

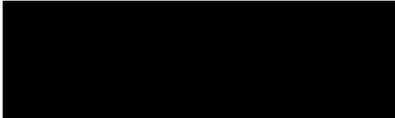


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: [Redacted] Office: Nebraska Service Center

Date: 22 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: 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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

In this decision, the term "prior counsel" shall refer to Nathaniel Hsieh, who represented the petitioner through the filing of the appeal. The petitioner has notified the Service that Mr. Hsieh no longer represents him.

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 health and safety specialist at Sunoco MidAmerica Refining and Marketing Company, Toledo, Ohio. 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 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 director did not dispute that the petitioner qualifies as member of the professions holding an advanced degree. The sole 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.

Prior counsel describes the petitioner’s work at Sunoco:

[The petitioner’s] sweeping mandate to research, evaluate, measure, and control all factors impinging on the physical or psychological health of Sunoco’s five hundred employees (in their manufacture and distribution of gasoline and petrochemical products throughout the U.S.A.’s heartland) and the greater East Toledo/Oregon community has led him to investigate hazards attendant on exposure to benzene, asbestos, lead, noise, toluene, xylene, and hydrocarbons.

Prior counsel asserts that, by measuring the effects of exposure to these and other hazards, the petitioner has an impact on “every corner of our nation, society, and culture. Every citizen’s health as well as our common stores of soil, air, and drinking water stand to benefit from and suffer without his many sided work.”

In a personal statement accompanying the petition, the petitioner describes not only his work at Sunoco, but also his then-ongoing graduate studies at the Medical College of Ohio. At that institution, the petitioner is studying the concentration of airborne methyl methacrylate vapors. Methyl methacrylate is used widely in many medical and dental procedures, as well as other purposes ranging from lubrication to road repair. The substance, however, “produces a number of toxic effects in human and experimental animals,” ranging from eye and skin irritation to numbness to “degenerative liver changes in experimental animals.” The petitioner collects and analyzes air samples taken from medical and dental offices where methyl methacrylate vapors are produced or released. The petitioner also states that, at Sunoco, he monitors workers for exposure to benzene and other industrial hazards, chemical and otherwise.

The petitioner submits several witness letters in support of his petition. Professor [REDACTED] chairman of the Department of Public Health at the Medical College of Ohio, states that the petitioner's educational background will equip him well for a career in an important occupation. He does not explain, however, why this petitioner, more than other industrial hygiene professionals, qualifies for the additional benefit of a national interest waiver.

Professor [REDACTED] of the Medical College of Ohio describes the petitioner's project there, and states:

The Occupational Safety and Health Administration (OSHA) has [a] permissible exposure limit of 100 ppm [parts per million] as an 8-hour time-weighted average for methyl methacrylate. The data compiled by [the petitioner] will be the first systematic look at the actual compliance of the OSHA standards in health occupations. It will therefore effectuate a lasting impact on the occupational safety of health professionals.

Other faculty members of the Medical College of Ohio discuss the petitioner's work briefly, and assert that the petitioner, when he graduates, will be well qualified to work in the profession of industrial hygiene, but they say little to explain why a waiver of the job offer requirement would be in the national interest. These individuals state that the petitioner will benefit the United States "by providing research and services," but it would appear that the same could be said of any properly trained and qualified industrial hygienist. The overall importance of the petitioner's profession does not establish a blanket waiver for all alien members of that profession.

Professor [REDACTED] University, Seoul, where the petitioner earned his first master's degree, describes two of the petitioner's principal research projects there. Prof. [REDACTED] states that the petitioner conducted a "health risk assessment of carcinogenic chemicals in drinking water," leading to recommendations for guidelines and regulations. The petitioner also studied "the application of the health risk models for the incidence of skin cancer caused by UVB radiation." As is the case with the faculty of the Medical College of Ohio, Prof. [REDACTED] does not indicate how the petitioner's work was of greater benefit than that of others in his field.

[REDACTED] manager of Health, Safety, Security, and Emergency Response at Sunoco, states:

At our Toledo/Oregon plant in Ohio, we currently employ approximately 500 individuals. . . .

To ensure the smooth and safe operations at Sunoco's Oregon/Toledo plant, we rely on our health and safety department to provide our workers with relevant and periodic training, and inspections so [as] to comply with respective state and federal laws and regulations. At the present time, we are in need of a junior-level health and safety specialist to supplement our health and safety department workforce. This individual will primarily assist the chief health and safety specialist to enforce and implement our company's health and safety programs. . . .

[The petitioner's] knowledge . . . and practical experience . . . have provided him with the information necessary to excel in this field of expertise. We therefore feel fortunate to have identified [the petitioner] as the ideal candidate for this temporary position.

██████████ president of the Northwest Ohio American Industrial Hygiene Association, confirms that the petitioner "is a member in good standing of the student section" who "has contributed to the [association's] newsletter with topical information about hazards associated with methyl methacrylate." The newsletter, with the petitioner's three-paragraph article, is in the record.

The director denied the petition, acknowledging the intrinsic merit of the petitioner's occupation, but stating that the importance of the petitioner's occupation does not, by itself, justify a national interest waiver. The director found that the petitioner's work lacks national scope; the petitioner's work at Sunoco directly affects workers at only one facility, and his only published work appeared in a regional newsletter with very limited local circulation. The director concluded that the petitioner has not distinguished himself from other qualified professionals in the same field to an extent that would warrant a waiver.

