



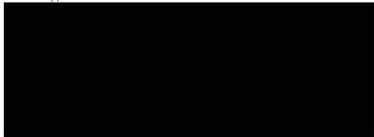
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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
JLLB, 3rd Floor
Washington, D.C. 20536



File: WAC 99 046 50189

Office: California Service Center

Date: DEC 13 2001

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)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision 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 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 that 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 that 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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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 with education and experience equivalent to an advanced degree. The petitioner seeks employment as a recruiting supervisor/manager at John Hancock Financial Services. 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 does not qualify for classification as a member of the professions holding an advanced degree, and 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.

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. 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.

Counsel asserts that the petitioner qualifies for this classification because he earned a B.A. in International Studies with a concentration in Trade and Finance from Chaminade University of Honolulu, and he has documented more than five years of relevant progressive post-baccalaureate experience.

In denying the petition, the director stated:

[T]he petitioner started out as an agent, was promoted to the marketing and customer service divisions, and is now a recruiting supervisor/manager. Therefore, the petitioner's duties for each of his positions held were not progressively responsible for at least a five-year period since his duties were different for each position held. He therefore did not specialize in the same occupation progressively. Finally, the occupation of Recruiting Supervisor/Manager is not one that generally requires an advanced degree professional.

The director concluded that, because the nature of the petitioner's duties has changed (as shown in a letter from general agent Irving T. Hallman), the petitioner has not accumulated at least five years of progressive experience in any one occupation. We find, however, that the petitioner's various positions are fundamentally related. The petitioner's recruitment work requires specialized knowledge of the positions for which the recruitment takes place, and his promotion to his current position is the result of a logical progression from his earlier duties.

8 C.F.R. 204.5(k)(4)(i) states "[t]he job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree," but this provision does not apply to national interest waiver petitions, in which there is no individual labor certification. In many instances involving the national interest waiver, there is no specific job offer. The regulations contain no express requirement that a petitioner seeking a waiver of the job offer requirement must establish that the position sought requires an advanced degree. The petitioner must show only that the position is professional in nature, i.e. it must require at least a baccalaureate for entry into the occupation. The petitioner's post-baccalaureate experience in this instance appears to be in a professional occupation and therefore we withdraw the director's conclusion regarding the petitioner's eligibility for the visa classification sought.

The petitioner qualifies as a member of the professions with post-baccalaureate experience equivalent to an advanced degree. The remaining issue 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 Service 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 Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service 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, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 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.

Irving T. Hallman, general agent for John Hancock, describes the petitioner's current duties as a recruiting supervisor/manager:

Responsible for administering and overseeing all functions of the recruiting and selection process. As the catalyst it is important to have continuous flow of potential candidates to consider for full time employment. Conduct initial interviews and assist with subsequent interviews. Administer training during selection process. Screen applicant during initial telephone contact and face to face meetings. Instruct and distribute material for licensing requirements.

Mr. Hallman states that the petitioner's "recruiting expertise and his professionalism have made John Hancock Hawaii one of the premier Financial Services firms in the state of Hawaii and in the country." Mr. Hallman (whose comments are spread out over several letters) indicates that the petitioner has been very successful in his work, "winning the recruiter of the year in 1996 and 1997 with a total of 29 new people hired," and that the petitioner was a guest speaker at nationwide corporate conferences.

Evans L. Taylor, sales manager for John Hancock, states:

[The petitioner] became the recruiting supervisor at the time the Hawaii Agency was having difficulties meeting their recruiting goal. It was because of [the petitioner's] exceptional and invaluable ability, expertise and experience in financial planning and professional recruiting, that we were able to turn the place around and reach our recruiting goal. This in turn has allowed the Hawaii Agency to increase the overall production goals.

[The petitioner] has [the] unique and exceptional combination of being an expert in financial planning as well as professional recruiting. His talent, ability, education and life experiences separates him from other recruiters at John Hancock as well as other financial services organizations.

The petitioner does not persuasively explain how his local recruiting efforts serve the national interest. While his work may ensure that certain skilled workers seek employment with John Hancock rather than with a rival financial services firm, there is no inherent national interest in ensuring that John Hancock, rather than some other firm, is the dominant financial services company in Hawaii.

The record shows that the petitioner is part owner of a café which employs 13 U.S. citizen workers. Irving Hallman, in his aforementioned employment letter, indicates that the petitioner is a full-time employee of John Hancock who typically works 50 hours per week. It is not clear whether the petitioner is actively

involved in the operation of the café, or largely a passive investor in the enterprise, but his heavy work schedule at John Hancock seems to demonstrate that the petitioner is not able to devote a significant amount of time to the operation of the café.

