

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5-



FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 22 2009
LIN 06 208 52368

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.

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 AAO will sustain the appeal and approve 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. At the time he filed the petition, the petitioner was a postdoctoral associate at the Massachusetts Institute of Technology (MIT), Cambridge. He has since begun working as a research engineer for Chevron Energy Technology Corporation, Houston, Texas. 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 had 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 new documentation and asserts that the director did not give sufficient consideration to previously submitted evidence.

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 the 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 7, 2006. The petitioner described his work:

My current research at MIT's Center for Ocean Engineering primarily focuses on the development of direct simulation and deterministic prediction capabilities for nonlinear ocean wavefield. This work is critically important to better understanding of ocean wavefield evolution mechanisms, successful prediction of severe ocean wave environments, and significant improvement of human safety and operation envelop [*sic*] for a wide variety of applications such as offshore oil exploration, offshore transportation, and Navy operations.

I am a leading researcher in the field of ocean wave hydrodynamics. . . . I have made numerous important contributions in the field over the last decade, including a revolutionary method for deterministic prediction of ocean wavefield based on remote-sensing or in-situ measurements, a powerful capability to directly simulate large-scale nonlinear ocean wavefield and generate realistic environmental inputs for ship/platform design and performance analysis, and a fundamental resolution of a long existing controversy over the effect of viscous dissipation on nonlinear ocean waves, just to name a few.

I am widely recognized in my field for my outstanding research achievements. . . .

I have been instrumental in the progress of many ongoing research projects. . . . Most importantly, my accomplishments on direct simulation and deterministic prediction of ocean waves have laid the fundamental groundwork for many government funded research projects to succeed. . . . The labor certification requirement . . . will jeopardize the steady progress in these important research projects."

A number of witness letters accompanied the initial filing. [REDACTED], who supervised the petitioner's doctoral studies and postdoctoral training, asserted that the petitioner "is clearly among the foremost experts today in the field of computational wave mechanics. He has already established himself as one of the rising young stars in his field and his trajectory is steep and accelerating."

[REDACTED] of the University of Southampton, England, stated:

I do not know [the petitioner] himself and have not personally met him yet. I first heard of [the petitioner's] research from [REDACTED] . . . in 2005 and became immediately interested in it. Later on, at my request, [the petitioner] sent an electronic copy of his Ph.D. thesis to me. With detailed descriptions, results, and discussions, this impressive thesis has allowed me to have a complete understanding of his work, on which my testimony, in this letter is based.

Two significant breakthroughs are made in [the petitioner's] Ph.D. thesis: (a) high-performance direct simulation of large-scale nonlinear ocean wavefield and (b) deterministic reconstruction and forecasting of smaller-scale nonlinear ocean wavefield. . . . Such synthetic nonlinear ocean wavefields have previously been unavailable and may bring revolutionary changes to ship design and testing in the near future.

[REDACTED] of the University of Hawaii at Manoa, who organized a 2005 conference where the petitioner presented some of his work, stated that the petitioner's "achievement in developing such a powerful direct simulation tool is a breakthrough in this field. It overcomes all of the shortcomings of existing model-equation-based approaches . . . and is valid for both deep sea and coastal areas."

[REDACTED] of the University of Colorado at Boulder, who "met [the petitioner] only once, at a scientific conference," stated that the petitioner's "new approach has been used to solve several nontrivial problems with immediate practical interest. One of them is the transient motion of a ship in a wave tank, which is critically important for ship design."

The petitioner submitted copies of "selected professional publications" including one unpublished manuscript, four published journal articles (three in Chinese and one in English), and six conference papers. The adjective "selected" implies that the petitioner has written other "professional publications" as well, but he neither identified nor submitted any further published work with the initial filing.

To establish the field's reaction to his published and presented work, the petitioner submitted six "selected citations [and] discussions," consisting of four citations in publications or presentations and two electronic mail messages. Again the petitioner used the word "selected" to imply that these citations represent only a sample from a larger pool, but he did not establish the total size of that pool. The initial submission did not show the existence of any citations other than the four documented as "selected" examples. Two of the four citations are self-citations by co-authors of the cited works. The other two citations both appeared at the same time as the cited piece in the published proceedings of a 2005 conference in Hawaii. Therefore, the citations do not indicate attention to the petitioner's work after, or outside of, that conference.

On December 7, 2007, the director instructed the petitioner to submit further evidence of his impact and influence in the field, including copies of additional independent citations published before the filing date. In response to the notice, counsel observed:

In October 2007, [the petitioner] was recruited to join one of our countries [*sic*] top Oil & Gas companies, Chevron Energy Technology Company, to conduct advanced research as a Leading Research Engineer. As a continuation of his previous ocean engineering research, [the petitioner's] current work focuses on R&D impacting offshore facilities including the development of computational fluid dynamic models for riser vortex induced vibration analysis, and other related issues. As noted in the attached exhibits, [the petitioner's] research has direct application to our nation's #1 economic issue . . . , namely the need for plentiful and economically accessible sources of energy.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

At the time the petitioner filed the petition, he did not yet work for Chevron. The record, however, indicates that the petitioner's work at Chevron continues and builds upon his prior research; it does not represent a radical change in direction. Therefore, the petitioner's prior achievements remain relevant in his new employment at Chevron.

With respect to the director's request for further evidence of citation, the petitioner re-submitted copies of the four previously submitted articles (including two self-citing articles) and submitted one new article, published after the petition's filing date. The minimal citation evidence, therefore, is not sufficient to establish the petitioner's impact; further evidence is necessary.

