



U.S. Citizenship
and Immigration
Services

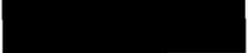
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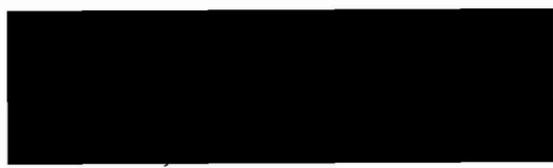
Petitioner:



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).

Maie Johnson

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. The petitioner seeks employment as an applications development engineer at [REDACTED], a semiconductor equipment manufacturer in San Jose, California. 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 a brief from counsel and copies of documents already in the record.

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, whose benefit to the national interest would 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 submitted copies of several of his articles that appeared in various journals, and evidence of his participation in various professional conferences. To indicate the impact of his work, the petitioner submitted several witness letters. A number of the witnesses are on the faculty of the University of Texas at Arlington (UTA), where the beneficiary earned his doctorate. [REDACTED]

described the petitioner’s work there:

[The petitioner] joined my research group in 2000 as a Ph.D. student. . . . He played a critical role in a project to grow and characterize the nanostructures on Si(100) substrates, which . . . are promising candidate materials for cutting edge opto-electronic

devices and have attracted extensive research during the last decade. However, the interdiffusion between the Ge nanostructures and the Si substrate is a critical issue standing in the way of its application. The degree to which interdiffusion takes place has been the subject of significant controversy with several groups reporting conflicting results. [The petitioner] led the effort to characterize the interdiffusion of Ge and Si in these nanostructures. . . . He made several important contributions in the application of positron induced Auger spectroscopy to materials' surface characterization. For example, he developed a new method to quantify the surface concentration of oxygen using the Time-of-flight Positron induce Auger Electron Spectroscopy (TOF-PAES). . . .

Upon graduation in 2004, [the petitioner] was offered a position as a post-doctoral fellow at the Nanofab research center of the University of Texas at Arlington, where his research was focused on the characterization of the selenium passivation layer on the Si(100) surface and the development of Ohmic contact devices. . . . Research on improved techniques of making ohmic contacts on silicon has long been an attractive and challenging area of research because of the huge potential economic impact on the semiconductor industry from improved contact techniques. . . . [The petitioner] made important contributions to the application of Se passivation techniques in making ohmic contacts. . . . In particular, [the petitioner's] analysis provided clear proof that the selenium passivation layer on Si(100) surface under atmospheric exposure is orders of magnitude more resistant both to oxygen attack and other forms of surface contamination as compared to the non-passivated surface. . . . His work will significantly improve the efficiency of many silicon based electronic devices such as light emission diodes (LED).

[REDACTED], who supervised the petitioner's postdoctoral training, stated:

[The petitioner] has made several extremely important contributions to the application of positron-induced Auger electron spectroscopy to material surface characterization. He developed a new method to characterize the surface concentration of oxygen quantitatively using this technique. His discovery is a breakthrough in condensed matter because it opens a way to analyze any material surface quantitatively with a much higher accuracy since oxygen is almost observed on all kinds of surfaces and it is critical to know oxygen surface concentration in many cases. . . .

Commercialization of his research in semiconductor devices will definitely improve the high-tech semiconductor industry in the U.S.

Senior Applications Development Manager at [REDACTED] described the petitioner's current work at that company:

In his current position as an applications development engineer at [REDACTED] [the petitioner] is responsible for characterization activities related to reticle inspection

systems during the prototype engineering, alpha and beta stages of product development. His duties also include extensive work with semiconductor process customers to develop new applications that help in better detectivity and process control of customer reticle manufacturing. . . . [The petitioner] improved the throughput and static precision for the critical dimension secondary electron microscopy metrology tools. . . . Another important contribution of [the petitioner] is his work on the 193nm photo resist material which leads to less shrinkage during critical dimension characterization. . . .

As an applications development engineer, [the petitioner's] work is an essential part of the development of the defect inspection tools.

Two of the initial witnesses claimed not to have worked directly with the petitioner. [REDACTED] Senior Member of Technical Staff at Texas Instruments, Dallas, Texas, stated:

Although I don't know Petitioner personally, I am aware of his research through his papers and presentations. . . . He has made several important contributions in semiconductor material surface characterization and research using TOF-PAES technique. . . . Most notably, he developed a novel method to quantitatively characterize surface concentration of oxygen at a much higher accuracy using this technique. The accurate measurement of this element is critical for semiconductor materials. [The petitioner's] method overcomes the defect of the traditional analysis methods which calculating [sic] the elemental contents by ignoring the oxygen signal. . . .

His pioneering work has made it possible for the PAES technique to be widely used in many fields, including [the] semiconductor industry.

Staff Scientist at Oak Ridge National Laboratory, Oak Ridge, Tennessee, stated:

Although I do not know [the petitioner] personally, I am aware of his research through his journal publications and conference presentations. . . .

[The petitioner] has made significant contributions in the application of PAES to the study of Ge/Si nanometer devices. He developed a new method to analyze oxygen surface concentration quantitatively. . . . He was one of the pioneers to apply PAES technique to the insulation surfaces, which were previously thought to be forbidden areas to PAES. . . .

[The petitioner's] research on Ge nanostructure growth and diffusion is equally outstanding. . . . [The petitioner's] research not only provided a detailed profile of the diffusion process, but also offered a mathematical model with meaningful physical understanding. . . . [H]is discovery of Ge-Si interdiffusion provides important clues for my recent research in developing nanostructure-based light emitting diode (LED) materials.

. . . [The petitioner] has accomplished feats that have evaded scientists for years and are well beyond the level of such a young researcher.

