



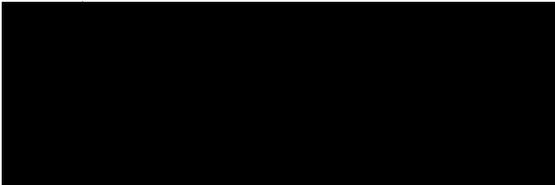
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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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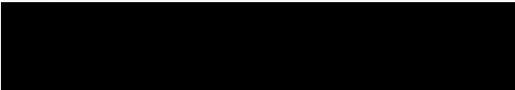


File: [Redacted]

Office: Nebraska Service Center

Date: 14 AUG 2002

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)

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

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, alternatively, as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a vice president. 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.

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 contest that the beneficiary qualifies as an alien of exceptional ability. The issue on appeal 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 director concluded that the beneficiary works in an area of intrinsic merit as a business executive in the utility industry. We concur. The director further concluded that since the petitioner had customers in several states and, as a publicly traded company, had shareholders nationwide, the beneficiary's impact would be national in scope.

The initial letters suggested that the beneficiary would only benefit his employer and the geographic region where it is based. Gail Sexsmith, Vice-President of Human Resources at British Columbia Hydro and Power Authority, provides a summary of the beneficiary's employment history at that company. She discusses several projects and reports in which the beneficiary was involved which benefited his employer. Finally, she states:

His talents will no doubt provide significant advantage to his new employer in maintaining their leading utility position in the state of Iowa, creating shareholder value and supporting a stable employment environment amidst an industry in transition.

Thomas Flaherty, an energy consultant with Deloitte and Touche, asserts that the deregulation of utilities has led to an "overhaul" of the utility industry and that the beneficiary has been instrumental in the necessary but complex restructuring of the petitioner. Mr. Flaherty concludes, "under [the beneficiary's] guidance it is expected that [the petitioner] will become the

prime investment engine for Iowa thus fueling economic growth and broadening the state tax base.”

Dale Schaefer, a partner at [REDACTED] indicates that he has been personally involved in some of the mergers and acquisitions with the beneficiary and that the beneficiary's role in those mergers and acquisitions has had a positive influence on the corporate business agenda and the economy of Iowa and the surrounding states. Kendrick Packer, a managing partner of Financial Advisors in Iowa, asserts that previous acquisitions by the petitioner have had a positive effect on the economy of Iowa and that the beneficiary's role there “is strategic and vital to the inception and completion of transactions which [the petitioner] will need to navigate and succeed in a competitive environment.”

Charles Grassley, United States Senator from Iowa, asserts that the beneficiary will benefit the national interest of the United States, “specifically the State of Iowa,” and that the beneficiary will “continue to play a significant role in insuring that [the petitioner] continues its current success.”

In response to the director's request for additional documentation, the petitioner submitted new letters in an attempt to demonstrate a more national impact. William B. Trent, a board member of the Iowa Department of Economic Development, writes:

[The beneficiary's] expertise in the entrepreneurial element of the electric utility industry will be a significant factor in (a) accelerating [the petitioner's] transition from a regulated to an unregulated utility in line with Federal policy (Federal Energy Policy Act of 1992), and (b) result in quality job creation and increased tax base for affected state and municipal governments. The economic development will impact the following states: Iowa, Illinois, Nebraska, South Dakota, and the nation as a whole through [the petitioner's] soon to be completed merger with CalEnergy, creating a \$13 billion global utility company whose corporate headquarters will be based in Des Moines, Iowa.

Robert Forsythe, Senior Associate Dean of the University of Iowa, asserts that the beneficiary's impact will be national in scope because the petitioner is merging with CalEnergy, which will create a \$13 billion dollar competitive energy provider poised to compete in several markets, for example, newly deregulated Chicago. Mr. Forsythe further asserts that the beneficiary's investment track record will lead to job retention and growth. Finally, Dr. Forsythe asserts that, due to his previous experience, the beneficiary has exceptional ability in economics that will allow him to benefit the national interest to a greater degree than an available U.S. worker with “similar minimum qualifications.”

While it is not clear that the acquisition of competitor utilities serves the purpose of deregulation (encouraging lower costs through competition), the petitioner is a publicly traded company with shareholders nationwide. Thus, any benefits to the petitioner could be considered national in scope.

Finally, the director concluded that the petitioner had not demonstrated that the beneficiary would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Specifically, the director concluded that the beneficiary's skills could be enumerated on a labor certification application.

On appeal, counsel argues that Matter of New York State Dept. of Transportation, *supra*, lacks statutory or regulatory support and that it requires a level of accomplishment akin to aliens of extraordinary ability. Counsel further argues that the labor certification process would disrupt business operations for the petitioner. The petitioner submits a letter from an executive search consultant firm asserting that the petitioner undertook an extensive search before hiring the beneficiary and that they were unable to find another qualified candidate.

By law, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers. To date, neither Congress¹ nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error.

With regard to the disruption the petitioner will allegedly face if forced to go through the labor certification process, 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.

