



U.S. Department of Justice

Immigration and Naturalization Service

PS

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



File: WAC 98 040 53002 Office: California Service Center Date:

JUL 25 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)

Public Copy

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, Acting Director
Administrative Appeals Office

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

Although the motion was filed in an untimely manner, counsel has presented a satisfactory explanation and we therefore excuse the late filing, pursuant to 8 C.F.R. 103.5(a)(1)(i).

The petitioner seeks to classify the beneficiary 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 or as a member of the professions holding an advanced degree. The petitioner, an institution of higher learning, seeks to employ the beneficiary as an instructor of women's studies and Nepali language and culture. 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 beneficiary qualifies for classification as an alien of exceptional ability, 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. The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, affirmed the director's decision and dismissed the appeal.

We note that the motion contains a new statement by the beneficiary, but it contains nothing at all from the petitioner. While counsel states that the motion has been filed on the petitioner's behalf, there is no direct evidence on motion that the petitioner is interested in pursuing the matter. We further note that counsel's explanation for the untimely filing of the motion revolves almost entirely around the personal circumstances of the beneficiary.

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.

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.

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 has not properly applied for a waiver of the job offer requirement. The AAO, in its prior appellate decision, noted the absence of this critical document, but on motion the petitioner again fails to submit Form ETA-750B.

The AAO, in its appellate decision, concluded "[t]he record has not established the significance of the beneficiary's contribution outside of southern California." The AAO further asserted "the national interest waiver is intended as an occasional exception to the requirements imposed on every advanced degree professional and every alien of exceptional ability." On motion, counsel states:

While petitioner agrees that the national interest waiver is intended as an exception to the normal requirements of labor certification and job offer, the requirements should not also be blindly and routinely followed when it is clear that no useful purpose is served in mechanically going through the

process. . . . Teaching faculty both at the University of California and the [petitioning] employer . . . assert that there are not enough qualified candidates to teach these language classes. . . .

To require the employer to go through the labor certification process just as a formality knowing that it is going to be [a] futile and time-consuming effort, defeats Congress' intent and the spirit of the provision.

In effect, counsel appears to argue: (1) the purpose of labor certification is to establish that qualified workers are unavailable for a given position; (2) experts in the beneficiary's field have attested that such workers are unavailable, and therefore (3) the determination of a shortage having already been made, labor certification would serve no useful purpose.

This argument is not persuasive. Counsel cites no statute or regulation which allows an employer to unilaterally declare exemption from labor certification on the grounds that such a process would be superfluous. Counsel fails to explain how an approved labor certification, which achieves the ultimate result desired by the petitioning employer, represents a "futile . . . effort" rather than a successful one.

The determination of a local worker shortage lies under the jurisdiction of the Department of Labor, and this office has no discretion to shift that responsibility to the petitioning employer. Counsel may deem compliance with federal law to be "blind," "routine" or "mechanical," but the pertinent statute does not deem labor certification to be a purely optional process, to be waived at the discretion of the petitioner.

With regard to Congressional intent, 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). In this instance, Congress clearly intended for the labor certification requirement to remain in place. Yet counsel contends that, if a labor certification is likely to be approved, the employer should be able to bypass labor certification altogether as a "formality."

Counsel's objections apparently rest on the fundamental nature of labor certification itself, and have no specific bearing on this case. General arguments to the effect that labor certification is fundamentally flawed are misplaced in this proceeding; the Service, and the Department of Labor, are bound by the statutes and regulations now in place.

Two letters accompany the motion. Oren Bergman, administrative director of the Nupur Dance Company, states:

[The beneficiary's] contribution to the culture and academia, through her efforts in teaching and promoting Himalayan Studies, is highly appreciated by many students and members of the community. She has helped bring awareness of the Himalayan culture to a large number of people. . . .

I do hope that her contribution to Himalayan Studies will continue to prosper and grow in the East Bay community.

Mr. Bergman's letter appears to limit the beneficiary's direct impact to the East Bay area near San Francisco. He offers no indication as to how the beneficiary's efforts have affected the United States to a substantially greater degree than the efforts of other language teachers.

Lisa Pious, who identifies herself as "an on-going Nepali language student, and also as a long-time friend," states that the beneficiary "is an astute observer of and has done research on many aspects of Himalayan cultures, including the role of women in various Himalayan societies, and prostitution in Nepal." Ms. Pious asserts that the beneficiary's "combination of first-hand experience . . . and formal training make[s] her a valuable resource" and "an asset to any teaching program of the cultures of the Himalayan region."

The new letters submitted on motion indicate that the beneficiary is well-qualified to work in her field, but they do not show that it would be in the national interest to exempt the beneficiary from the labor certification requirement which, by law, attaches to the visa classification sought.

The motion does not address key issues raised by the AAO in its prior appellate decision, and therefore the petitioner has not overcome that decision on motion.

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 July 6, 1998 is affirmed. The petition is denied.