



U.S. Department of Justice

Immigration and Naturalization Service

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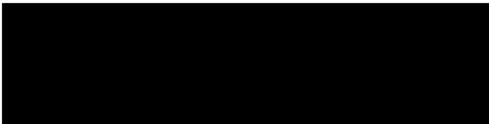


File: [Redacted] Office: Vermont Service Center Date: 05 Dec 2001

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)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal, reopened the matter on the petitioner's motion, and affirmed the denial of the petition. The matter is now before the Associate Commissioner on a second motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

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 an alien of exceptional ability and as a member of the professions holding an advanced degree. The petitioner seeks employment as the president of an export company specializing in electronic components. 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. In denying the petition, the director stated that the available evidence indicates that the petitioner is a competent businessman, but not an exceptional one, and that the petitioner had not demonstrated an economic impact that would justify a national interest waiver of the statutory job offer requirement. The Administrative Appeals Office ("AAO"), in dismissing the appeal, concurred that the petitioner had not established exceptional ability or eligibility for a national interest waiver.

In his first motion, the petitioner argued that he qualifies as a member of the professions holding an advanced degree as well as an alien of exceptional ability in business. The petitioner also contended that he merits a national interest waiver because his business contributes to the economy by providing jobs and stimulating manufacture. The AAO found that the petitioner had not established eligibility for the underlying visa classification, and that the petitioner had not shown that his contributions outweigh those of any other competent business manager to an extent that would merit a special exemption from the statutory requirement of a job offer with a labor certification.

On motion, the petitioner (who consistently refers to himself in the third person) contends that "the INS is viewing his application under this section with the **presumption of denial only**" (emphasis in original). We note that, regardless of how many motions the petitioner files, the burden of proof remains on him; there is never a presumption of eligibility in a visa petition such as the matter at hand. We also note that the petitioner has repeatedly requested appellate review of this matter. Because the primary purpose of appellate review is to correct prior Service error, the petitioner cannot demand that the AAO remedy only those errors which are against the petitioner's interest, while ignoring errors in the petitioner's favor. We have already found that the director erred by stating that the petitioner qualifies as a member of the

professions holding an advanced degree, and we have explained this finding in our prior decisions. The filing of one or more motions does not compel a finding that is favorable to the petitioner, nor is the AAO barred from overturning any specific finding by the director.

Section 203(b) of the Act states in pertinent part that:

(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. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement 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 first issue to be decided is whether the petitioner is a member of the professions with an advanced degree, and/or an alien of exceptional ability. The petitioner argues on motion that the Service has already acknowledged that he is a member of the professions, because his "petition was earlier approved for H1B visa, which confirms that the equivalency submitted by the petitioner, is accepted by the [S]ervice as having Baccalaureate degree." The requirements for an H-1B nonimmigrant visa differ from the requirements for an immigrant visa as a member of the professions holding an advanced degree. We repeat here some salient points from the regulatory language:

The regulation at 8 C.F.R. 204.5(k)(2) states, in pertinent part:

Advanced degree means any United States academic or professional degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The Service's regulation at 8 C.F.R. 204.5(k)(3)(i) states:

To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The AAO has already explained that the alien must possess either a baccalaureate degree from a U.S. institution, or a foreign degree which is at least equivalent to a U.S. baccalaureate degree. The petitioner has submitted evidence showing that his college education amounts to the equivalent of three years of a four-year baccalaureate program. The petitioner does not hold any degree that is equivalent to a U.S. baccalaureate. His assertions to the effect that his post-college experience is equivalent to college credit are entirely without weight because the regulations plainly require "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree."

Because the petitioner is not an advanced-degree professional, the petitioner cannot receive a visa under section 203(b)(2) of the Act unless he qualifies as an alien of exceptional ability. The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. We have addressed these six criteria in prior decisions in this matter.

We note that one of the criteria pertains to the alien's receipt of a salary or other remuneration indicative of exceptional ability. The petitioner now argues that "a higher salary does not necessarily demonstrate exceptional ability. The petitioner has deliberately chosen to take a low salary so that the money could be ploughed back into the company in order to grow it." It does not follow from the petitioner's reasoning that a low salary is inherently indicative of exceptional ability. While the petitioner's decision to pay himself a low salary in order to boost his company's finances may make economic sense, it does not demonstrate or imply exceptional ability.

The petitioner observes that he has previously submitted a number of witness letters in support of his petition, and he contends that he would not have been able to obtain these letters were it not for his exceptional ability in business. The petitioner asserts that the Service has an ethical responsibility to contact the authors of the letters if the petitioner's eligibility is in doubt. This latest attempt to shift the burden of proof to the Service, like all the petitioner's other attempts, is without legal foundation and is not persuasive.

The petitioner submits evidence that, in May 1999, his company received a 1999 Hudson Valley Award for Achievement in International Trade, and that his company's gross sales for 1999-2000 approached \$600,000. The petitioner admits that this evidence "cannot be considered" because it does not establish his eligibility as of the petitioner's June 1997 filing date. Nevertheless, the petitioner asserts, this evidence establishes that his business "will substantially benefit prospectively the national economy." While the award may offer some support for a claim of exceptional ability, a plain reading of the regulations shows that exceptional ability in one's field of endeavor does not, by itself, compel the Service to grant a national interest waiver of the job offer requirement. The award, which is clearly local in nature, is in the category of "Exporter of Manufactured Goods - Small to medium company." The petitioner's gross sales do not take his expenses into account; his taxable income for the same period, amounting to just over \$30,000, does not appear to indicate significant economic impact at the national level.

The petitioner submits several other documents on motion which he had already submitted with the petition and/or with his first motion. The arguments regarding these documents are, for the most part, largely identical to arguments already set forth in the previous motion. Simply repeating arguments that we have already considered is not grounds for reopening the petition or overturning prior findings. The purpose of a motion to reopen is to consider new evidence not previously available, which establishes that the petition should have been approved as of the filing date. The purpose of a motion to reconsider is to offer legal arguments concerning errors in the Service's prior reasoning. The motion process is not intended to allow a petitioner to indefinitely delay closure of his petition by repeatedly submitting the same package of evidence and arguments, as he has done in this case. We have limited consideration to newly submitted evidence and arguments relating thereto.

Even if we were to find that the petitioner qualifies as an alien of exceptional ability in business, the petition would not be approvable. The petitioner's overall argument appears to be that he merits a national interest waiver because he is an entrepreneur who operates a successful export business. Certainly the conduct

of business in general is in the national interest, but it does not follow that every entrepreneur who maintains a viable company is entitled to an exemption of the job offer/labor certification requirement which, by law, attaches to the classification the petitioner seeks. The petitioner's overall impact appears to be primarily local, and as recently as 1999 the petitioner's local Chamber of Commerce deemed the petitioner's business to be a "small to medium company." While the petitioner has earned admirers through his work, he has not shown that his efforts have had such a disproportionately great economic effect that he merits the special benefit of a national interest waiver.

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. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of October 23, 2000 is affirmed. The petition is denied.