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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: FEB 05 2009

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.

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).

Maigelson
John F. Grissom, Acting 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 doctoral student at Rice University, Houston, Texas. After completing his degree, the petitioner became a postdoctoral researcher at the same university. 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.

On appeal, the petitioner submits a brief from counsel.

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.

Several witness letters accompanied the petitioner’s initial submission. [REDACTED] of Lamar University, Beaumont, Texas, where the petitioner earned his master’s degree, stated:

I am very enthusiastic about [the petitioner’s] research because it greatly advanced our understanding of biodegrading process of chlorinated benzenes in groundwater by injection of Oxygen Releasing Compound (ORC) into a contaminated aquifer. . . .

[The petitioner] conducted thus far the most detailed investigation on the natural attenuation of chlorinated benzenes in groundwater incorporating injection of Oxygen Releasing Compound. Firstly, he creatively developed one-dimensional and two-dimensional models of the transport and degradation of contaminants in groundwater to assess existence of natural attenuation of the contaminants from a test site. [The petitioner] is extremely knowledgeable in the field of numerical modeling. He worked as a primary researcher and planner to develop a program coupling a regression of concentration versus distance for stable plumes and an analytical solution for one-dimensional, steady-state, contaminant transport. By doing so, he accurately quantified total decay rate constants based on monitored field data. . . . The results and findings from his first-stage project is no doubt a breakthrough in our research, which also significantly contributes to the national and international hydrogeologic modeling field. [The petitioner's] results provide a theoretical platform for all hydrogeologic modelers to understand how contaminated groundwater flows and what are the key factors influencing biodegradation rate in the subsurface. Therefore, cost-effective remediation strategies for any groundwater-contaminated site in the nation can be designed based on his findings in order to clean up the site in a shorter duration, and protect Americans in a safer way.

. . . He discovered that total remediation duration for recovering the contaminated site could be shortened from forty-two years to three and a half years by injecting Oxygen Releasing Compound into the groundwater.

The record does not continue that the petitioner continued his research into groundwater remediation after he completed his master's degree in 2003.

[REDACTED], who supervised the petitioner's doctoral studies at Rice, described the petitioner's work at that university:

The primary focus of [the petitioner's] research is to develop and enhance a radar-based flood warning system to achieve more accurate, and timely flood forecasts for Houston and other flood-prone areas in the U.S. Since his joining my research group, [the petitioner] has been playing a major role in developing the next-generation flood alert system. This system has been operational during the last 30 storm events and successfully provided precise and timely information to governmental emergency center. By directly utilizing available radar (NEXRAD) rainfall data coupled with the real-time hydrologic model, [the petitioner's] new system is able to provide visual and quantitative identification of severe storm rainfall, as well as a linkage between the rainfall and likelihood of flooding. It is a major step forward from traditional flood alert methods.

Counsel identified two of the initial witnesses as being independent of the petitioner. Louisiana State University Associate [REDACTED] stated:

Although I have only met [the petitioner] on a couple of occasions, I am fully aware of the importance of his research. His work on real-time modeling of hydrologic and hydraulic responses provides a completely novel approach in the real-time flood warning and prevention fields. . . .

[The petitioner's] pioneering work is the first to provide accurate flood warning information with two to four hours of lead time under extreme weather conditions. . . . His work will not only provide a better understanding of the flood inundation process in urban areas under extreme weather conditions but also offers key decision making information for urban planning and design.

a consultant with Houston's Public Works and Engineering Department, stated:

I was very impressed by [the petitioner's] research results from the advanced flooding warning system that he presented at the Annual Conference of American Water Resources Association (AWRA) in Houston, Texas in May of this year. . . .

[The petitioner] developed the advanced techniques necessary to provide warnings and flood prediction at specific urban locations affected by the complex interaction between local and riverine flooding, and hydrodynamics of storm surge and sea level rise. . . .

[The petitioner's] advanced flood warning system can protect critical infrastructures from rainfall and storm surge flooding and wind associated with severe storms. His system is also able to provide better design information to prevent the release of chemicals from at-risk facilities during potential catastrophic events.

