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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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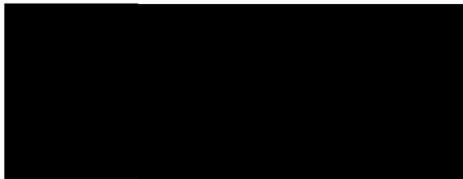
OFFICE: TEXAS SERVICE CENTER



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
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 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. The petitioner seeks employment as a marine laboratory specialist at Texas A&M University (TAMU). 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 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 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 (USCIS)] 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 (NYSDOT), 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.

The AAO also notes 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 Form I-140 petition on March 1, 2010. In an accompanying letter, the petitioner described his work with the Integrated Ocean Drilling Program (IODP), in which TAMU is a participant:

IODP is a unique program which conducts scientific investigation of the Earth system using multiple drilling platforms and new technologies. It is a cooperative venture among about 25 nations. . . . The mission of IODP is to provide a holistic understanding of the Earth by state-of-the-art drilling, sampling, monitoring and

analyzing of seafloor environments. It (1) unifies the international scientific community to study the Earth as a system and (2) advances future research and discovery through the worldwide dissemination of data and samples that (3) promote global awareness of geohazards and environmental change. . . .

During the course of my career, in addition to my exceptionally in-depth knowledge of Earth Science, I have been able to make significant contribution in the **design, research and development of . . . instruments and softwares** [*sic*] [used in IODP]. In particular, I've led the development of a complex software that captures geological observations and interpretation by a majority of scientists that form the core of each expedition. The uniqueness of this software and database structure can be considered revolutionary in the field of marine geology in that it allows the dynamic data search and synthesis needed for comprehensive studies of earth materials. Although it has only been implemented in the last seven expeditions, Earth Scientists have already realized the huge potential that this type of database structure can bring to their studies.

(Emphasis in original.) The petitioner submitted background materials about the IODP, which establish the intrinsic merit and national scope of the petitioner's work. They do not show, however, how it is in the national interest for the petitioner to be the one performing the duties of a marine laboratory specialist.

The initial filing included several letters from IODP officials at TAMU and researchers who have accompanied the petitioner on expeditions of JOIDES Resolution (JR), the drilling vessel on which the petitioner has performed much of his field work.

TAMU Professor ██████████ who "served for 13 years as the Director for Science Operations for the JOIDES Resolution," stated that the ship "is to our understanding of Earth's record of deep time (present back to 180 million years ago) what the Hubble telescope is to our understanding of deep space." Regarding the petitioner's contributions, Prof. Fox stated:

When [the petitioner] was hired several years ago the JR was undergoing a major overhaul, including the ship's laboratory complex, and [the petitioner] was tasked with developing a new analytical application that would make it more efficient, flexible and productive for the science party when they described cores recovered during an expedition. The JOIDES Resolution returned to sea 8 months ago and the application that [the petitioner] had developed has been described as transforming by the scientists who have used the application. . . I have spoken with colleagues who have participated in these expeditions and they are unanimous in their assessment that [the petitioner] was one of the outstanding members of [the] TAMU laboratory team.

██████████ of IODP Analytical Systems at TAMU, stated:

[The petitioner] has demonstrated exceptional technical capabilities that bridge his geological education and background with the research and development undertaken by my section. He has had a lead role in developing a new paradigm in geological description software that is currently deployed upon our research drillship, the *R/V JOIDES Resolution*. Since joining IODP, he has worked in defining and putting together the database structure, content and specifications for several of our essential applications for capturing, downloading and formatting data. . . . His exceptionally detailed and comprehensive knowledge [of] the entire workflow has made him the resource person for training users and collaborating with other sections and departments . . . and other IODP implementing organizations . . . , as well as our customers on board the ship here and on shore.

