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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



File: [Redacted]

Office: Texas Service Center

Date: NOV 26 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:

Self-represented

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, Texas 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.

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. The petitioner seeks employment as a legal consultant. 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. The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, affirmed the director's decision in part and dismissed the appeal. The AAO withdrew the director's finding that the petitioner qualifies as a member of the professions holding an advanced degree, because the record at that time lacked the required academic records.

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 addressed is the petitioner's eligibility for the underlying visa classification. The petitioner claims she had sent official academic records with her petition. The petitioner submits new copies on motion. This documentation satisfies the evidentiary requirements and establishes that the petitioner

qualifies as a member of the professions holding an advanced degree. The AAO's prior finding in this regard is withdrawn, based on the newly submitted evidence.

The remaining 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.

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 petitioner, on motion, offers no rebuttal to the AAO's findings regarding the national interest waiver. The petitioner states that she has attempted to secure employment with an existing law firm, but that she has encountered difficulty in doing so. The remainder of the petitioner's statement on motion concerns an appeal filed by her husband (which lies outside the scope of this proceeding) and general observations about the difficulties of being a recently arrived immigrant in Florida. The petitioner submits copies of income tax returns, which have no demonstrable relevance to the petitioner's claim that she will serve the national interest as a legal consultant.

Several months after filing the motion, the petitioner has submitted new documentation. There is no regulation which allows the petitioner an open-ended or indefinite period in which to supplement a previously-filed motion. 8 C.F.R. 103.3(a)(2)(vii) requires a petitioner to request, in writing and in advance, additional time to submit a brief. The existence of this regulation demonstrates that the late submission of supplements to an appeal is a privilege rather than a right. Even these limited circumstances for late supplements expressly apply to appeals rather than to motions; there is no regulatory provision at all to allow a petitioner to supplement a motion at any time, let alone months after the filing of that motion. Any consideration at all given to such untimely submissions, which are not preceded by timely requests for an extension, is discretionary. The act of filing a motion to reopen does not grant the petitioner an indefinite or open-ended period in which to supplement the record at will.

The petitioner submits documentation showing that she and her husband have established a consulting firm, which has offered her employment as a consultant. Documents in the record show that this firm was not even incorporated until a month after the motion was filed. 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), and Matter of Katigbak, 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.

Furthermore, while the petitioner has submitted an application for labor certification along with the job offer from her own consulting firm, this application has not been approved by the Department of Labor. Without an approved labor certification, the petitioner still must demonstrate that a waiver of the job offer

requirement (which includes an approved labor certification) would be in the national interest.

Even if the petitioner were to somehow secure an approved labor certification from a company that she founded and owns, we could consider that document only in the context of a newly filed petition. The petitioner appears to have submitted her application for labor certification in February 2001,¹ which cannot secure the petitioner a May 1998 priority date. For immigrant visa petitions involving a labor certification, the petition's filing date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The absence of a job offer with labor certification can only be remedied by the filing of a new petition, accompanied by an already-approved labor certification. Such a petition must be filed by the U.S. employer rather than by the alien seeking immigrant status.

Aside from the above discussion, it remains that the critical basis for the denial of the petition, and for the dismissal of the appeal, was not the absence of a job offer. Rather, the petitioner has failed to demonstrate that she will serve the national interest to a greater extent than other legal consultants. It is not sufficient simply to list the services that such a consultant provides. The structure of the statute clearly indicates that members of the professions holding an advanced degree are, generally, required to have an approved labor certification and a qualifying job offer, and these requirements are only to be waived when it is in the national interest to do so. The law provides for no blanket waivers for legal consultants; therefore, the fact that the petitioner intends to engage in a useful occupation is not sufficient grounds for a national interest waiver.

Because the petitioner, on motion, has not addressed this key finding, our previous conclusions regarding the national interest waiver still hold. The petitioner has not established that the

¹The February 2001 filing of the application for labor certification is far from certain, however, for while the petitioner has submitted correspondence dated February 2001 regarding her attempts to file such an application, this correspondence includes what appears to be the original application form (ETA-750) itself. If the petitioner has sent her original Form ETA-750 to the AAO, where it remains in the record, then it is not in the hands of the Department of Labor and cannot be processed. The record contains no documentation from the Department of Labor to acknowledge receipt of the application.

petition was approvable when it was first filed, and subsequent developments (such as the petitioner's creation of a consulting firm to employ herself) cannot retroactively establish eligibility as of May 1998.

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 motion, the petitioner has submitted nothing of substance to challenge the AAO's finding that the petitioner does not qualify for a national interest waiver of the job offer/labor certification requirement.

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.

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 Associate Commissioner's decision of October 25, 2000 is affirmed. The petition is denied.