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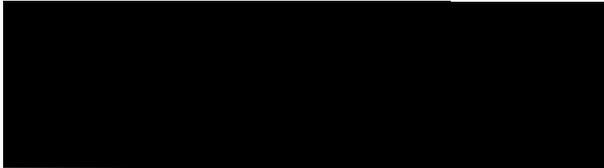
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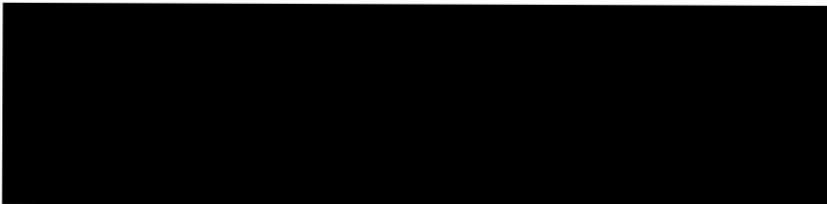
IN RE:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in cursive script that reads "John F. Grisson".

John F. Grisson, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) remanded the matter for a new decision. The director again denied the petition and certified the decision to the AAO for consideration. The AAO will affirm the director's decision to deny the petition.

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 U.S. 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 AAO’s previous decision, prior to the certified denial, contained a detailed discussion of the record as it then stood. The AAO will not repeat that entire discussion here. Instead, the AAO incorporates its prior decision by reference and presents a condensed version of that discussion. 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." With regard to counsel's use of the present tense in asserting that the petitioner "conducts fundamental research," the AAO observes that the 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).

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 unpublished manuscript form. Other articles, said to have been published previously, were 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. (A copy of the letter attributed to [REDACTED] later surfaced, but the letter was unsigned and therefore of diminished evidentiary value.) The remaining letters were from individuals who had supervised, taught, or worked with the petitioner at LSU or the Transportation Department of Manatee County. The AAO discussed all of those letters in its initial decision. For example, [REDACTED] who served as the petitioner's doctoral advisor at LSU before becoming an associate professor at Virginia Polytechnic Institute and State University, stated:

[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.

then Director of the Transportation Department of Manatee County, Florida, 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 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 initial witnesses 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 (RFE), 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, 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 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."

The AAO remanded the matter, based on counsel's correct observation that the director's decision rested on demonstrable errors of fact. At the same time, the AAO stated:

[T]he 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.

On October 15, 2008, the director issued a new decision, certified to the AAO for review pursuant to the AAO's instructions. In that decision, the director stated that the petitioner had failed to establish the national scope of her work at the Manatee County Transportation Department (as opposed to her now-completed graduate work). The director also found that the petitioner's published work appeared to have had minimal impact on the field.

In response to the certified denial, counsel protests that the director did not issue a new RFE, and that the prior RFE "was so broad and generic that counsel could not tell if any of the supporting evidence had been received." In that RFE, the director acknowledged the petitioner's submission of "letters of experience" and the petitioner's published work, and called for "evidence that demonstrates the alien's specific prior achievements which would justify the projected future benefit of the alien to the national interest." The director asked for evidence of citation of the petitioner's published work. The purpose of an RFE is, generally, not to dissect the existing evidence of record, but to indicate what sort of evidence is still lacking. *See generally* 8 C.F.R. § 103.2(b)(8).

The key issues remaining in this proceeding concern whether: (1) the petitioner's work is national in scope; and (2) the petitioner has distinguished herself from others in her field to an extent that would justify a national interest waiver. Counsel cites *Matter of New York State Dept. of Transportation* as indicating that the work of a civil engineer working on roads is presumed to have national scope. That precedent decision, however, did not make such a sweeping finding. The work of the alien in *Matter of New York State Dept. of Transportation* involved bridges connecting the island of Manhattan to the mainland United States, a matter of clear economic importance beyond the local level. As the AAO observed in its remand order, the petitioner had not shown that her present and intended future work had direct repercussions outside of Manatee County, Florida. The AAO will consider the most recent evidentiary submissions, but it will not rule that the petitioner, simply by virtue of her occupation, has satisfied the "national scope" test.

The petitioner submits copies of three articles. An exhibit index indicates that these articles have been submitted to demonstrate that the petitioner "continues to research and publish in her field." The work of a researcher who produces new findings for dissemination to a wider audience, rather than working solely on behalf of a local employer, can be said to have national scope.

The newly submitted articles, however, do not show that the petitioner continues to produce published research. One new article was published in the *Journal of Engineering Mechanics* in February 2008, but a

footnote indicates: “The manuscript for this paper was submitted for review and possible publication on June 1, 2005.” The beneficiary was still a doctoral student at LSU in June 2005.

The second article appeared in *Transportation Research Record*. The article is undated, but a footnote states that the petitioner works at Louisiana State University, which she left in 2005. The article’s bibliography does not list any sources dated after 2002.¹

The third article was submitted for publication in *Construction and Building Materials* in 2004 and published online in 2005, again while the petitioner was a doctoral student. The articles submitted in response to the certified denial plainly cannot be considered evidence that the petitioner “continues to research and publish in her field.” The record is devoid of evidence to show that the petitioner continued to produce publishable research after she completed her doctorate and began working for her current employer. Articles that the petitioner wrote while she was a graduate student cannot establish that her subsequent efforts for a county transportation department are national in scope.