Section 203(b)(5) of the Act has created a separate visa classification for aliens who invest at least \$500,000 (generally \$1,000,000) in a new or troubled business that creates at least ten new jobs for U.S. workers. The petitioner's investment of \$200,000 in an already-existing and viable business does not inherently demonstrate eligibility for a national interest waiver.

The record contains substantial documentation regarding the petitioner's athletic activities as a college basketball player, first at the College of Southern Idaho and then at Chaminade University of Honolulu. Since 1996, the petitioner has been a volunteer assistant basketball coach at the latter school.

The petitioner's principal employment is as a full-time recruiting supervisor/manager at John Hancock, and it is on the basis of that employment that the petitioner seeks classification as a member of the professions holding an advanced degree. The petitioner's request for a national interest waiver must be based on that employment.

The petitioner in this case seeks an employment-based visa classification. The petitioner's activities which are held to be in the national interest must, therefore, derive from the same employment that qualifies him for the underlying classification. The national interest waiver is statutorily limited to advanced degree professionals and aliens of exceptional ability. The petitioner has not explained why the volunteer activities of advanced degree professionals or exceptional aliens should be rewarded with an immigration benefit (i.e., the national interest waiver), when the comparable efforts of aliens in other visa classifications cannot be so recognized. Therefore, fundamental fairness dictates that activities unrelated to one's employment cannot fairly be considered in the context of an application for an employment-based national interest waiver.

For the reasons discussed above, while the petitioner had some impressive accomplishments as a college basketball player, it does not follow that he will serve the national interest as a manager with John Hancock. His more limited activities as an assistant coach do not appear to have any direct effect outside of the basketball team at Chaminade University of Honolulu.

While the petitioner has submitted a number of witness letters in support of his waiver request, almost all of the authors of these letters are affiliated with Chaminade University and John Hancock. The letters establish that the petitioner is a valued employee of

John Hancock and a respected figure in the Honolulu area who tutors and otherwise assists local college students. In a statement addressing the waiver application, counsel offers various vague and general assertions regarding the importance of commerce, role models, and so on, but counsel fails to establish that the petitioner's activities are of such national importance that the petitioner warrants a waiver of the job offer requirement which, by law, normally applies to the visa classification sought.

The director denied the petition, stating "[t]he evidence presented does not establish that the petitioner's work has been in the nation's interest—on a national level—or will continue to be in the future." The director noted that "it was clearly not the intent of Congress that every business owner who employs U.S. workers should be exempt from the labor certification process" and that the petitioner's volunteer athletic activities likewise fail to establish eligibility.

On appeal, the petitioner submits copies of previously submitted documents as well as some new exhibits and arguments from counsel.

Counsel states that MassMutual Life Insurance Company has offered him a position as a general manager. The record contains no documentation of this offer. The record does contain a description of the duties of a MassMutual general manager, but this document is general in nature and does not show that MassMutual has offered the position to the beneficiary. Furthermore, even if the petitioner had established the offer, it was not in effect as of the petition's filing date and therefore it cannot retroactively establish that the petition was approvable as of the filing date. See Matter of Katicbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Finally, counsel fails to explain why a job offer represents a compelling factor in favor of waiving the job offer requirement.

The petitioner submits further documentation regarding the petitioner's café, but there is no evidence that the petitioner (who works 50 hours a week for John Hancock and volunteers for the college basketball team) takes an active role in running the business. The passive act of owning a business does not inherently serve the national interest. Counsel states that "if [the petitioner] were not permitted to continue his work, the U.S. citizens employed by him would become unemployed and the business . . . would close." We note that the café has existed since 1980 and was already well-established when the petitioner purchased it as a "going concern" in 1998, and the record shows that the café had changed hands on more than one occasion. There is no evidence that the business would inevitably or automatically close if this petition is not approved. If the petitioner chooses to fire his

employees in response to the denial of the petition, it is the petitioner, not the Service, who has made the continued employment of those workers contingent on the outcome of the petition. An alien cannot qualify for a national interest waiver by buying a well-established existing business and then threatening to fire its workers unless the waiver is granted.

The record shows that the petitioner has contributed to the growth of an already massively successful insurance and financial services company, while donating his time to a local college sports team and investing in a successful side business. We certainly cannot say that the petitioner lacks initiative and dedication to his community. At the same time, the record offers no persuasive evidence that the petitioner's activities have had a significant impact outside of certain groups in the Honolulu area, or that the petitioner's activities as a recruiter for John Hancock offer any net benefit to the United States economy, rather than simply promoting the success of one business at the expense of its U.S. rivals.

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, U.S.C. 1361. The petitioner has not sustained that burden.

This denial 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.