



U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:
SRC 07 800 25104

OCT 21 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:



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).

Jerry Rhew
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 AAO will dismiss the appeal.

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 statistician at Countrywide Bank, Thousand Oaks, 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 submits a brief from counsel, copies of documents already in the record, and background materials about statistics and computational fluid dynamics.

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.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or equivalent sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director,

however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

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 petitioner filed the petition on July 28, 2007. In his résumé, the petitioner described himself as a:

Detail-oriented, applied **Mathematician/Statistician/Modeler** with extensive senior-level experience in modeling analytics, high performance computing, advance numerical methods, business structure application, strategic model design and development, data management, statistical consultation, and statistical analysis process development.

Six witness letters accompanied the petitioner's initial filing. Three of the witnesses are on the faculty of the University of Texas at Arlington (UTA), where the petitioner earned his doctorate. [REDACTED] of UTA's Center for Numerical Simulation and Modeling, stated:

[The petitioner] is a highly respected expert in applied mathematics and CFD [computational fluid dynamics]. His contributions in the area of direct numerical simulation (DNS), Large Eddy Simulation (LES), flow transition, high order compact scheme, shock capturing, and Multigrid and Discontinuous Galerkin (DG) method have provided significant advances to the field of CFD.

. . . In 2003 summer, [the petitioner] joined in the project of "LES Investigation of Near-Field Wakes behind Juncture of Wing and Plate." . . . Wingtip vortex is extremely important in the aeronautical and marine industry. Wingtip vortex induces the drag and increases the fuel cost in the flight. . . .

As a key research member, [the petitioner's] contributions are irreplaceable to this project. He took the initiative to implement a one block computation domain to describe the complex geometry in place of the traditional domain decomposition method. Using the traditional method, time and accuracy are lost during the data exchanges between decomposed domains. It took bold imagination and creative spatial structuring expertise to combine all the domains into a high quality integrated computation domain. With this improvement, a high quality transition is achieved and the gain in efficiency and accuracy is immeasurable. . . .

By far the utmost important research [the petitioner] has done is documented in his dissertation – Direct Numerical Simulation (DNS) for Flow Transition. . . . One of its applications is to monitor and predict stalls in flight. . . . Because so many difficulties . . . exist, only some approximate results were available through simplified methods like LES. Unlike LES, DNS simulates the flow with all the possible details and provides a deep insight into the physical phenomena and helps guide space vehicle design. . . . His creativity in this work is well recognized. . . . [The petitioner's] work on this project has the potential to help prevent stalls in aircrafts, thereby saving billions of dollars and hundreds of lives.

[REDACTED] stated:

As [the petitioner's] Ph.D. thesis co-advisor, I am very familiar with his research work in numerical simulation of flow transition and its Computational Fluid Dynamics (CFD) applications. CFD utilizes computers to perform the millions of calculations required to simulate the interaction of fluids and gases with the complex surfaces used in engineering. . . . [The petitioner] has made great progress in this field and has found important results in his studies. He measured K-type and H-type transitions for the first time using direct numerical simulation (DNS). . . . [The petitioner's] research established the validity of DNS in the transonic and supersonic flow simulation.

stated that the petitioner "delivered a customized high performance computing system" for a nanotechnology project. asserted: "There is no doubt he will continue to make substantial contributions in the Nanotechnology research in the United States." At the time he filed the petition, the petitioner was not engaged in nanotechnology research or CFD. Rather, according to his *curriculum vitae*, he worked at a bank, "[d]evelop[ing] statistical models for Fair Lending department to evaluate and improve compliance program."

, now the Director of Consumer Regulations at the Compliance and Consumer Protection Division of the Office of Thrift Supervision, stated:

As the former Executive Vice President of Lending Compliance, I met [the petitioner] when he was hired to work full-time at Countrywide Bank in 2005. . . . [The petitioner's] role is to analyze data on loans within the bank's portfolio to identify trends or patterns that may be evidence of disparate pricing, steering or other illegal practices on the part of a region, branch, loan officer or mortgage brokers. [The petitioner] quickly became a valued and outstanding performer . . . [who] made significant contributions to the accuracy and integrity of the analysis used to create management reports to the Fair Lending Committee and Audit Committee of the Board of Directors.

The remaining two witnesses worked with the petitioner at HyPerComp, Inc., in 2004-2005. The petitioner's supervisor, credited the petitioner with "pioneering research" "in Discontinuous Galerkin (DG) Magneto-Hydrodynamic (MHD) Flow Solver." stated: "DG-MHD has the power to study complex physical phenomena (such as multi-phase flows and chemically reacting flows) efficiently and has applications such as nuclear fusion engineering for nuclear power plants and high speed flow control for supersonic jet fighters." Referring to the petitioner's research in the present tense, stated: "At Hypercomp, [the petitioner's] work involves large-scale parallel computation, high-resolution numerical methods . . . and high-quality three dimensional grid generation in complex geometry," but the record does not otherwise indicate that the petitioner remains a HyPerComp employee.

of HyPerComp, called the petitioner "one of the pioneering researchers in Multigrid algorithms" whose "past research has achieved significant national impact and has been well recognized by the CFD society." referred, in the past tense, to the petitioner's "year stay at HyPerComp."

None of the witnesses at UTA or HyPerComp discussed the petitioner's subsequent career in banking. A list of the petitioner's published work shows that only one article appeared after January 2006. An article appeared in the July 2007 issue of *Computers & Fluids*. [REDACTED] is a co-author, indicating that this article arose from the petitioner's student work at UTA rather than from ongoing research in CFD or related fields.

