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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



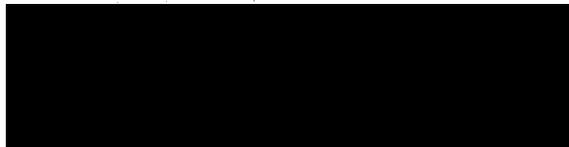
File: [Redacted] Office: Nebraska Service Center

Date: AUG 29 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, Nebraska 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 seeks employment as an environmental scientist at Ecology & Environment, Inc. ("E & E"). 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 a 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.

Counsel describes the petitioner's work:

[The petitioner] is a recognized expert in the Hazardous Ranking System (HRS¹), which is a complex set of U.S. environmental laws and regulations used in assessing, ranking and prioritizing various Superfund eligible environmental sites. . . [The petitioner's] efforts aid in the protection of the environment and the health of U.S. citizens as well as aid in the efficient use of resources allocated to the assessment and cleanup of such sites.

Along with documentation pertaining to his field of endeavor, the petitioner submits 15 witness letters. We will discuss examples of these letters here. Paul E. Doherty, Superfund Technical Assessment and Response Team ("START") project officer for the U.S. Environmental Protection Agency ("EPA" or "USEPA"), Region VII, states:

[T]he START Contract provides technical expertise and support to EPA's Superfund Program in the four-state region of Iowa, Kansas, Missouri and Nebraska. . . .

¹ The record contains various interpretations of the initials "HRS." The official term, as stated in EPA regulations at 40 C.F.R. Part 300, is "Hazard Ranking System."

[T]his contract . . . requires E & E to provide a "dedicated" multi-disciplinary team of engineers, chemists, biologists, and geologists. . . .

I have known [the petitioner] as a START project manager for over six months. The inclusion of [the petitioner] on this contract has proven to be an invaluable resource to the USEPA. During the time I have been associated with [the petitioner], he has been instrumental in the successful completion and management of multiple projects. . . . In addition, [the petitioner] has played a central role in recent Agency efforts to assess the hazardous nature of [several] sites. . . . Through the help of [the petitioner's] efforts, these investigations have progressed and been completed in a timely and cost-effective manner.

A specialized expertise which sets [the petitioner] apart from his colleagues as an environmental scientist, however, is his intimate knowledge of the Hazard Ranking System (HRS) used by the EPA. The HRA is the scoring system used by EPA's Superfund program to assess the relative threat associated with actual and potential releases of hazardous substances. The HRS is the primary screening tool for determining whether a site is to be included on [the] National Priorities List, EPA's list of sites that are priorities for further investigation, and if necessary, response action. . . . This is a very complex system of ranking that takes intense study and years of experience to master. . . . Without [the petitioner's] contribution to the program, EPA would likely experience a significant disruption in conducting scheduled field work considered critical to the Agency's mission.

Jeff Gadt, assistant group leader for site assessment at E & E, states that the petitioner's "knowledge of HRS scoring concerns . . . has been invaluable in assisting my completion of several large-scale site assessment projects." Mr. Gadt deems the petitioner "an irreplaceable member of the site assessment team here at E & E, Inc." Several other E & E officials discuss the petitioner's skills, focusing on his in-depth knowledge of the Hazard Ranking System. The officials indicate that to replace the petitioner would be costly to the company in terms of time and monetary expense. HRS is not an actual remediation process. Rather, HRS is used to determine the priority that EPA assigns to various sites slated for cleanup. As one witness describes it, "[w]ith the application of HRS, environmental scientists and policy analysts can prioritize the most contaminated sites and conduct emergency removal and remediation activities."

The petitioner submits copies of several letters from officials of DynCorp, which was the petitioner's previous employer. These letters are all photocopies, and they are all dated May 1998, nearly a year before the other letters in the record which are dated March 1999. It appears that the letters were written while the petitioner was still working for DynCorp. These witnesses assert that the national interest will be served if the petitioner and his HRS expertise remain at DynCorp. These assertions have obviously been rendered moot by the petitioner's departure from that company.

The record contains other photocopied letters dated May 1998, apparently originally prepared for a petition that was never submitted. Toby Scholl, an engineer with the West Virginia Office of Air Quality, states "I have found [the petitioner] to be knowledgeable and innovative in his approaches in tackling environmental and public health issues." Saroj Bhattarai, research analyst with the International Food Policy Research Institute, discusses pesticide contamination and states "[t]he unique few environmental scientists such as [the petitioner], who has had extensive experience in the Hazard Ranking System (HRS), can closely calculate the 'quantitative' scale of danger these sites contaminated with pesticides possess." Other witnesses offer similar assertions, to the effect that the petitioner has accumulated valuable experience and knowledge, particularly in the area of HRS.

