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U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

JUL 16 2001

File: EAC 98 265 50320 Office: Vermont Service Center Date:

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: Self-represented

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, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont 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 an alien of exceptional ability and as a member of the professions holding an advanced degree. 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 neither as an alien of exceptional ability nor as a member of the professions holding an advanced degree, and 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.

The record is, at times, ambiguous as to which classification the petitioner seeks. At times, she refers to herself as an alien of extraordinary ability, a classification established and defined at section 203(b)(1)(A) of the Act. More frequently, however, the petitioner refers to the national interest waiver of the job offer requirement. This waiver applies only to aliens seeking classification under section 203(b)(2) of the Act as aliens of exceptional ability, or as members of the professions holding an advanced degree. On the Form I-140 petition itself, the petitioner has indicated that she seeks classification under section 203(b)(2), and it is under that classification that the director adjudicated the petition. On appeal, the petitioner does not contend that the director erred in limiting consideration to that classification. Because a single Form I-140 petition does not qualify an alien for consideration under multiple classifications, we will not here consider the petitioner's occasional claims of extraordinary ability.

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 appears to have claimed eligibility for each of these classifications. The director determined that the petitioner does not qualify either as an advanced-degree professional or as an alien of exceptional ability.

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

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 petitioner claims no advanced degree. She received a bachelor's degree in Languages and Literature (German and English) in 1974, and has documented several years of experience as a translator. The petitioner has asserted that this post-baccalaureate experience constitutes the recognized equivalent of a master's degree. The petitioner, however, has offered no evidence to establish that one must hold a bachelor's degree in order to work as a translator or interpreter. Without such evidence, we cannot conclude that the petitioner is a member of the professions as the pertinent regulations define that term. An alien does not qualify as an advanced-degree professional simply by holding an advanced degree or its equivalent.

The petitioner asserts that her skills qualify her "for a range of professional jobs" such as teaching and some computer-related

occupations. The fact that she is capable of securing professional employment, however, cannot suffice to establish that she is a member of the professions. While the statute and regulations indicate that an alien seeking a national interest waiver need not have a specific job offer, it does not follow that the alien can obtain a waiver with only a very general idea of what type of employment she intends to pursue.

On appeal, the petitioner contends that she seeks employment as a teacher, which qualifies as a profession. The initial petition, however, offered no clear indication that the petitioner intends to teach. The petitioner initially indicated that she had contacted "persons and companies" to find employment; she never stated that she had contacted schools. In a statement accompanying the initial petition, the petitioner has stated:

I came here [to the U.S.] to visit my friends from the Internet, fell in love with the country and decided to go for myself here, since I felt this was my time and place now. . . .

I want to stay here for many, many reasons. The United States of America have been a part of my life since I was a kid back in Brazil. . . .

American music has nourished my soul forever. Gershwin, Cole Porter, Rodgers and Hart, the Hammersteins and many others have always brought me here. . . . And Walt Disney

I won't even mention all the American authors, writers and artists who influenced me. . . .

I needed to know what this nation was like. . . . And I decided to stay.

The tone of this early statement, which includes only vague references to what the petitioner intends to do for a living if she becomes a permanent resident, suggests that the petitioner considers her career to be of secondary importance; her chief goal appears to be simply to reside in the United States by any means available to her. Only on appeal does the petitioner state unambiguously that she seeks employment as a teacher.

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998). Prior to the director's decision, the petitioner had not plainly stated that she seeks employment as a teacher. Her earlier communications suggested that she seeks employment as a translator or "language consultant," the term on her business card. The petitioner has

even submitted evidence of her work as an artist and author, further obscuring her exact occupational intentions.

In a two-page letter submitted in response to the director's request for additional information, the petitioner states that she had "tried for many months to find a company to sponsor" her. The petitioner describes her skills and vaguely expressed various goals, but the only time she mentions teaching in this letter is when she discusses various volunteer efforts she has undertaken in the United States - she names several venues where she has worked as a volunteer, one of which is a school.

Given the information which the petitioner chose to present to the director, we cannot find that the director erred in determining that the petitioner is not a member of the professions holding an advanced degree.

Because the petitioner has not established eligibility as an advanced-degree professional, the petitioner cannot receive a visa under section 203(b)(2) of the Act unless she 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. These criteria follow below.

We 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." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows "exceptional" traits.

The petitioner's first serious effort to address the regulatory criteria is on appeal; therefore, we will address the petitioner's comments on appeal in the context of those criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

As noted above, the petitioner holds a bachelor's degree relating to language skills. The petitioner also has taken some short-term courses in translation skills. Because the record offers no evidence regarding the usual educational requirements for a translator, we cannot determine whether or not it is at all unusual for a worker in that field to hold a bachelor's degree. Thus, the

petitioner (on whom the burden of proof rests) has not satisfied this criterion as a translator.