The petitioner submitted copies of his writings, including a co-authored chapter from *Coastal Hydrology and Processes*, one journal article, a paper for the Texas Water Resources Institute, and abstracts of eight conference presentations. The petitioner did not establish the extent to which these published and presented works have influenced his field. On a related note, the petitioner's initial submission did not include evidence of implementation of the petitioner's flood warning system except at the most local level, at certain specified sites in Houston.

On February 7, 2008, the director issued a request for evidence, instructing the petitioner to submit evidence of "a degree of influence on [the] field that distinguishes [the petitioner] from other Engineering researchers with comparable academic/professional qualifications." The director specifically requested "copies of additional published articles [by other researchers] that cite or otherwise recognize [the petitioner's] research achievements."

In response to the director's notice, the petitioner submitted copies of newer writings by the petitioner, but no evidence of citations by other researchers. The petitioner also submitted additional independent witness letters. [REDACTED], a Research Associate and Program Manager at the University of Texas at Austin, credited the petitioner with "a significant contribution to the real-time flood warning and floodplain mapping field." [REDACTED] asserted that the system "has great potential to be used as a prototype in other flood-prone areas in the United States," but the only example of existing implementation that [REDACTED] named was "the advanced hydraulic prediction feature for a critical evacuation corridor (State Highway 288)."

a Principal Engineer at the South Florida Water Management District, stated:

As an associate editor of ASCE's *Journal of Hydrologic Engineering*, I firstly became familiar with [the petitioner] and his research work through my review of a technical manuscript that he submitted to the journal. . . . [The petitioner] furthered a unique hydraulic prediction tool – Floodplain Map Library (FPML) to dynamically provide hydraulic inundation information to local emergency agencies. [The petitioner's] FPML system will provide end users with comprehensive understanding of dynamic flood response allowing emergency personnel to promptly determine likelihood of road inundations and begin flood preparations with as much lead time as possible. His research work is a remarkable milestone in the area of real-time floodplain mapping. The FPML system is a very novel and important tool for flood alert purpose, and will find great applications in the field.

Other witnesses also discussed the FPML system in varying levels of detail. The AAO can find no mention of implementation of the FPML system in the petitioner's initial submission. Even when Prof. Bedient discussed the petitioner's work with maps, he did not specifically discuss FPML or indicate that the petitioner's efforts had yielded a functional system. The documents submitted in response to the request for evidence indicate that the FPML system was introduced in mid-2007, several months after the petition's November 2006 filing date.

The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The 2007 introduction of a "prototype" version of FPML cannot establish that the petitioner already qualified for a national interest waiver in 2006.

The director denied the petition on May 1, 2008. In the decision, the director acknowledged the intrinsic merit and potential national scope of the petitioner's work, but found that the petitioner's submissions failed to establish that the petitioner's work has, thus far, had significant impact and implementation within the field. On appeal, counsel argues that *Matter of New York State Dept. of Transportation* requires only "some degree of influence on the field as a whole," and that the petitioner has met this standard by submitting letters and other materials that establish "some degree of influence." The cited passage, quoted more fully, reads:

The alien . . . clearly must have established, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his or her colleagues. The Service here does not seek a quantified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole. . . . In all cases the petitioner must demonstrate specific prior achievements which establish the alien's ability to benefit the national interest.

Id. at 219 n.6. In context, it is clear that the use of the word "some" was not meant to rule or to imply that an alien qualifies for the waiver simply by showing more than no influence. Also, the petitioner has not established that the petitioner has influenced "the field as a whole." Rather, the petitioner has established tentative, limited testing of a prototype version of a system introduced after the filing date.

Counsel cites letters from witnesses who stated that they have adopted the petitioner's findings into their own work. These letters, submitted in response to the request for evidence, relate to the implementation of work that dates from after the petition's filing date. Even then, the petitioner's impact appears to be heavily (although not entirely) concentrated in coastal Texas and adjacent areas. The record affords little basis for an objective comparison between the petitioner's achievements and those of others in his field.

The AAO has not disregarded the witness letters and other materials submitted in support of the petition, but the record as it stands indicates that that the petitioner's impact has been limited, and even then much of that impact post-dates the petition's 2006 filing. The AAO finds that, while the petitioner's career is certainly not without potential, the filing of the petition while the petitioner was still a student was premature at best.

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.