Onshore, [the petitioner] works in the shore laboratory developing similar instruments and processes for use by scientists who visit the Gulf Coast Repository and by the College of Geosciences at Texas A&M University. [The petitioner's] specialization in sedimentology and stratigraphy has also allowed him to assist the engineering group in optimizing the sediment used in the simulated borehole test system to test improvements to our coring and downhole measurement tools. In addition, he has displayed exceptional skills in SolidWorks software and has therefore been instrumental in the 3-dimensional design, testing, actual machining of some components and assembly of six core loggers that are all unique to our shipboard and shore-based laboratories. . . .

[The petitioner] is irreplaceable for the continuation of our current projects and his loss would be a strong detriment to US science support for the program.

██ at TAMU, stated that the petitioner's "broad knowledge in several fields of geology has allowed him to be an exceptional resource person in developing this core description system, microscopy and other data capture and query software that we have developed here at IODP.

████████████████████, an expedition project manager for the IODP, stated that the petitioner's "primary job duty is to provide operational support for a multitude of science systems aboard the *JOIDES Resolution*." ██████████ called the petitioner "one of our most resourceful team members with a broad set of skills that would be extremely difficult to replace."

████████████████████ of Technical and Analytical Services for IODP at TAMU, stated: "[the petitioner's] contribution to our implementation of an innovative conceptual model for data collection and interpretation has made him our local expert."

The remaining witnesses work at a variety of institutions, but all have sailed with the petitioner on *JOIDES Resolution*. ██████████ of Indiana University of Pennsylvania stated:

The work on Expedition 321 would not have been possible without [the petitioner's] exceptional abilities. . . . He was the main "go-to" guy for training other scientists about how to use different laboratory equipment and software. And whenever equipment was in need of repair or tuning, he ably came to the rescue. . . .

[I]t's clear that these sediment cores will form the basis for our understanding of equatorial climate change for years to come. . . . None of this would be possible without accurate initial data collection on these cores that was accomplished because of the specialized skills of scientists like [the petitioner].

Professor [redacted] of Notre Dame University, Indiana, stated:

I have worked with [the petitioner] on board the drilling vessel JOIDES Resolution when I was the chair of the Readiness Assessment Team of Scientists who sailed earlier this year to test out the new science systems that had been installed on this now start-of-the-art [*sic*] ocean-drilling vessel. During this voyage, I was allowed a lot of time to observe and interact with [the petitioner] as he was the lead trainer for the new science systems that had been installed over the previous 2 years. . . .

[D]uring a scientific expedition . . . [a]ll data gathered must be entered into the ships [*sic*] database and then recovered and integrated to allow the final site and expedition reports can [*sic*] be written up and published. [The petitioner's] expertise is in the various programs that interact with the main database, core description, and data integration.

My observations leave me in no doubt that the US scientific ocean-drilling program would be seriously compromised without [the petitioner's] expertise. His knowledge of the ships [*sic*] science systems and, maybe more importantly, his teaching skill . . . are second to none. It is my opinion that his presence is essential to the smooth operation of this vital US scientific endeavor.

[redacted] an [redacted] at the University of California, Davis, stated: "The work on Expeditions 320/321 would not have been possible without [the petitioner's] unique and exceptional ability and knowledge about the science, instrumentation, and data management.

[redacted] at Christian Albrechts University, Kiel, Germany, stated that the petitioner's "wide background in most of the fields of geology, coupled with his knowledge in instrumentation and database, has given him a unique combination of tools for research that many of his peers do not have."

[redacted] on the Faculty of Education at Ibaraki University, Japan, sailed with the petitioner on a six-week expedition. [redacted] stated that the petitioner "has been involved in establishing an integrated laboratory system for the drilling vessel JOIDES Resolution. . . . His deep background in

geology and wide knowledge on how to run the different instruments and software . . . made work very easy during the expedition.”

On June 10, 2010, the director issued a request for evidence, instructing the petitioner to submit additional documentation to meet the guidelines set forth in *NYS DOT*.¹ In response, counsel noted [REDACTED] earlier assertion: “IODP policy does not allow us to sponsor foreign nationals for permanent residence.” Counsel states: “the national interest will be harmed if [the petitioner’s] employer is prevented by the US immigration laws from employing him in his current position.” “US immigration laws,” however, did not compel the petitioner’s employer from adopting a policy against applying for a labor certification.