On September 17, 2008, the director issued a request for evidence, instructing the petitioner to submit documentary evidence showing that his "past record of specific prior achievement . . . justifies projections of future benefit to the national interest." The director specifically requested evidence of citation of the petitioner's published work. In response, counsel stated that the petitioner's "research work has been in the field of numerical simulation of flow transition and its CFD applications." Counsel referred extensively to several of the petitioner's initial exhibits, including a single sentence from [REDACTED] letter (referring generally to the petitioner's "modeling skills and expertise").

The petitioner submitted printouts from Google Scholar (<http://scholar.google.com>), showing modest citation of articles published while the petitioner was a student. The petitioner's earliest articles have titles such as "Kinetics of Sewage Sludge Combustion" and "Recycling of Plastic Wastes," fields in which the petitioner does not claim to remain active. The petitioner showed four citations of articles based on his work at UTA. The petitioner did not identify most of the citing articles, so we cannot tell from the record how many of these citations are self-citations by the petitioner or his co-authors.

The petitioner also submitted four additional witness letters. Three of the witnesses are from academic fields. [REDACTED] of the University of Houston stated: "I don't know [the petitioner] personally and I have never worked with him. However through his publications, I know the importance of his work . . . in the research field of Computational Fluid Dynamics," a field in which the petitioner "has established himself as a leading researcher."

[REDACTED] deemed the petitioner "a skilled computational fluid dynamicist whose . . . recent papers demonstrate a high level of technical competence and leadership in this research field."

[REDACTED] at the University of Central Florida, discussed the petitioner's CFD research and stated: "From seeing [the petitioner's] impressive contributions, it has sparked my interests in achieving similar goals in my field of research. . . . I can foresee that [the petitioner] will be an expert in this field and will continue to make important contributions in the field of applied mathematics and computational fluid dynamics." The record indicates that the petitioner has already abandoned these fields to work in the financial industry.

The remaining witness discussed the petitioner's banking work. Ernst & Young LLP, stated:

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I have known [the petitioner] since summer 2006 in my professional capacity as an independent reviewer of the work that he has done at Countrywide Bank. . . .

[The petitioner] is a thorough professional dedicated to his work and has added significant value to Countrywide Bank through his modeling skills and expertise. He was able to articulate the rationale behind the professional judgments he made in developing certain regression models to evaluate the Bank's compliance with the fair lending laws. . . .

I have maintained a professional relationship with [the petitioner] since then and understand that he is now involved in credit risk modeling using statistical methods and techniques. He is actively involved in researching risk factors for new products and new initiatives including a new pilot experiment with a new product. He has also been analyzing default/foreclosure data for the company using different and innovating techniques to help Countrywide refine its Credit Risk Scorecard Model for loan underwriting.

In my view, [the petitioner] offers a unique and high caliber skill and expertise in risk analytics to Countrywide Bank, which is and will continue to be, a core business imperative in the lending industry.

Counsel referred to the new letters as "four independent letters of recommendation from non-affiliated person[s] in the industry which [the petitioner's work has affected]," and as "four letters from independent referees who have attested to the influence of [the petitioner's] work on his field. These letters are written by scientists who have not worked or collaborated with [the petitioner], but who have been influenced by his major contributions" (counsel's emphasis). [REDACTED] is not a "scientist," and his letter makes it clear that he has indeed worked with the petitioner. Also, counsel's references to "the industry" and "his field" ignore the obvious fact that the witnesses represent two vastly different "industries" and "fields." The witnesses who claim that the petitioner will continue to make contributions in CFD offer no evidence whatsoever that the petitioner has any intention at all of returning to that field.

The director denied the petition on February 23, 2009, stating that the petitioner had failed to establish significant influence through his published research. The director referred to the petitioner as a "Statistician." On appeal, counsel states:

The field in which Petitioner/Appellant has made major contributions is mathematics and computational fluid dynamics, not statistics, as the Nebraska Service Center claims in its denial. In fact, there is a large distinction between statistics and mathematics related to computational fluid dynamics.

To illustrate this point, the petitioner submits printouts from the Bureau of Labor Statistics' web site (<http://www.bls.gov>) relating to statisticians, and from Wikipedia (<http://en.wikipedia.org>) relating to CFD.

Missing from counsel's argument, however, is that the record shows that the petitioner is no longer involved in CFD research. He is a self-described "statistician" at a bank. Now that the petitioner is a statistician (as he repeatedly indicated on Form I-140, Form G-325A, and elsewhere in the record), it is reasonable to ask why he should receive immigration benefits as a result of his work in what counsel concedes is a very different field.

Even if the petitioner had established that his past work in CFD had been highly influential (which he has not done), this would not establish that the petitioner will prospectively benefit the United States in that same field. Counsel, on appeal, persists in referring to the petitioner as a CFD researcher. There is no evidence that the petitioner has actively participated in CFD research since 2005, and substantial evidence that the petitioner has left that field entirely. Counsel's admission of a "large distinction" between the work of a CFD mathematician and a statistician supports our finding that, whatever the petitioner may have achieved in the CFD field, there is little reason to believe that he will continue working in that 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. Furthermore, because the immigrant classification rests on prospective (*i.e.*, future) benefit to the United States, an alien's past achievements in a given field cannot earn that alien a waiver if there is strong evidence that the petitioner has ceased to work in that field. 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 decision 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.