

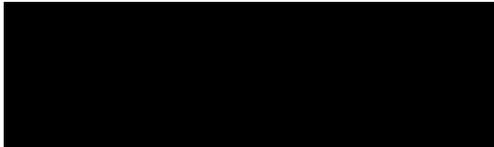


B5

U.S. Department of Justice
Immigration and Naturalization Service

Do not type 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: [Redacted] Office: Texas Service Center

Date: AUG 12 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 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, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

We note that there are two signatures on the Form I-140 petition – that of the alien beneficiary, and that of the managing director of the company that seeks to employ him. Because the petition form identifies the company as the petitioner, we will consider the company, rather than the alien, to be the petitioner in this matter. If the alien had been the only one to sign the form, then he would have assumed sole responsibility for its content and therefore he would have been designated as the petitioner.

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 a member of the professions holding an advanced degree. The petitioner is a publishing company that seeks to employ the beneficiary as director and editor of the petitioner's newly formed division, Theses & Dissertations Press ("TADP"). 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 a member of the professions with post-baccalaureate experience equivalent to 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 beneficiary qualifies as a member of the professions with post-baccalaureate experience equivalent to an advanced degree as defined by 8 C.F.R. 204.5(k)(2). 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.

Documents in the record (such as a fully executed Form ETA-750 application for labor certification) suggest that the petitioner initially intended to seek a labor certification for the beneficiary, but there is no indication that the application was submitted to the U.S. Department of Labor.

The petitioner is a "publishing company devoted to the combination of hard sciences and historiography." The I-140 petition form describes the company as "dormant" with one employee (presumably its founder and managing director, Dr. Robert H. Countess). The petitioner submits the company's articles of incorporation, dated November 1993, over six years before the May 2000 filing of the petition. The record contains documentation dated November 1999, granting a subsidiary of the petitioning company the English-language publishing rights to a German book entitled *Stalins Vernichtungskrieg*.

Counsel describes the beneficiary's work: "[The beneficiary's] employment with the Petitioner benefits the United States by promoting the free exchange of ideas and by ensuring the publication of important foreign language manuscripts that would not be available in the United States if not for Beneficiary's work."

The petitioner submits a personal statement from the beneficiary, which reads in part:

During the preparation of my Ph.D. thesis¹ in the years 1990-1993 I started being interested in doing research and organizing and co-ordinating research of others in the field of introducing the methods of exact science (physics, chemistry, geology a.s.o.) and technology into historiography. In 1996, after having written or edited several books on this topic, I decided to make this hobby my proper profession by establishing a publishing house in Britain, focussing on critically and sometimes controversially discussed topics of history. The scope of my publishing activities is to offer those scholars and scientists, whose opinions and theses contradict widespread paradigms and are thus sometimes ignored or treated in a quite unfair and unscholarly way, a public podium to express their views and criticize them in a scholarly way.

The beneficiary states that, while running his own business in the United Kingdom, he has acted "as an unpaid, independent consultant" for the petitioner, supervising publishing projects, locating new and prospective employees, and "investing money as a third party into that company in order to get it started." The beneficiary concludes by stating:

Allowing me to stay in the U.S. for a reasonable period of time (several years) in order to work as an employee for [the petitioner] would lead to:

1. Establishing a publishing company that gives American scholars with dissenting views a public podium;
2. Making dissenting foreign language material of scholarly value accessible for American and other English speaking scholars;
3. Creating work for several American citizens;
4. Permanent investment of money earned in Europe in the United States.

Denying me this right would lead to my withdrawal of all investments already made and the loss of job for the employee already hired.

The petitioner submits several witness letters. Some of the witnesses are outside of the fields of publishing, history, and chemistry. For example, Dr. Arthur Butz is an associate professor of Electrical and Computer Engineering at Northwestern University, while Dr. Christian Lindtner is "a former professor of Asian Languages and Literature." These witnesses offer their general

¹ Elsewhere in the record, the beneficiary indicates that he completed his doctoral studies but that the Max Planck Institute refused his thesis on political grounds. As such, the beneficiary does not hold a doctoral degree.

assessments and opinions of the beneficiary's writings,² and assert that the beneficiary is well suited to the position for which the petitioner seeks to hire him. The witnesses state that their ties to the beneficiary derive from a common interest, but in their letters they do not specify what that area of interest is. The titles of various publications, shown in the record, indicate that the common area of interest centers around the Nazi Holocaust during World War II.

Other witnesses are more directly involved in publishing and historiography. Mark Weber, director of the Institute for Historical Review ("IHR"), states "[f]or some years I have closely followed [the beneficiary] and his work. . . . He brings to his scholarly and publishing work a special combination of expertise in the 'hard sciences.'" The IHR's letterhead lists the members of its Editorial Advisory Committee. Among these names is Dr. Robert H. Countess, owner of the petitioning company. Journalist Serge de Beketch, editor of various publications in France, asserts that the beneficiary "has a very sound historical and literary knowledge aided by a good critical mind based on his scientific education and his skill in the fields of chemistry and physics. . . . I am impressed by the exceptional quality of the material that he edits and publishes."