On November 16, 2007, the director issued a request for evidence, stating:

Please be advised that merely establishing that you are an alien of exceptional ability or one who will substantially benefit prospectively the United States is not sufficient to warrant this waiver. . . .

Regarding your work which had been published or otherwise disseminated as of the filing date of your petition, please submit evidence of the total current number of published citations of that work by others.

Please submit copies of three or four published citations of your work which demonstrate the reliance that the citing authors placed on your achievements.

[Several witnesses] commented on your knowledge and expertise in PAES. Please submit verification from your current supervisor that you use this technique in your current capacity, or explain if that is not the case.

In response, the petitioner submitted a letter from [REDACTED]

[REDACTED] Dr. [REDACTED] stated:

I recognize [the petitioner] as an indispensable member to my group because of the unusual combination of his strong educational training and his research experience in surface physics and semiconductor device fabrication – which is a key area of focus for my division of the company. Although his expertise with PAES cannot be applied directly to our products, his outstanding knowledge of material science, surface physics, semiconductor device fabrication, photo lithography and X-ray diffraction are very valuable to perform his job. More importantly, his scientific intuition and creativity, problem solving skills, capability of handling multiple projects, and proven successful research history put him far above the average engineer working in this industry. . . .

In his current position as an applications development engineer at [REDACTED] [the petitioner] is responsible for characterization activities related to reticle inspection systems during the prototype engineering, alpha and beta stages of product development. His duties also include extensive work with semiconductor process customers to develop new applications that enable better detectivity and process control of customer reticle manufacturing. . . .

During this time, [the petitioner] also published a paper in the SPIE proceedings which addressed a new method of recipe optimization of wafer fabrication mask inspection for

180-90nm reticles to save inspection time and improve productivity. His outstanding work resulted in improved performance of our new metrology products, benefiting many semiconductor manufacturers. . . .

As an applications development engineer, [the petitioner's] work is an essential part of the development of the defect inspection tools. His work will not only benefit [REDACTED] product, which dominates the global market share, but also the U.S. semiconductor industry in general.

The petitioner also submitted a letter from [REDACTED] Research Scientist at the Massachusetts Institute of Technology, who formerly worked alongside the petitioner at UTA and who has continued to collaborate with him. Dr. [REDACTED] praised the petitioner's "exceptional technical abilities . . . and proven capacity for innovation," and stated that the petitioner's "ability to apply all of these state-of-the-art fabrication and characterization methods is quite unusual for a young scientist, and it provides him with a major advantage over the majority of his peers."

With respect to citation of his work, the petitioner submitted a printout from a citation database indicating that one of his articles has been cited twice. The petitioner also listed eight citations of another of his articles. The list includes a United States patent, documents from UTA's database of theses and dissertations, and articles by the petitioner's collaborators citing their own past work, leaving at most three journal articles readily identifiable as independent of the petitioner.

The director denied the petition on April 7, 2008, stating that the petitioner's "record of citations gives little support to the assertion of independent expert [REDACTED] that the petitioner's 'substantial contributions to surface physics and semiconductor physics have set him apart from other researchers in these fields.'" The director also expressed skepticism about the claim that the petitioner had found solutions "that have evaded scientists for years." Furthermore, the director noted that the petitioner's initial witnesses focused heavily on the petitioner's "knowledge and expertise in PAES," but that the petitioner no longer uses PAES in his current position and therefore "the petitioner is no longer using the specific technological expertise which his affiants indicated distinguished him from his peers."

On appeal, counsel asserts that the witnesses of record were "not asserting that the petitioner's specific technological expertise regarding PAES alone distinguishes him from his peers. Rather, these recommenders are referring to the petitioner's general expertise in the field of materials science and surface physics as what distinguishes him from his peers." We note [REDACTED]'s assertions regarding the petitioner's "ability to apply all of these state-of-the-art fabrication and characterization methods."

The petitioner's mastery of complex or specialized technology invented or developed by others is not a strong basis for a waiver. Special or unusual knowledge or training 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.

Counsel argues that the petitioner has submitted independent attestations of his influence on his field. The director did not dismiss or overlook those attestations. Rather, the director observed that the record does not appear to contain significant objective evidence that would lend strong support to the claims set forth in the witness letters. If it is alleged that the petitioner is responsible for a major and long-sought-after breakthrough in his field, then it is reasonable to expect credible objective evidence that this breakthrough has attracted significant notice in the field. The petitioner cannot overcome the lack of such evidence simply by asserting, through counsel, that “it is not for the service center to judge how one should compare an alien beneficiary’s contributions . . . against others.” It is very much for the service center to judge whether or not a given alien qualifies for the benefit sought via a given petition.

Counsel states: “It is very inconsistent for the [director] to use lack of citations as a reason for denial when the petitioner fulfilled the Service’s request by providing 4 new citations which demonstrated the petitioner’s influence on the field.” The AAO fails to see the inconsistency. When the director requested documentation of the petitioner’s citation record, including selected examples, there was no stated or implied promise that the submission of that evidence would ensure approval of the petition. Rather, the director requested citation evidence in order to gauge the extent of the petitioner’s impact on his field. The evidence provided showed a modest number of citations, only a fraction of which appeared in independent published articles. There is nothing “inconsistent” about first requesting evidence, and then evaluating that evidence.

The record indicates that the petitioner’s productive graduate and postdoctoral work has situated him well for a position in the semiconductor industry, but there is little evidence that the petitioner’s ongoing work serves the national interest to an extent that would justify a waiver of the job offer requirement that, by law, normally attaches to the immigrant classification the petitioner has chosen to seek. The AAO duly notes the assertion that the petitioner has improved the products offered to his employer’s clients, but this is arguably the basic purpose of his work rather than a sign that he stands above his peers in a nationally significant way.

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.