documentary evidence to support claims made in the initial filing. In response, counsel acknowledged that “there are not many” citations of the petitioner’s published work. The petitioner herself stated “there have not been any citations of my work as yet.”

Counsel explained the lack of citations by asserting that the petitioner’s “field is studied at only one or two laboratories in the United States. . . . It is, however, nonetheless important, since NASA has funded this study, and is extremely interested in the results.” The petitioner has not established federal funding, from NASA or any other government entity, is inherently a sign that the funded research is especially significant compared to research funded through other channels. Without objective documentation about NASA funding, showing for instance how many other projects receive such funding, we cannot assign great significance to the fact that “NASA has funded this study.”

Regarding the absence of the petitioner's name from NASA grant documents, the petitioner asserts that "this grant was awarded prior to my being on this team." She adds, however, that "the primary inspiration . . . for this project was from me," which seems to imply that she "inspired" the project before she joined the research team.

In a new letter [REDACTED] asserted that the petitioner "is one of the few experts in the field of unsteady (pulsed) combustion in the world." Given the assertion that very few laboratories engage in pulsed combustion research, one would not expect there to be a large quantity of experts in the field. There is no indication that Congress intended for the job offer requirement to apply only to fields with large numbers of workers. Indeed, one could argue that an alien in a small field might have an easier time obtaining a labor certification, given the scarcity of potential rival applicants for a given position.

The director denied the petition on May 23, 2007, acknowledging that the "petitioner is an ambitious and well-educated individual" whose field of expertise possesses both intrinsic merit and national scope, but finding that "[t]he evidence submitted does not distinguish the petitioner from other research assistants to a substantial degree."

On appeal, counsel repeatedly compares the petitioner to Albert Einstein, and speculates that the adjudicator who denied this petition would also have denied a petition filed by Einstein in 1905. Counsel's arguments in this vein do not merit serious discussion. We will note only that Einstein *did* immigrate to the United States later in life, after he had earned a reputation as a brilliant physicist, an avenue that remains open to this petitioner if counsel's comparisons are warranted.

Counsel adds that the petitioner "was . . . recently diagnosed with cancer." The petitioner submits medical documentation indicating a "clear cell renal cell carcinoma" in the left kidney. The AAO is not indifferent to this diagnosis, or to the effect it has likely had on the petitioner and those close to her. At the same time, this diagnosis does not offer any basis for approving the national interest waiver. Counsel does not explain the relevance of the petitioner's medical status to the present proceeding.

The most substantive assertion in counsel's brief is that the petitioner has established herself as "the major expert in this field in the world." A claim of this magnitude requires powerful evidentiary support, and, if true, substantial evidence ought to be available to support it. The record, however, simply does not justify such a finding. The assertions of counsel do not constitute evidence. *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).

The petitioner submits a personal statement on appeal. The petitioner states: "Currently energy efficiency and pollution are some of the biggest concerns in America and if this work would not qualify as a significant contributor to national interest in comparison by work done by other research assistants . . . what would?" The issues of energy efficiency and pollution pertain to the intrinsic merit and national scope of the petitioner's work, factors which the director acknowledged the petitioner had met. The importance of the

petitioner's specialty does not establish that it is in the national interest for this particular alien to be the one performing that work.

Regarding the impact of her published work, the petitioner observes that she "did find that at least two citations have been made since January 2006 (prior to filing the petition)," as well as a third citation that was soon to be published. A co-author of all three articles containing these citations is [REDACTED], who was also the petitioner's co-author of the cited articles. These articles are, therefore, self-citations rather than independent evidence of impact.

The petitioner points to her academic achievements, a "Best Paper" award at a symposium, and other distinctions. Some of these factors could contribute to a finding of "exceptional ability" under standards set forth at 8 C.F.R. § 204.5(k)(3)(ii), but would not by themselves fully establish exceptional ability. Under the clear wording of the statute and regulations, exceptional ability alone is not grounds for a waiver; aliens of exceptional ability are presumptively subject to the job offer requirement.

The petitioner has participated in productive research, and it may well be that not many other researchers engage in this very specialized area of study. The importance of the specialty, however, is not grounds for approving the waiver, nor is the overall size of the community performing research in that specialty. While a number of witnesses have been very complimentary towards the petitioner and her skills, it appears that, at best, the petition was prematurely filed. The petitioner was still a graduate student when she filed the petition, and in many ways she had barely begun productive work in her chosen specialty. Even if counsel should turn out to have been correct in comparing the petitioner today to Albert Einstein in 1905, we do not have the benefit of a century of hindsight in evaluating the petitioner's achievements and her impact on the field; we can only rely on the evidence available now, without speculating on the outcome of a possible future petition once the petitioner becomes more established in the field.

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.