The initial submission indicates that witnesses who share the beneficiary's area of interest consider him to be a good researcher and editor, with scientific training unusual in the field, but there is no clear explanation of why a waiver of the job offer requirement would be in the national interest. While the petitioner seeks to provide a forum for dissenting points of view, it is not clear why a qualified U.S. worker cannot satisfactorily serve this goal. The petitioner's desire to hire the best-qualified applicant, while understandable, does not rise to the level of national interest.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted a copy of the beneficiary's German-language doctoral thesis, along with a partial English translation thereof, and other documentation of the beneficiary's educational background.

The petitioner submits a four-page statement in which the beneficiary describes his publishing experience. He states that he had to do much of the technical work (such as layout and typesetting) by himself, through small companies that he established for the purpose, and thereby gained a more complete understanding of many aspects of the publishing industry.

The petitioner submits additional witness letters attesting to the beneficiary's competence as a researcher and editor. Some witnesses discuss the beneficiary's scholarly work, such as Dr. C. Zaverdinos of the University of Natal, South Africa, who states that he "was impressed by the mathematical innovation shown by" the beneficiary in his work regarding "minimal Gaussian surfaces." Others offer only brief, general statements, such as British historian David Irving's assertion that he has "known [the beneficiary] for three years and can vouch for his honesty."

² The beneficiary has published his work under various names, including Germar Rudolf (his birth name, sometimes spelled "Rudolph") and Ernst Gauss. A Form G-28 in the record refers to the beneficiary as "Germar Deutsch" but there is no other documentation in the record in which the beneficiary uses that name.

Dr. Countess states that the beneficiary, as an unpaid consultant for the petitioner's subsidiary TADP, "performed the bulk of the necessary work to make possible the publication of TADP's Handbook Series. . . . This Handbook has become a huge sales success, with over half of the first printing sold as of the date in August when I obtained it from the printer." Dr. Countess asserts that, without the beneficiary's involvement, "I cannot possibly handle the daily load of business," and adds that the beneficiary "has already invested over \$60,000" from the beneficiary's own publishing company in the U.K. Dr. Countess asserts that the beneficiary's continued involvement is, therefore, crucial to the future growth and success of TADP.

The director denied the petition, stating that the petitioner cannot establish the beneficiary's eligibility for the waiver simply by showing that the beneficiary is qualified for the position in question. On appeal, Dr. Countess maintains that only the beneficiary "can fulfill the task of functioning as Editor of Theses & Dissertations Press." The petitioner's reliance on the beneficiary does not imply that the beneficiary's work is of comparable importance to the nation.

Dr. Countess asserts that the beneficiary has, as of the appeal date, invested \$63,408 in TADP, thus benefiting the economy. This argument is not persuasive. There exists a lower immigrant classification, established by section 203(b)(5) of the Act, through which an alien can become a permanent resident by investing \$500,000 or \$1 million in a U.S. business and thereby creating ten jobs. The beneficiary's investment of a fraction of that amount, creating fewer jobs, is not *prima facie* evidence that he qualifies for a higher immigrant classification, and we cannot find that every alien who invests capital into a U.S. business qualifies for a national interest waiver. The petitioner has not shown the economic or scholarly significance of TADP compared with other publishers of historiography, nor has he established that labor certification is not a viable option even in light of the assertion that the beneficiary was the only fully qualified applicant for the position of editor. The petitioner has persuasively shown that the beneficiary's work serves the petitioner's interests, as does the beneficiary's capital, but the record shows little benefit outside of the continuing viability of the petitioner's very small publishing company and its new subsidiary. Furthermore, the record indicates that the beneficiary intends to devote "several years" to establishing TADP, while continuing to operate his own British company. It is not clear that the beneficiary intends to reside permanently in the U.S., in which case a nonimmigrant visa (some of which can be valid for up to six years) would appear to be a more appropriate course of action.

The beneficiary, on appeal, offers details and documentation regarding his infusion of capital into TADP (which appears to be incapable of continuing without this capital). The beneficiary asserts that his relationships with many European scholars and publishers is unmatched by any U.S. worker, thus allowing the petitioner greater access to European materials for publication in the United States. The petitioner has not established the extent of the demand for the types of materials published by the beneficiary.

Our Constitution guarantees the rights of free speech and freedom of the press. These freedoms are meaningless without the right to dissent from the viewpoint of the majority. At the same time, the freedom to dissent does not imply special benefits in order to ensure that the business

vehicle through which one expresses that dissent remains viable. The petitioner's right to publish material reflecting a dissenting viewpoint means that the United States cannot actively take steps designed to prevent the petitioner from publishing that material. At the same time, however, it does not mean that the beneficiary, by availing himself of the right to dissent, has earned a special exemption from standard immigration requirements. While the beneficiary's espousal of an unpopular point of view should not present extra impediments to his immigration, neither should it entitle him to an additional benefit such as the national interest waiver. The beneficiary's work in service of what appears to be a small and highly specialized "niche" market does not appear to rise to the level of significantly serving the interests of the United States.

The phrase "marketplace of ideas" is in common parlance, and in any marketplace some merchants thrive while others do not. The petitioner's reliance on the beneficiary's continued involvement does not place an obligation on the United States government, including the Service, to waive standard requirements in order to ensure the viability of TADP, any more than the government is obligated to step in to prevent the failures of other businesses that are not self-sustaining.

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.