



B5

U.S. Department of Justice
Immigration and Naturalization Service

Identification data deleted to
prevent clearly unwarranted
invasion of personal privacy.

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



File: EAC-99-108-52237 Office: Vermont Service Center Date: 10 APR 2002

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:



Public Copy

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, 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 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 did not contest that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but concluded 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.

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.

8 C.F.R. 204.5(k)(2) provides, in pertinent part:

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.

(Emphasis added.) The petitioner allegedly holds a Bachelor's degree in Civil Engineering from the University of the District of Columbia. While this degree is not in the record, the petitioner indicated on the Form ETA-750B that she obtained this degree in 1996. In his initial brief, counsel argued that the petitioner had six years of experience "in addition to" her Bachelor's degree, thereby qualifying her as an advanced degree professional.

The record reveals that the petitioner's work experience consists of working as a building technician for Marmara Linyitleri Isletmesi Muessesesi in Turkey from August 1986 to July 1990. The petitioner also claims to have worked as an intern for the Department of Water Resources from

1995 to 1996, a soil technician for Mafi Associates, Inc. from May 1996 to December 1996, and Operation Manager for CTL of Virginia, Inc. from August 1997 to the time of filing, February 1999. The regulations provide that the experience must follow the Bachelor's degree. Thus, any experience prior to the petitioner's receipt of her Bachelor's degree cannot be considered qualifying experience. The petitioner had less than three years of post-graduate experience at the time of filing. Thus, at the time of filing, the petitioner did not have an advanced degree or the equivalent of an advanced degree.

The petitioner does not claim to qualify as an alien of exceptional ability. As such, the petitioner is not eligible for the classification sought and a determination of whether a waiver of the labor certification requirement is in the national interest is moot. Nevertheless, we will address this issue as it was the sole basis of the director's decision.

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.

We concur with the director that the petitioner works in an area of intrinsic merit, geotechnical engineering. The director then concluded that the benefits of the petitioner's work, ensuring the safety of construction projects, would be purely local. On appeal, the petitioner submits a letter from [REDACTED], Operations Manager at CTL. He asserts:

Projects for which [the petitioner] has been responsible include: buildings and training facilities for Army posts and other military or naval bases; security upgrades at sensitive Federal buildings; building expansions at the National Institutes of Health; expansions of national and international airports; housing developments; commercial projects; and highways. These are vital to the national security and to our economy.

Matter of New York State Dept. of Transportation involved an engineer working on New York bridges and roads. The decision states:

While the alien's employment may be limited to a particular geographic area, New York's bridges and roads connect the state to the national transportation system. The proper maintenance and operation of these bridges and roads therefore serve the interests of other regions of the country.

Id. As the record now establishes that the petitioner's projects include national airports and highways which connect to the national transportation system, we conclude that the proposed benefits of the petitioner's work would be national in scope.

Thus, it remains to determine whether or not the petitioner has established that she would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Id. at note 6.

Initially, the petitioner submitted two letters from her employer, CTL, discussing the importance of her job in securing the safety of construction workers and future occupants. They also praise her technical skills and contributions to CTL. In response to the director's request for additional documentation, the petitioner submitted letters from two professors at the University of Maryland and the vice president of CTL written in behalf of another geotechnical engineer whom counsel

asserted received a national interest waiver. The letter writers all discuss the severe shortage of Americans with the type of advanced civil engineering experience obtained by this other petitioner.

The director concluded that the petitioner had not demonstrated that she had influenced her field and noted that it was not 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 beneficiary.

On appeal, [REDACTED] reiterates that there is a shortage of adequately trained geotechnical engineers and asserts, "even if we could find someone as technically qualified, it would be extremely difficult to match [the petitioner's] common sense in the application of her technological education."

A shortage of American workers is not an argument for waiving the labor certification process. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. In fact, the petitioner is the beneficiary of another approved petition filed by CTL, EAC-00-224-50298, in a lower classification which requires an approved labor certification. The approval of this second petition demonstrates how unnecessary the waiver request was. As stated in Matter of New York State Dept. of Transportation, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process.

Moreover, the approval of others in the same field is not persuasive evidence that the petitioner herself has the ability to benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualification. The facts in the allegedly approved petition appear to be vastly different from the ones in the instant petition. For example, the alien in that case had a Ph.D. in engineering, whereas the petitioner in the instant case had only a Bachelor's degree at the time of filing.

Finally, we concur with the director that the petitioner has not demonstrated a track record of achievements which reflects that she has influenced her field as a whole. As stated by the director, all of the letters submitted which directly relate to the petitioner are from her employer. While such letters are useful in providing details of the petitioner's role in various projects, they cannot by themselves establish that she has influenced her field as a whole.

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.