The employer’s policy cannot be a major factor in the petitioner’s favor. The statutory job offer provision is a requirement, not an option for an employer to exercise at its sole discretion. The job offer requirement would soon become meaningless if employers could unilaterally exempt their current or prospective employees from that requirement simply by declaring that the requirement is contrary to their policy. An employer’s unwillingness to comply with the job offer requirement does not establish or imply that it is therefore in the national interest to waive that requirement.

The petitioner submitted background documentation about the IODP’s mission, budget, and other factors. The intrinsic merit and national scope of the IODP, as a whole, is not in dispute here. It does not follow, however, that every participant in the IODP qualifies for a national interest waiver.

The petitioner submitted two new witness letters. [REDACTED] in his second letter, stated:

There are three distinct phases of the data collection process. [The petitioner] possesses unique skills necessary for each phase. First, the software must be developed and constantly revised. . . . Just as important as the data storage is the development of instruments that will collect the data deep below the ocean floor. . . .

The second phase is on-site data collection and storage. This phase must be carefully supervised by an individual with expertise in the software itself, as well as a technological understanding of earth science researchers’ requirements and the instruments used to collect the data. . . . The databases cannot be developed or maintained by a standard IT technician. Rather, they must be developed and maintained by an individual who understands the data being collected, has familiarity with the data collection instrumentation, and can “tweak” the software as necessary.

The third phase is the dissemination of collected data, carefully tailored to each researcher’s needs. . . .

¹ The date on the request for evidence is May 11, 2010, but the director did not mail the notice until June 10, 2011. The date of service is the date of actual mailing, not the date printed on the notice. See 8 C.F.R. § 103.5a(b).

[The petitioner] possesses the necessary skills for each of the three phases of data processing. He came to IODP with these skills, and has continued to develop them throughout his assignments. The necessary skills that [the petitioner] possesses are:

- \$ Highly developed understanding of geology, earth and environmental science . . . , including two masters degrees . . . ;
- \$ Exceptional computer programming and database management skills . . . ;
- \$ Creative ability . . . so that the data collected can be transferred seamlessly to the appropriate software;
- \$ Outstanding ability to teach others. . . . [The petitioner] has used these well-developed skills both to mentor other programmers with whom he collaborates, and also to teach other earth scientists to input, manipulate and study data in the highly complex program he maintains;
- \$ Exceptional ability to solve problems creatively when constrained by the limited resources available on a ship at sea for many months;
- \$ Training in numerous safety programs required for shipboard living;
- \$ Innate ability to maintain calm under pressure. . . .

His rare combination of skills is an absolute necessity for an incumbent in his position. . . . In addition, each individual on the ship must possess numerous skills, as the ship would not have room to have one individual for each uniquely-defined skill set.

[REDACTED] of Oregon State University stated:

I participated in IODP Expedition 324 and I will lead the upcoming Expedition 330 as the US co-chief scientist, which starts December 2010. Earth Scientists on every continent are participating in this program, bringing knowledge to use in research that is expected to help predict catastrophic events such as earthquakes, volcanoes and tsunamis. The research will also help document the causes and effects of climate change and global warming, attempting to mitigate the damages from this man-made disaster. IODP is, without exception, the most important and well-known geological expedition in the world, and has been for over forty years. . . .

IODP is very lucky to have recruited [the petitioner]. . . . Not only does he have the skills to communicate technical issues to users, but also the knowledge to guide programmers to creatively design the instruments that collect the data to input into the software. . . .

[The petitioner] has also been very helpful in assisting users of the software.

The director denied the petition on August 30, 2010, stating: "The petitioner has heavily focused on . . . the significance of his field of employment itself, rather than . . . his exceptional

accomplishments and the impact of his contributions in the field of his expertise.” The director noted that the petitioner claimed authorship of a number of published articles, but the petitioner did not submit the articles themselves. The director concluded that “the petitioner appears to be a competent and qualified Research Specialist,” but “has not shown that the waiver of the required job offer and labor certification would be in the national interest.”