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 beneficiary merits the special benefit of a national interest waiver, over and above the visa classification he 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. Matter of New York State Dept. of Transportation, *supra*, note 6.

The beneficiary is employed as the Corporate Development Vice President for the petitioner. His responsibilities include mergers, acquisitions, divestment, alliances, joint ventures, and start-up operations. The petitioner asserts that the beneficiary "is widely recognized as an executive that has provided significant contributions to the utility industry through his management and

¹ Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to Matter of New York State Dept. of Transportation; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

investment banking skills,” and that “his unique knowledge of the utility industry combined with over fifteen years related experience and superb qualifications sets [sic] him apart from his peers in our industry.” The petitioner further asserts that the beneficiary has benefited the U.S. economy as follows:

[The beneficiary] has played a leading role in the acquisition by [the petitioner] of four home security and lock companies and in the nation’s third largest real estate brokerage company in support of our Company’s retail strategy. He also led the sales process of two companies in the railcar design, leasing, operation and maintenance business. He was also involved in several other acquisitions, divestitures and alliances. The total value of these transactions exceed[s] \$110 million of which \$87 million related to acquisitions and \$23 million related to divestitures. [The beneficiary] is also leading confidential business deals with a value in excess of [\$]1 billion.

We believe that these transactions have a direct impact on the nation’s job creating strategy. [The petitioner’s] strategy is directly related to our response to a changed economic environment where utility companies have the potential to diversify into non-traditional business in order to offset the potential loss of revenue stability and energy delivery efficiencies caused by a changed business environment.

[REDACTED] the President and CEO of the petitioner company asserts that the beneficiary was selected based on his accounting and investment banking experience in both the non-utility and utility industries. It cannot suffice to state that the alien possesses useful skills, or a “unique background.” Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. Id.

Derek Donaldson, currently a private attorney, recounts the beneficiary’s assistance to Pacific Western Group of Vancouver while employed there from 1987 to 1989.

Ken Crews, the managing director for Warburg Dillon Read who has worked extensively with the petitioner and beneficiary, writes that the beneficiary is responsible for the following:

1. Creating a high quality employment opportunity base for Iowa’s citizens through the development of new business opportunities for [the petitioner] in line with the company’s mandate to achieve higher levels of business growth.
2. The implementation of corporate strategies that will improve the wages and level of employment in the area through the development and acquisition of value-added businesses to complement a deregulated energy sector. In the past two years, [the petitioner] has completed a number of corporate

transactions in this regard, such as the acquisition of AAA Security, McLeod USA (20%), Iowa Realty and Edina Realty Home Services.

3. Seeking to create a more efficient use of [the petitioner's] energy resources and deliver greater economics of scale to [the petitioner's] customers. Thus, the petitioner's operational efficiencies will improve, to the benefit of the customer base, shareholders and employees.

Mr. Trent then discusses the importance of the petitioner's business to the Iowa economy and the recent growth in the company due to mergers and acquisitions. Mr. Trent continues:

Within the past year, [the petitioner] has successfully acquired over \$110 million in value of real estate brokerage companies in the Midwest and now owns the second largest real estate brokerage company in the United States. [The petitioner] has also acquired several significant security and alarm companies. It is [the petitioner's] intention to leverage these acquisitions to enhance its current bundle of energy-related value-added products and services, build further customer loyalty and expand its customer base outside its service territory. This has proven to be a unique strategy for [the petitioner] and will provide them with a competitive advantage over others. Similar strategies have been used by CalEnergy in other markets (i.e. United Kingdom) and proven successful. These investments will provide job retention and job growth, on the basis that these investments have been innovative and strategic and in alignment with overall corporate direction. These companies are a primary basis for [the petitioner's] retail strategy in the Midwest and will be nurtured for growth in expanding product and service offerings to existing customers as well as growth into new markets.

The above letters all attest to the beneficiary's contributions to his various employers. None of these letters, however, reflect that the beneficiary has influenced positively the utility industry as a whole. The letters are all from individuals who have worked with the beneficiary or represent his employer's home state of Iowa. While such letters are important in providing the details of the beneficiary's work, they cannot by themselves demonstrate that he has positively influenced the industry beyond his employer and its geographic region, expanding as it may be. The record contains no evidence of the beneficiary's influence on the industry from relevant national governmental agencies or other leaders in the industry.

Finally, as evidence that the beneficiary commands a high salary, the petitioner submitted a letter from Ned Tannebaum, president of an executive search consulting firm, asserting that the beneficiary's salary places him "in the top 10% level of utility Corporate Development professional's compensation," and that his salary level is "25% higher than top tier professionals in similar or much larger U.S. utilities due to his unique background." A high salary is simply one of the criteria which must be met for aliens seeking classification as exceptional. As stated in Matter of New York State Dept. of Transportation, supra, the exceptional ability classification

is one which normally requires a labor certification. As such, we cannot conclude that meeting one or more of the criteria for exceptional ability (in this case the director concluded that the beneficiary met at least three) automatically qualifies the alien for the national interest waiver of the labor certification process.

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.