The petitioner submits evidence of citation of her previous publications. The most-cited article shows only 6 citations, which the petitioner has not shown to be a particularly high citation rate in her field. Along with the citations, the petitioner submitted a copy of a “Manuscript Review Form” dated March 8, 2006. It is not clear why the petitioner submitted this document. The reviewer’s comments are rather critical of the petitioner’s paper, finding “a large overlap to an earlier paper” with no clear indication of the “new contributions” in the article under discussion. The reviewer also found that “the title is somewhat misleading.”

The remainder of the latest submission consists of four witness letters. LSU Professor Emeritus [REDACTED] discusses the petitioner’s work as a graduate student at LSU. Discussing one such project, Prof. Tümay states:

[The petitioner’s] discrete element method (DEM) computer model to simulate the interaction of actual granular particles . . . is expected to replace laboratory tests which usually cost massive time, tedious labor, and enormous fund [*sic*]. . . With [the petitioner’s] computer model, the investigation of internal properties is not such a difficulty any more. . . .

Prior to [the petitioner’s] discovery, DEM computer models were limited to a two-dimensional simulation approach. . . . [The petitioner’s three-dimensional] model, which is based on the actual particle characteristics, has made it far easier to understand the internal properties of granular matter, and more importantly, to understand its intrinsic damage mechanisms.

[REDACTED] of North Dakota State University states that the petitioner’s “research on granular materials has broad applications across a variety of industries.” Previous witnesses had made the same claim. [REDACTED] states: “In my capacity as a member of the Editorial Board of the *Journal of Engineering*

¹ The article appeared in volume 1853 of the *Transportation Research Record*. According to the journal’s web site, volume 1853 was published in 2003. Source: http://trb.metapress.com/content/0361-1981/?sortorder=asc&p_o=201 (visited November 25, 2008, copy incorporated into record of proceeding).

Mechanics . . . I am pleased to see that [the petitioner] has continued to research and publish on the topic of granular materials. In addition to several papers published in past years, [the petitioner] has published another journal paper in 2008.” As we have already shown, the paper that appeared in the *Journal of Engineering Mechanics* in 2008 was submitted for publication in June 2005, while the petitioner was still a student. Therefore, [REDACTED] claim that this article shows that the petitioner “has continued to research and publish” is mistaken at best and disingenuous at worst.

Because the national interest waiver is not simply a reward for past work, we must consider the petitioner’s current and planned future work in addition to her student work. The remaining two letters concern the petitioner’s recent work in Florida. [REDACTED] Deputy Director of Engineering Services for Manatee County Public Works Department, states:

We are proud to say our transportation facilities, as well as, our highway systems have been speedily improved, and at the same time our design and construction expenses have been largely reduced since [the petitioner] joined our Department. . . .

Her professional knowledge and experience have improved our efficiency on many projects, including those funded by the Florida Department of Transportation (FDOT). [The petitioner] is our “go-to” expert with regard to projects that need to be coordinated with FDOT or the United States Environmental Protection Agency (EPA) for permits. Her sophisticated knowledge of pavements, soils, and groundwater has enabled her to solve many highly technical engineering problems, thus expediting the process in obtaining the needed FDOT and EPA permits, as this can be quite difficult.

adds that his department “simply cannot approve the expenditure of thousands of taxpayer dollars” for “the legal fees and costs of advertising the position,” a process that may result replacing the petitioner with a less-qualified United States worker. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Matter of New York State Dept. of Transportation* at 223. The AAO does not question the employer’s desire to retain the petitioner’s services, but the employer’s interest in this matter does not rise to the level of the national interest.

[REDACTED], Program Operations Team Leader for the Federal Highway Administration, Florida Division, states:

Desoto Historical Park, Robinson Preserve Park, and Emerson Point Perserve [sic] park are three important tourist attractions currently owned by the state of Florida and maintained by Manatee County. . . .

[The petitioner] has played an important part in roadway-related projects in these parks. Based on her expert knowledge of pavement materials, she successfully designed a roundabout with culvert underneath at the entrance of Robinson Preserve Park to smooth traffic circulation without significantly impacting the surrounding wetland and salty surface

water. [The petitioner] also designed a pedestrian bridge and sidewalk at Emerson Point Preserve, which provides tourists a convenient and safe route to magnificent views of the park.

The information regarding the petitioner's recent work for Manatee County does not persuasively establish that such work has been or is likely to be national in scope. While witnesses have asserted that the petitioner's skills exceed those of others in comparable positions, we note that exceptional ability – defined at 8 C.F.R. § 204.5(k)(2) as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor – is not sufficient to qualify an alien for the national interest waiver. Aliens of exceptional ability are, by statute, normally subject to the job offer requirement, and an employer's preference for workers with superior skills, while understandable, does not meet the threshold of a national interest waiver.

The petitioner has clearly earned some degree of respect for the research work she conducted during her graduate studies. The national interest waiver, however, is dependent on prospective benefit to the United States. While the petitioner seeks a waiver of the job offer requirement, in instances such as this where a job offer clearly exists, it is proper to consider the circumstances of that job offer. There is no credible evidence that the petitioner continues to engage in publishable research or other activities of demonstrably national scope. The most detailed description of the petitioner's current work focused on site-specific construction projects. The attempt to present an obviously three-year-old article – clearly marked as such – as evidence of new or continuing research raises serious questions and cannot have been put forward in good faith. The claim comes perilously close to crossing the line between presenting evidence in the most favorable possible light, and making outright misleading assertions about that evidence.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

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.