As we have also noted above, the petitioner asserts on appeal that she seeks employment as a teacher. In such an event, her credentials as a translator are of diminished relevance, and the petitioner admits that she has no training in the field of education. The Department of Labor's Occupational Outlook Handbook, ("Handbook"), 1998-1999 edition, page 168, indicates that a Ph.D., or at least a master's degree, is required for most college and university faculty positions; and on page 177, the Handbook indicates that a bachelor's degree is a universal requirement for public school teachers throughout the United States. Thus, assuming the petitioner intends to work as a teacher, her own baccalaureate degree is not evidence of exceptional ability; it is a minimum requirement for school teachers, and an insufficient qualification for university teachers.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

As noted above, it is not fully clear exactly what occupation the petitioner initially sought when she filed the petition. She has, however, demonstrated over ten years of experience in a variety of language-related occupations including teaching and translating. Upon consideration, we conclude that the petitioner meets this criterion.

A license to practice the profession or certification for a particular profession or occupation.

The petitioner holds a license in Foreign Language Education in her native Brazil. The petitioner states on appeal that her work "required . . . a license." If licensure is compulsory in a given occupation, then it is not indicative of a degree of expertise significantly above that ordinarily encountered in the field; everyone legitimately employed in that field holds such a license and therefore licensure is not "exceptional."

The petitioner claims no licensure or certification in any occupation outside of teaching.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

The petitioner makes no claims regarding this criterion. On appeal, she states only that she "earned a salary in Brazil."

Being paid for one's work does not distinguish one from any other gainfully employed individual. At issue is whether the petitioner's abilities were so clearly superior that she commanded a substantially higher salary than what is ordinary encountered in the petitioner's field.

Evidence of membership in professional associations.

The petitioner was an official of the German Teachers Association of Minas Gerais, Brazil, from 1992 to 1997. As with several other regulatory criteria, the petitioner attempts on appeal to satisfy this criterion through her teaching work, although her initial petition made scant mention of teaching, focusing instead on her translating work and her efforts to find employment with various "companies."

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The petitioner cites her involvement with various teaching organizations, without establishing that she has made contributions of particular significance to the field as a whole (as opposed to a small, local community of colleagues or clients).

The record does not show that the petitioner has established a record of accomplishment and credentials that would set her apart from others in her field, to an extent that she could be considered "exceptional" as the pertinent regulations contemplate that term. 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.

The director did not discuss at length the petitioner's national interest claim; rather, the director simply stated the guidelines published in Matter of New York State Dept. of Transportation. This omission is not fatal to the director's decision, because the director had already determined that the petitioner does not qualify for the underlying visa classification. Therefore, the issue of the national interest waiver is moot. In the interest of thoroughness, we will briefly address the petitioner's claim here.

The application for a national interest waiver cannot be approved. The regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this document, and therefore, by regulation, the petitioner cannot be considered for a waiver of the job offer requirement.

With the petition, the petitioner has submitted a personal statement in which she explains her reasons for wanting to remain in the United States. The petitioner also discusses her job skills and her efforts to secure employment:

I have extensive experience in translating and teaching German, English and Brazilian Portuguese (my native language). In

Brazil I worked also with technical, music, and literary translations. I have also a good working knowledge of Italian, French and Spanish. . . .

I am capable of using most office software, Windows 3.1, Windows 95, Windows NT, Netscape, I use the Internet extensively. I feel comfortable in a technical environment as well as in human resources and I learn very fast, am open to new experiences. . . .

Trying to find a company to sponsor me so that I can work . . . is tougher than I thought. I have had many job offers, but as soon as I mention the word *sponsorship* they give up. . . .

I am applying for an exemption of job offer. I am applying for an exemption of a sponsorship. I am my own sponsor. I know what I can do. My potential and my limitations. . . .

I am to prove I am of national interest. What does it mean to be of national interest?

We are all of national interest, so I see it. You and I and millions of other people are the famous unknown soldiers of an everyday war. . . .

Many of my life's achievements cannot be proved here in the USA for the most varied reasons. But I am comfortable to say that I am a respectable human being and a responsible citizen. Wherever I might be.

This statement reinforces our finding that, when she first filed the petition, the petitioner appears to have had no clear idea of what occupation she intended to seek in the United States.

The petitioner states that she has taken an interest in volunteer activities, in part because she has not legally been able to secure paid employment in the United States. The petitioner submits letters from various acquaintances and colleagues, attesting to her skill, dedication, and personal character. The petitioner also submits samples of documents which she has translated. These documents attest to the petitioner's competence as a translator, but they do not show how she has significantly more to offer the United States than other competent, fully qualified translators.

The petitioner's assertion that every person, in their own way, serves the national interest amounts to a personal philosophy rather than a cogent legal argument; we cannot accept the implied inference that, because "[w]e are all of national interest," therefore the statutory job offer requirement should never be enforced. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect.

Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). The statutory job offer requirement would have no purpose or meaningful effect if it were automatically waived for every alien.

On appeal, the petitioner submits documentation regarding a shortage of language teachers in the vicinity of Alexandria, Virginia (where the petitioner resided at the time of filing). We have already discussed the petitioner's apparent shift from translation to teaching upon filing the appeal. Also, the petitioner's work as a teacher would have only a very limited, local impact, with little effect outside of her own group of students and the school where she would teach.

Furthermore, a shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. See Matter of New York State Dept. of Transportation, supra.

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.