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U.S. Citizenship
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Services

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FILE:

SRC 07 800 18518

Office: TEXAS SERVICE CENTER

Date: NOV 13 2009

IN RE:

Petitioner:

Beneficiary:

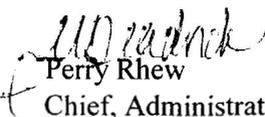
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.


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. At the time he filed the petition, the petitioner was a postdoctoral research associate at North Carolina State University (NCSU). U.S. Citizenship and Immigration Services (USCIS) records indicate that he has since accepted employment at the University of Michigan, but the petitioner's most recent reported address of record is in South Carolina.¹ 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 argues that the director relied on too strict a standard of eligibility.

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.

¹ Form I-129 receipt number WAC 09 096 50755, filed February 12, 2009, approved February 23, 2009.

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 1, 2007. The petitioner stated that his doctoral research at NCSU “focused on *Hurricane Storm surge modeling* and *estuarine and coastal ocean modeling* for the East Coast of the United States” (emphasis in original).

The petitioner submitted copies of several of his articles, some published and some in press but not yet published, along with abstracts of several conference presentations relating to his work in oceanography. The petitioner also submitted copies of correspondence offering him temporary postdoctoral or intern positions at the National Oceanic and Atmospheric Administration (NOAA) and Texas A&M University, and indicating that he was under consideration for similar positions at Louisiana State University, Oregon State University, and the College of Charleston (South Carolina).

To support his claim that he has “contributed significantly to the improvement of environmental atmospheric/oceanic studies,” the petitioner submitted several witness letters. [REDACTED] the petitioner’s master’s thesis advisor at the First Institute of Oceanography, State Oceanic Administration, Qingdao, China, stated that the petitioner’s “creative research on coastal material circulation is extraordinary, and his numerical scheme for coastal material distribution and transportation is crucial to coastal environment protection.”

[REDACTED] who supervised the petitioner’s doctoral research, stated:

[The petitioner] is an outstanding researcher dedicated to hurricane induced storm surge prediction and its influence on coastal environments and human health. . . .

His research is pioneering in estuarine and coastal ocean modeling of USA and the world. [The petitioner’s] skillful long-range experimental forecast coastal ocean model would benefit insurers and reinsurers, as well as society and government’s decision by reducing the risk and uncertainty inherent to varying active and inactive tropical storm seasons, long term sea level changes and other changing environments.

. . . His experiences and expertise on coasts and oceanography study are crucial to facilitate our hurricane induced storm surge program as well as coastal environmental modeling to be continuously in the frontier of marine science research.

[REDACTED] described several of the petitioner’s research contributions, including the following examples:

A Three-layer Creative High Resolution, Three-dimensional Storm Surge Model for Coastal Hurricane Disaster Prevention

Description: . . . This high resolution model is especially important for river and estuarine area[s]. . . This creative hurricane storm surge model has been verified by many historic hurricanes and greatly improves the accuracy of the simulated results compared with the SLOSH model that is the model currently used by NOAA. . . . It is most likely that his model will be the core structure of the American Coastal Hurricane Prediction System for the next generation.

Significance of the Contribution: . . . [The petitioner's] creative numerical model is a significant breakthrough in the digital evaluation of the coastal storm surge induced by hurricanes. . . . [The petitioner's] new nesting windows methodology embedded in the three-dimensional high-resolution model is an innovative milestone for accurate simulation of the storm surge along the American coast. . . . The simulations of historic most severe coastal landfall hurricanes show that the accuracy of [the petitioner's] creative model is 10-15% higher than the former two-dimensional model. In some cases, the accuracy of his model surpasses 30% over the old model. . . .

The integration of Flooding Area with Geographic Information System.

Description: [The petitioner] is one of the few hurricane researchers in the world who integrates 3-D numerical model results of flooding and draining with the Geographic Information System (GIS) when a hurricane or any other storm approaches. . . . It creates, analyzes, and displays hurricane flooding scenarios, which help local officials address the negative effects of storm surge by allowing them to identify communities that are at risk, assess the situation, and develop mitigation strategies.

Significance of the Contribution: . . . [The petitioner's] mapping technique makes it possible to accurately simulate not only where but also how the coast region may be inundated by an approaching hurricane. . . . Federal or local emergency agenc[ies] could know if the company, residents, roads could be ruined by the storm surge level and coastal flooding. His new modeling technique integrat[ed] with GIS could give the agenc[ies] quick response to the most impacted locations to save human lives and mitigate property loss.

