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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**

B5

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: SEP 24 2009
SRC 07 800 23720

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas 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 Ph.D. candidate at the University of Houston, Texas, and a seismic geophysicist at CGGVeritas, Houston. 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.

The petitioner filed the petition on July 27, 2007. Several witness letters provided information about the petitioner's work and its significance.

[REDACTED] of the University of Houston stated:

[The petitioner] was one of my graduate students and he will obtain his Ph.D. degree within the next few months. . . .

[The petitioner's] research has been very beneficial to the semiconductor industry. . . . With the *dimension of semiconductor chip devices shrinking into the nanometer range*, the integrated circuit technology is confronting ion implantation with a new round of physical and engineering challenges. . . .

[The petitioner's] achievements and efforts have opened up new techniques of semiconductor devices and will have significant impacts on the semiconductor industry for the entire United States.

described several of the petitioner's projects in technical detail, stating for instance that the petitioner "researched the irradiation effect of 2-MeV Si ions on HfO₂ films deposited on Si substrates. His measurement results are one of the important references in the radiation effect study of the dielectric materials." Regarding the petitioner's work at CGGVeritas, stated:

[The petitioner] has been able to apply his research and efforts to other areas of physics including geophysics and the exploration of crude oil. . . . [H]e has already provided significant and original contributions through his development of several new function models in rock physics. For example, [the petitioner] played a crucial role in the development of the control beam migration (CBM) model in seismic processing. The CBM model is a quantum physics model applied to rock physics that has provided more precise results in the seismic wave velocity prediction, which is very important in predicting the precise position and percentages of the rock, gas, water and oil underneath the Earth.

a former University of Houston researcher who is now Project Manager for Research and Development at Rock Solid Images, Houston, stated:

[The petitioner] has produced breakthroughs in condensed matter physics research that have been hailed as landmark discoveries. His development of completely new methods for studying the migration of doping atoms in the solid state of crystal and ion beam radiation effect on substrate properties can be widely used in many hi-tech fields that will have enormous benefits to the science community and the economy of the United States.

[The petitioner] has already had an immediate impact in the field of earth science research through his creation of a wave equation migration (WEM) model and a control beam migration (CBM) model. [The petitioner's] research in the CVM model has provided new directions for the seismic process technology that is still being developed for commercial purposes by many companies all over the world. . . .

[The petitioner] is a brilliant engineer and physicist. It is indeed very unusual for a researcher to achieve so much fame and international recognition in such an early stage of his career.

[REDACTED] of Research and Development at CGGVeritas, stated:

[The petitioner] has a strong background in condensed matter physics and physics computing simulation. . . .

We hired [the petitioner] for his extraordinary abilities in both fields – physics and numerical computation. Indeed, after joining CGGVeritas, [the petitioner] has engaged in an important exploration project and has obtained significant results, which will improve our current data processing techniques and will have an impact on the seismic industry as well.

Our industry provides the best possible delineation of hydrocarbon reservoirs for the oil companies to manage exploration risk and enhance drilling and production success. In the past decade, due to the rapidly increasing power of computers and the demand from major oil and gas providers, the mainstream technology of this industry has evolved very quickly. However, "subsalt imaging quality" is still the main production problem in the Gulf of Mexico exploration due to two reasons. First, the conventional streamer acquisition provides only narrow azimuth information . . . [which] introduces shadow zones in the images. Secondly, traditional imaging techniques are very sensitive to the noise. Therefore, in the subsalt area, where noise dominates, many migration artifacts are created and hide the true geological structures. To overcome these difficulties, we have developed the most innovative techniques: Wide Azimuth (WAZ) data processing and Controlled Beam Migration (CBM). [The petitioner] is assigned to test the new techniques, further improve them, and apply them in an important exploration project for major international oil and gas providers.

. . . [The petitioner] adopted the vector offset concept and made CBM available for WAZ seismic imaging. His work on WAZ and CBM gave seismic process an edge over traditional techniques.

[REDACTED] Laboratory Fellow at Los Alamos (New Mexico) National Laboratory, stated:

Although I have never personally worked with [the petitioner], I have read his publications with great interest. He has rapidly been earning an internationally [*sic*] reputation in the fields of semiconductor physics, nuclear physics and nano-technology. . . .