On appeal, counsel observes that the director did not dispute the substantial intrinsic merit or national scope of the petitioner’s occupation. The AAO agrees with this statement, and will focus only on the petitioner’s individual merits rather than the overall importance of his occupation.

Counsel claims:

the Director imposed novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5, ignored significant portions of the evidence that conclusively demonstrate [the petitioner’s] exceptional ability, misapplied the government’s own standard for reviewing petitions submitted under INA § 203(b)(2)(B) and misconstrued the labor certification process, by rendering a denial that was arbitrary and capricious.

Counsel cites *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), stating that the court did not permit “arbitrary and capricious imposition of requirements beyond those set forth” in the regulations (*see id.* at 1121). The *Kazarian* decision involved a petition for an alien of extraordinary ability under section 203(b)(1)(A) of the Act. The implementing regulations for that classification include, at 8 C.F.R. § 204.5(h)(3), a list of ten evidentiary criteria. A petitioner seeking that classification must meet at least three of those ten criteria. The court, in *Kazarian*, held that USCIS adjudicators could not modify those requirements. In this proceeding, under different sections of the statute and regulations, there is no comparable list of qualifications. The regulation at 8 C.F.R. § 204.5(k)(4)(ii) provides for the national interest waiver, but is entirely silent as to the requirements for it. In the absence of statutory and regulatory guidance (with the exception of provisions for certain physicians, not applicable here), the only binding law pertaining to the national interest waiver is *NYSDOT*.

Counsel does not address *NYSDOT* except to state: “We do not understand how *NYSDOT*’s message applies to [the petitioner’s] case,” because the petitioner had neither claimed a shortage in his occupation nor “suggested that the minimum qualifications and special requirements for the position cannot be specified by the employer.” *NYSDOT*, however, is not limited to those issues. A cornerstone of that decision is the three-prong test described earlier in this decision, including the following provision:

The petitioner seeking the waiver must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the alien. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought by the alien. The labor certification

process exists because protecting the jobs and job opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. An alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process.

Stated another way, the petitioner, whether the U.S. employer or the alien, 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 is not sufficient for the petitioner simply to enumerate the alien's qualifications, since the labor certification process might reveal that an available U.S. worker has the qualifications as well. Likewise, it cannot be argued that an alien qualifies for a national interest waiver simply by virtue of playing an important role in a given project, if such a role could be filled by a competent and available U.S. worker. The alien must clearly present a significant benefit to the field of endeavor.

Id. at 217-18 (footnote omitted). Counsel tacitly acknowledges the above provisions, asserting that the petitioner "has . . . demonstrated that the national interest would be adversely affected if a labor certification were required."

Counsel stands on firmer footing when discussing the evidence in the record. Counsel states that, in discussing the witness letters, the director focused on the parts of the letters dealing with the overall importance of the IODP endeavor rather than the petitioner's individual contributions to the effort. Counsel is justified in this complaint.

While many witnesses devoted considerable space to the overall merits of the IODP, the letters also provided clear and detailed explanations of the petitioner's role aboard the JR. The petitioner is not, himself, primarily a researcher, and therefore one should not expect to see volumes of published material in his name. At the same time, he is not merely a laboratory technician, following rote instructions to perform basic functions so that the researchers are free to perform higher-level work. Credible witnesses have consistently indicated that the petitioner is largely responsible for creating the conditions necessary for IODP researchers aboard the JR to achieve optimal results, and the remainder of the record supports their assertions.

Because the petitioner's primary role is not to produce published research, it is appropriate to look to other means to gauge the impact of his work. The individuals who perform research aboard the JR have made it clear that the petitioner is not simply a technician who maintains laboratory equipment, ensures that the onboard computers function properly, and "crunches" data collected on expeditions. Rather, the witnesses have credibly, consistently, and in detail explained how the petitioner's work is an integral part of a major, international effort to collect and interpret data with important implications for climatology, disaster preparedness, and other highly significant enterprises.

The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. 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 AAO will withdraw the director's denial decision and approve the petition.

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