Other contributions include a "3-D baroclinic high resolution numerical model" that can simulate and predict water quality conditions and a "3-D hydrodynamic model [that] has great value to evaluate the effect of a coastal construction/restoration on its surrounding environment."

[REDACTED] praised the petitioner's

enormous expertise in the general areas of continental shelf, larger scale ocean, large lakes and smaller scale embayment, estuary, harbor and river circulation and associated processes, such as sediment transportation and erosion. . . .

[The petitioner's] creative 3-D hurricane simulation model is one of the top three of the most advanced numerical method[s] for hurricane induced storm surge and inundation models. . . . [The petitioner], for the first time in hurricane study history, linked storm surge and ecological models thus making it possible for the model to reflect the ecosystem response. . . . On average, the accuracy of his hurricane model is 20-25% higher than NOAA's most commonly used 2-D forecast model and other lower resolution domain models.

[REDACTED] at NOAA's Great Lakes Environmental Research Laboratory (GLERL), Ann Arbor, Michigan, credited the petitioner with "great contributions to the study of hurricane[s] using numerical models . . . [which] have many innovative features which make them reliable and robust for prediction of the hurricane induced storm surge and inundation in every region of the U.S. coast."

Other witnesses from a variety of institutions praised the petitioner in varying degrees of detail, tending to emphasize the petitioner's innovations in 3-D modeling with relation to hurricane storm surges and the dispersal patterns of hazardous materials.

On October 28, 2008, the director requested evidence of the impact of the petitioner's work, including published independent citations and reference letters from independent sources who have not worked with the petitioner. In response, the petitioner conceded that he "does not have [an] enormous number of citations," but claimed that "he nevertheless still has made groundbreaking impacts both on his field as a whole and on other peer researchers."

The petitioner observed that "many of [his] papers were published fairly recently," and therefore there had not been time for citations to appear. While this may be true, this is not, itself, an argument in the petitioner's favor. Rather, it could indicate that the petitioner filed the petition prematurely, before there had been time to gauge the impact of his published work. (With regard to premature filing, we note that the petitioner filed the petition seven weeks after he received his doctoral degree.)

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). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The two documented citations of the petitioner's work both appeared after the petition's filing date. Furthermore, one of these two citations is a self-citation by the petitioner and his collaborators, citing an article that was published after the filing date.

The petitioner claimed that his participation "in government projects . . . testifies that [he] has made contributions to the national interest and he is deemed as one of the most recognized experts in the field." This particular argument is not persuasive; the petitioner did not establish that only "the most recognized experts" are "able to participate in government projects."

The petitioner submitted additional witness letters. Three of the witnesses work at various NOAA laboratories. [REDACTED] of GLERL at NOAA, stated:

[The petitioner] was recently selected by me as a research investigator to work at GLERL and the University of Michigan. . . .

[The petitioner's] research results during his Ph.D. studies have greatly inspired GLERL scientists. His plume dynamics models have been applied to Lake Michigan Plume dynamics in our lab and have received very positive feedback from GLERL scientists.

[REDACTED] of the NOAA National Severe Storms Laboratory in Norman, Oklahoma, stated that the petitioner's "work has had a significant impact within his field. From my observation, [the petitioner] is beginning to compile a strong record of academic excellence. . . . [The petitioner's] baroclinic water quality model . . . has been successfully applied to Pamlico estuary in North Carolina."

[REDACTED] at NOAA's Center for Operational Oceanographic Products and Services, Silver Spring, Maryland, stated that the petitioner "has been showing . . . leadership in the coastal physical oceanography."

of the Ocean Modeling Group at Princeton University, stated:

As one of the major developers of the Princeton Ocean Model (POM) which has been used widely in the world, I know the importance of mathematical modeling in forecasting the oceanic or atmospheric states. . . .

The first achievement [the petitioner] achieved is a significant breakthrough in the digital evaluation of the Hurricane induced storm surge by using the Princeton Ocean Model (POM) with complex dynamics and physics. . . . Prior to [the petitioner's] result, no other scholars had successfully used POM to forecast hurricane induced storm surge. By using POM, [the petitioner's] research identified that Hurricane-induced storm surge is very sensitive to hurricane tracks. . . . This represents a breakthrough in the field of numerical modeling for improving the forecasts of the hurricane and hurricane-induced storm surge/flooding.