I have been especially impressed with [the petitioner's] study and research at [the] University of Houston, where he has been closely collaborating with nuclear physicists and material scientists on many different research projects based on ion beam applications.

After devoting more than a full page of his letter to the petitioner's work with ion beams at the University of Houston, [REDACTED] turned to the petitioner's non-academic work:

[The petitioner] has even been able to apply his knowledge to the field of geophysics and the exploration of oil and gas. His contributions of the wave equation migration in seismic process and the modified patch in fluid substitution are very significant and important. Those technologies will reduce the risk of energy industry in mis-investment in the exploring of crude oil.

The petitioner submitted copies of several journal articles and presentations that he co-wrote between 2000 and 2007. The petitioner did not claim or demonstrate that any of these works relate directly to his intended field of seismic geophysics.

On October 1, 2008, the director issued a request for evidence, instructing the petitioner to submit further evidence of his impact on his intended field. The director noted that the petitioner had not established significant citation of his published work.

In response, the petitioner submitted documentation of 10 English-language citations of his work, three of which are self-citations by the petitioner and/or his co-authors. The petitioner also submitted Chinese-language materials said to represent additional citations of his work, but this is not clear without the translations required by 8 C.F.R. § 103.2(b)(3). The petitioner did not establish that any of his cited articles, or the articles citing his work, relate directly to the field of geophysics. The petitioner's articles appear, instead, to relate to the design of small-scale electronic components.

The petitioner submitted further witness letters, none of them from geophysicists. Some of the witnesses stated that they knew the petitioner through his graduate student work with nuclear physics and materials science; none of the witnesses mentioned his later work as a geophysicist or even expressed awareness that the petitioner worked in that field. The only witness to mention geophysics was [REDACTED] of the University of Arkansas at Little Rock, who stated: "Although [the petitioner] has focused his attention on the solid state physics and ion beam technology, additional economic gains are to be expected as this technique makes it[s] way into other areas such as geophysics, chemical physics, biophysics, and related fields." The implication appears to be that the petitioner's graduate work in some areas of physics has been of such high quality that we should expect comparable results from the petitioner's ventures into other subspecialties within the field of physics.

The director denied the petition on November 26, 2008, stating that the petitioner had not established that his work "has very much altered the thinking of similarly employed geophysicists or nanotechnologists." The director noted the low citation rate of the petitioner's published work.

On appeal, counsel asserts that the petitioner "is a highly distinguished researcher" and "an expert in the fields of solid state physics and geophysics, and specifically the development of ion-beam technology." Counsel repeats or paraphrases descriptions of the petitioner's work from witness letters in the record, and stated that the evidence "demonstrated that [the petitioner] possesses a degree of expertise

significantly above that ordinarily encountered in the science." That sentence quotes directly from the regulatory definition of exceptional ability at 8 C.F.R. § 204.5(k)(2). By statute and regulation, an alien does not qualify for a national interest waiver simply by virtue of exceptional ability.

While the petitioner worked with ion beam technology during his graduate studies (which were still ongoing as of the petition's filing date), the record does not show that his work at CGGVeritas directly involves such technology. The few witnesses to assert that the petitioner's work has had a significant impact on the energy industry, where the petitioner now works, are all based in Houston. There is no evidence that the petitioner's ongoing work has attracted wider attention or has otherwise influenced the field in which he now works.

The timing of the filing of the petition illustrates a difficulty that sometimes accompanies petitions such as this one. Graduate student work involves projects pursued with the specific goal of completing degree requirements, and such student work may or may not be a close match with one's subsequent job duties. Witnesses have praised, sometimes at length, the petitioner's work and how it relates to nanoelectric devices, but the record does not show significant implementation of the petitioner's work in such devices, nor does it establish that manufacturers of such devices have sought to engage the petitioner's services. The record, instead, shows that an employer in the same city as the petitioner's graduate school hired the petitioner not for his specific contributions, but because his broader skill set could be adapted to the employer's needs. The record does not indicate that the petitioner's geophysical work has yielded any published work, and the petitioner's earlier published work has accumulated an admittedly small citation record. The assertion that such citations may increase in the future is speculation rather than evidence. In light of the above discussion, we conclude that, at best, the petition was filed prematurely.

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 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.