More persuasive are the letters in the petitioner's second submission. Witnesses from various companies in the energy industry attested to the value of the petitioner's work in that field.

Subsea Transport Systems Engineer for Saipem Energy Services in Italy, stated:

My research has been focused on the long-term statistics and modeling of three-dimensional extreme sea wave groups.

Although I am not familiar with [the petitioner] personally, I have asked [him] many times for advice and suggestions on my own research because of his leading role in this field.

Senior Staff Engineer and Supervisor of the Naval Architecture/Ocean Engineering Group at ConocoPhillips, stated:

[The petitioner] is one of the very top researchers in the field of ocean wave dynamics. Although I do not know [the petitioner] personally, I got to know his significant contributions to ocean wave simulations and predictions from his remarkable Ph.D. thesis at Massachusetts Institute of Technology. In this thesis, [the petitioner] developed several new technologies that are critically important to offshore industries. One of them is his pioneering achievement in developing an efficient methodology to deterministically reconstruct and forecast nonlinear ocean wavefield from sparse probe measurements. . . . I believe such [a] breakthrough would not have been possible without [the petitioner's] ingenuity in fluid mechanics and mathematics and strong capability in computer applications. With such deterministic reconstruction and forecasting technology, wave data measured in field or laboratory can be thoroughly analyzed to obtain unprecedented detailed kinematics/dynamics information of the wavefield. This information is critical to the complete understanding of the load and motion of ships and oil platforms in ocean waves, which in turn provides valuable guidance to improve various offshore applications such as ship/platform design, ship/platform motion control, and optimal path planning.

A number of the letters show the petitioner's impact in academia. For instance, of the University of Surrey, England, stated:

I have never worked with [the petitioner], nor do I know him personally. I am, however, familiar with his research and I have cited his work in publications that recognize his significant contributions. . . .

He is playing a leading role in some exciting research developments. This research is especially important now because of the extreme conditions experienced by modern offshore oil and gas facilities.

of Rheinisch-Westfälische Technische Hochschule, Aachen, Germany, stated:

I do not know [the petitioner] personally and have never worked with him. However, my research has substantially benefited from the outstanding computational tool developed by [the petitioner].

. . . I have worked on shock wave dynamics for more than 10 years. . . .

I got to know [the petitioner's] work from his journal paper on numerical simulation of diffraction and reflection of shock waves in a dusty gas. In his paper, [the petitioner] presented an outstanding numerical method that can effectively simulate and predict the shock wave's propagation in a two-phase flow. Following [the petitioner's] idea, we applied this method into our research and developed a better technique to control the flow inside the shock tunnel. This has allowed us to significantly improve the coating quality.

Other witnesses work for the United States government. [REDACTED] Deputy Director of the High Performance Computing Modernization Office at the Department of Defense, is "familiar with [the petitioner's] research because our office has provided the supercomputing capability to support his computational work on large-scale ocean wavefield simulations." [REDACTED] stated that the petitioner "has proven, and continues to prove, that he is capable of major accomplishments in the field of ocean engineering research."

[REDACTED] of the National Oceanic and Atmospheric Administration (NOAA) stated:

I have knowledge of his research through my role as a reviewer for the Department of Defense (DoD) High Performance Computing Modernization Program. . . .

[The petitioner's] work is intriguing because it is one of the first efforts to attempt to specifically predict the state of the ocean wavefield without relying on statistical descriptions. . . . Their model has the unique ability (to the best of my knowledge) to predict the occurrence of "rogue" (giant) waves: they occur relatively infrequently and as isolated waves but are capable of great destruction to seagoing vessels. As such this work is of apparent great value to the DoD with respect to the deployment of forces to specific operating areas.

The director denied the petition on May 13, 2008. The director acknowledged the intrinsic merit and national scope of the petitioner's work, but found "the evidence fails to establish that the petitioner's

research has had a substantial impact on his field of endeavor." The director based this conclusion primarily on the minimal citations of the petitioner's published work. The director noted the petitioner's submission of "letters from individuals outside the petitioner's circle of collaborators," but found that these letters did "not establish that the petitioner has contributed to his field of endeavor to a substantially greater extent than the majority of his colleagues."

On appeal, the petitioner submits documentation of a newly published independent citation of his work, in which a group of French researchers asserted that the petitioner's research "partially inspired" their "approach for the deterministic prediction" of non-linear wave systems. We duly note this submission, but the basis for denial was not that the petitioner was one citation short of eligibility.

The petitioner states that the director "ignored the fact that I have been invited to serve as a judge of other researcher's work for a series of international journal and conference" [*sic*]. Participation in peer review appears to be expected of researchers, rather than a privilege granted only to a select few. The record does not show that the petitioner is in unusually high demand in this regard.

The petitioner is more persuasive when he contends that the director failed to give due consideration to letters from a number of independent sources, attesting to the importance and impact of his work. Upon careful consideration of the evidence submitted, we agree with the petitioner that the director did not give sufficient consideration to evidence of the petitioner's influence beyond his collaborators and mentors. The credible independent witnesses have attested specifically to the importance of the petitioner's work and findings, rather than simply praise his skill or attest vaguely that his work shows promise that may eventually produce important results. The objective documentary evidence in the record supports and is consistent with the witnesses' detailed and specific assertions. The record reflects that the petitioner's work has attracted considerable attention in academia, industry, and government, and that others have found the petitioner's work to be not only incidental, but central to their own subsequent endeavors.

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 field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.