University of Connecticut Assistant [REDACTED] praised the petitioner's "impressive publication record" and stated that the petitioner "is a young scientist on track to being a leader in coastal oceanographic research." [REDACTED] added:

[The petitioner's] plume dynamics research is very impressive. His plume dynamics research stands out because he successfully developed a realistic numerical simulation for a river estuary that reproduces the complex physical processes using sophisticated numerical techniques. He has successfully described how plume structure responds to wind, buoyancy, and tides for the Cape Fear River Estuary. Compared to other similar research results, [the petitioner's] work is much better because of the accuracy and the efficiency of his model. It is thus very clear to me that [the petitioner] was able to distinguish himself from many other people in our field. His research has fundamentally improved our understanding of river estuaries and I believe it will motivate plume dynamics research conducted by other U.S. researchers and scientists.

[REDACTED] of the Watershed Assessment Section at the Florida Department of Environmental Protection, stated that the petitioner's "research achievements are truly outstanding."

The director denied the petition on January 20, 2009, stating: "The record leaves no doubt you seek employment in an area of substantial intrinsic merit or that the proposed benefit will be national in scope. This leaves the issue of your contributions to nephrology." On appeal, the petitioner states: "The director clearly made a] mistake here since the petitioner's major field is physical oceanography and marine science, instead of nephrology" (emphasis in original). Clearly the reference to nephrology was incorrect; it was likely copied from an earlier decision. Nevertheless, the decision contains other correct references to the petitioner's work, and correctly identifies various witnesses. Therefore, the director obviously did not issue a decision intended for a different petitioner. The isolated reference to nephrology, though incorrect, does not discredit the director's entire decision. Of greater concern is this passage in the director's decision:

[N]othing submitted with the petition clearly establishes that any portion of your research, taken either individually or in the aggregate, was of such a truly groundbreaking nature that it greatly altered the thinking and/or approach of a vast number of oceanographers/marine scientists or other similarly employed researchers. That is to say, nothing in any of the letters of any other part of the record convinces this office that your work has at the time the petition was filed so figuratively shook the field of oceanography research that your name has become essentially a household one among other researchers. Too, the record does not absolutely, convincingly document and make clear that your presence on any of your research projects was so critical that the entire endeavor would virtually had to have ceased in your absence.

The petitioner protests that the director's stated requirements are "clearly overly restrict[ive]" (emphasis in original), and that "almost no one except the one or two very top leaders in each research field could satisfy this requirement."

The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here, the director has erred by replacing the "preponderance of evidence" standard with a stricter "clear and convincing" standard. More seriously, the director has greatly overstated the degree of influence required for an alien to qualify for the national interest waiver. It is absolutely true that the petitioner cannot simply show that he is an above-average oceanographer. This does not mean, however, that the petitioner must be a "household" name who "shook the field of oceanography research."

While the petitioner must meet a higher standard than "exceptional ability," that standard does not rise to the level of "extraordinary ability" as set forth in section 203(b)(1)(A) of the Act (which refers to "sustained national or international acclaim") and defined at 8 C.F.R. § 204.5(h)(2) as "a level of

expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” The director made a significant error by asserting that the petitioner must be not only an influential figure in his field, but also one of the best-known figures who has made fundamental changes to the very nature of that field, and without whom progress would cease.

We acknowledge the difficulty of establishing a simple, fixed standard for the national interest waiver, particularly when the statute and regulations offer no meaningful guidance in this regard. *Matter of New York State Dept. of Transportation*, while surely imperfect, is at present the only controlling case law to specifically address the national interest waiver. Nothing in that decision can be interpreted to support the onerous standards described in the director’s decision.

The director correctly observed that the petitioner’s citation record is negligible, but the petitioner, on appeal, is equally correct in asserting that citations are not the only permissible measure of his influence. In this instance, the petitioner has submitted letters from independent witnesses at numerous academic and government institutions, attesting to the significance of his work. The submission of independent witness letters should not, by any means, result in the automatic approval of a waiver application; each letter requires careful consideration on its own merits. In this instance, the witnesses did not merely peruse the petitioner’s *curriculum vitae* and published articles; they have, in many cases, explained exactly why the petitioner’s work is important and how it has affected their own work. The developer of the Princeton Ocean Model praised the petitioner’s innovative use of that model.

Looking at the record as a whole, the preponderance of available evidence indicates that the petitioner’s work has attracted attention not just among his collaborators, but throughout his field. Credible, independent experts have stated that the petitioner has significantly improved oceanographic models with obvious implications for public safety and other issues of concern. The record does not rise to the director’s almost impossibly high standard of proof, but it does show that the petitioner is a well-regarded and influential oceanographer who, even at this very early stage in his career, has made a significant mark on his field.

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.