On appeal, prior counsel states:

[The petitioner] has established a significant reputation in his field through his unique study on methyl methacrylate toxicity. Moreover, [the petitioner] is also actively working to defeat the forces of global warming as part of his current research activities with Sunoco's Climate Wise Program. His contributions to the field have clearly been national in scope and above and beyond other contributors to his field.

Prior counsel asserts that "the materials previously submitted" establish the petitioner's "strong reputation as an Occupational Health Scientist." The record, however, does not support this assertion. The initial submission consists primarily of letters from the petitioner's professors, advisors, and employer, stating that the petitioner is well qualified to work in his chosen field. An individual does not qualify for a national interest waiver simply because his credentials are in order. The statute plainly attaches a job offer/labor certification requirement to members of the professions holding an advanced degree, and there is no statutory exemption for industrial hygienists or occupational health scientists.

Prior counsel states that the appeal includes "two additional letters further evidencing the national importance of [the petitioner's] specific contribution in methyl methacrylate research." The first of these letters is from Prof. ██████████ Prof. ██████████ first letter was dated September 21, 1998. The letter submitted on appeal is dated only a few weeks later, October 8, 1998, long before the March 27, 2000 denial of the petition. Prof. ██████████ letter, on appeal, is virtually identical to the letter submitted with the initial filing. The only difference is the addition of one sentence: "It would retard the research and development in Environmental and Occupational Health areas in the U.S., if labor certification process was required for someone like [the petitioner], who has outstanding research ability and experience in the areas, in the immigration petition." The record does not indicate that Prof. ██████████ high opinion of the petitioner's importance is shared even

among other faculty members at the Medical College of Ohio, let alone the wider research community. The faculty members' letters, for the most part, focused on the importance of the occupation and the fact that the petitioner is sufficiently well-trained to qualify for employment in that occupation.

The other letter submitted on appeal is merely a color photocopy of John Horoschak's previously submitted letter. We have already discussed and considered this letter, above.

Prior counsel observes on appeal that Sunoco is a major national corporation, "one of the largest independent petroleum refiner-marketers in the United States." The overall size of Sunoco is irrelevant, considering that, according to Sunoco officials, the petitioner's work affects only the employees at one facility. Even then, Sunoco's letter in the record indicates that the petitioner is a "junior-level" worker in a "temporary position." The initial submission contains no indication that Sunoco considers the petitioner's work important beyond the usual duties expected of any industrial safety professional.

The petitioner states that, owing to a reorganization at Sunoco, his duties now include "research of Greenhouse Gas Emission and Environmental & Health Risk Assessment (Greenhouse Effect)." Prior counsel devotes much of the appellate brief and accompanying documentation to a discussion of air pollution, global warming, and "Climate Wise, a cooperative program . . . to help companies identify and implement cost-effective energy efficiency and pollution prevention measures that reduce greenhouse gas emissions." Sunoco is a member of Climate Wise; prior counsel's description, above, is taken verbatim from Sunoco's web site (a printout from which accompanied the appeal).

We do not deny that emissions reduction and overall efforts to improve air quality serve the national interest. Nevertheless, as we have noted, working in a meritorious area does not guarantee eligibility for the national interest waiver. Furthermore, and most significantly, there is no evidence that the petitioner's work, as of the petition's filing date, had anything to do with global warming or emissions reduction. The petitioner's subsequent assumption of these duties cannot retroactively demonstrate that the petitioner already qualified for a waiver at the time he filed the petition. 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. Certainly, the petitioner's assumption of new duties, in the previously unmentioned area of greenhouse gas reduction, constitutes a significant material change to the petition.

The Form I-290B Notice of Appeal instructed the petitioner and prior counsel to state whether any further brief or evidence were being submitted with the appeal, or within 30 days. The form also indicated that, if more than 30 days were required to obtain supplementary evidence, any extension of time "may be granted only for good cause shown," in which case the petitioner was instructed to explain why more time was necessary. These instructions are consistent with the regulations, set forth at 8 C.F.R. 103.3(a)(2), governing the filing of appeals. Prior counsel

indicated that further documentation was attached to the appeal; there was no indication that any further material would be forthcoming.

The petitioner subsequently filed a motion to reopen, which the director rejected as untimely. The director added, however, that the petitioner's appeal was still in effect and still pending. Since that time, the petitioner has repeatedly attempted to supplement the record, sometimes by submitting copies of previously submitted documents.

There is no regulation that allows the petitioner an open-ended or indefinite period in which to supplement the appeal. Indeed, the existence of 8 C.F.R. 103.3(a)(2)(vii), which requires a petitioner to request, in writing, additional time to submit a brief, demonstrates that the late submission of supplements to the appeal is a privilege rather than a right. Any consideration at all given to such untimely submissions, which are not preceded by timely requests for an extension, is discretionary. In this instance, the petitioner's supplementary documents are concerned almost exclusively with the petitioner's participation in the Climate Wise program, with which he was uninvolved at the time he filed his petition. Because the petitioner did not submit these documents in a timely manner, and because the documents involve activities that the petitioner did not even begin until after the filing date, we need not discuss them at length. The petition, as filed, focused exclusively on the petitioner's work with occupational health and safety, and the director committed no error in failing to predict the petitioner's future involvement in an environmental program. If the petitioner desires that the Service consider his environmental work with Climate Wise at Sunoco, the appropriate forum would be in the context of a new visa petition.

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.