Apart from the witness letters, the remaining materials in the initial submission establish that the petitioner has taken various EPA training courses. Several newspaper articles discuss contaminated sites, but none of the articles mentions the petitioner or HRS.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. The director specifically requested more specific information to show how the petitioner's HRS training compares with that of others in the field. In response, the petitioner has submitted a brief from counsel and new exhibits and letters.

Daniel J. Harris, environmental engineer with USEPA Region VII, states:

I recently worked with [the petitioner] on a battery recycling site (former Frith site) in Iowa. During the investigation of this site I found his efforts and technical knowledge in the fields of site assessment and the Hazard Ranking System (HRS), specifically, to be of high quality. . . . This ranking system requires superior technical expertise, formal training, and experience to master. [The petitioner's] work displays these characteristics as well as an exemplary ability to interface policy with technical analysis.

Mr. Harris asserts that the petitioner's "experience and understanding of the HRS is [sic] not easily duplicated" but he does not indicate how common such training is in the petitioner's field. Mr. Harris asserts that HRS is used to identify sites for inclusion on the National Priorities List, and that the list includes hundreds of such sites.

Gary L. Haden, group leader at E & E, states that the company hired the petitioner "because of his superior expertise with the Hazard Ranking System." Mr. Haden observes that this expertise can be applied at any site in the U.S., and that the petitioner is one of only two E&E employees "who has tried to remain current in the HRS area." Mr. Haden states that "several individuals at E&E" have lesser HRS training.

The petitioner submits a copy of the regulations pertaining to HRS, to illustrate the complexity of the system.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director observed "[t]he HRS system appears to be a public formula available generally to the environmental [protection] industry. Demonstrated expertise in this particular methodology appears to support the case for undergoing a labor certification test, rather than exemption from it." The director stated that HRS training, if truly necessary for the petitioner's duties, could be included as a job requirement on an application for labor certification.

An alien seeking immigrant classification as an alien of exceptional ability or as a member of the professions holding an advanced degree cannot meet the threshold for a national interest waiver of the job offer requirement simply by establishing a certain level of training or education which could be articulated on an application for a labor certification. Matter of New York State Dept. of Transportation, supra. Counsel states that the present matter differs from the precedent decision because "the Beneficiary in that case was recognized to possess the skills and expertise necessary to serve as a Bridge Engineer, but not . . . to have exceeded the normal level of competence expected of a Bridge Engineer." We find, however, a parallel between the matter at hand and the precedent decision. In both instances, the petitioner claimed that the alien would benefit the national interest not because he had invented a new methodology, but because he possessed advanced training in such a methodology. In effect, this logic amounts to an attempt to attach the national interest waiver not to the particular alien, but to any alien who happens to possess that training. The petitioner's HRS training illustrates the direction in which the petitioner has chosen to specialize, but specialization does not necessarily amount to superiority.

On appeal, counsel argues that the petitioner "has submitted evidence showing 'non-quantifiable' qualifications and requirements for his position that could not be reflected in a labor certification." Counsel also contends that the petitioner "is one of only a few recognized experts" in HRS, although the record contains no firm statistics to demonstrate the number of HRS specialists. If no such statistics exist, then there is no evidentiary justification for the assertion that the petitioner "is one of only a few" such experts. The record contains certificates demonstrating that the EPA offers HRS training classes, and letters from EPA officials have focused on the petitioner's knowledge of the system rather than on the number of individuals with similar training.

One new letter accompanies the appeal. Todd Trometer, now a project manager with Jacobs Engineering Group, Inc., describes his prior work with the petitioner:

I worked with [the petitioner] on the Omaha Lead Site Investigation where I was the Project Manager on behalf of the U.S. Environmental Protection Agency (EPA). . . .

[The petitioner] was responsible for the development of the Hazardous Rank Scoring (HRS) package for the site. The HRS scoring package requires extensive documentation, a great deal of detail and special training. . . . There are only a few HRS experts in each EPA region, [the petitioner] is one of the HRS experts in

EPA Region VII. It generally takes several years for an educated person to become experienced enough to complete HRS scoring packages to meet EPA's satisfaction.

As with previous letters, the above letter consists of a combination of specific observations regarding the petitioner, and general statements that are for the most part vague and/or unsupported. The record shows that the EPA created HRS in 1982, and revised it extensively via regulations promulgated in 1990, when the petitioner was an undergraduate student. We are extremely hesitant to find that familiarity with existing federal regulations is a basis for a national interest waiver. We are not persuaded by counsel's assertion that the petitioner's knowledge of HRS has risen to the level of an "art." The petitioner's value to his employer lies in his training and experience in HRS. The letters from the EPA distinguish the petitioner from engineers with lesser knowledge of HRS, but they do not show that the petitioner has made a greater contribution to the national interest than other trained and experienced HRS specialists. We reject the implied argument that a blanket waiver should apply to all engineers who demonstrate a certain level of familiarity with a system they did not have any part in creating.

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.