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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.
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Washington, D.C. 20536



File: EAC-00-228-50508

Office: Vermont Service Center

Date: DEC 03 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 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, Vermont 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 a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a manager of technology. 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 holding an advanced degree, 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 beneficiary holds a Ph.D. in electronics and electrical engineering from the Imperial College of Science, Technology and Medicine. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary thus qualifies as a member of the professions holding an advanced degree. The remaining issue 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, 22 I&N Dec. 215 (Comm. 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 beneficiary works in an area of intrinsic merit, engineering. The director then stated:

The proposed benefit of the beneficiary's work is not entirely unnational, so to speak, in scope, but we do not find the benefit to be national in scope in the sense intended by Congress. That is, any commercial product that can be useful to customers in numerous states is somewhat national in its benefit.

On appeal, counsel asserts that the beneficiary has developed and maintained the Dynamic Travel Exchange (DTE) on which the petitioner, an online booking system, depends. Counsel notes that consumers from across the United States utilize the booking system. A review of the record reveals that the proposed benefit of the beneficiary's work is improved e-commerce. We concur with counsel that these proposed benefits would be national in scope.

It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications would. The director concluded the beneficiary could not meet this prong since the petitioner's travel service website was not unique. Specifically, "there are a number of such sites providing those services to customers."

While we concur that the beneficiary does not meet the final prong, the focus should be on the beneficiary's 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 beneficiary'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 that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, note 6.

Initially, the petitioner submitted the beneficiary's degrees and recommendation letters from one of the beneficiary's professors and two employers. Professor Mino Green provides general praise of the beneficiary's technical abilities, but does not identify a specific contribution to the field. Jamshed Akhtar, senior systems manager at Lanier, Inc., asserts that he has worked with the beneficiary on several projects and provides general praise of the beneficiary. While Mr. Akhtar asserts that the beneficiary "has made significant contributions in his field," he does not specify any contributions. C. T. Elliott, a consultant to DERA, asserts that the beneficiary worked at DERA as a key member of one its best research teams. Mr. Elliott continues:

The work he did with me was mainly concerned with the demonstration of ultra high speed transistors, based on the narrow gap semiconductor indium antimonide. We were able to demonstrate for the first time the speed and low voltage potential of transistors in this materials system and this was the subject of a paper at the prestigious International Electronic Device Meeting in 1997. [The beneficiary] showed his general engineering skills in developing the processing technology and processing equipment needed for this work. One particular achievement was to study and optimise the surface oxide, the quality of which was essential for the operation of field effect transistors. The interface density he achieved was lower than that of GaAs and second only to that on thermally oxidised silicon. He demonstrated the very demanding qualities needed for new device fabrication of drive, determination, persistence and perseverance.

The record contains no evidence regarding how the beneficiary's 1997 paper was received. For example, the petitioner has not demonstrated that this paper has been widely cited. 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.* at 220-221.

The above letters are all from the beneficiary's professors and employers. While such letters can be important in providing details about the beneficiary's role in various projects, they cannot by themselves establish the beneficiary's influence over the field as a whole.

The petitioner also submitted Form 750A, a form not required when seeking a waiver of the labor certification process. We note, however, that on line 20, the petitioner stated “there are not enough skilled US workers to fill this position.” The job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages. *Id.* at 218.

In response to the director’s request for additional documentation, which included the expressed concern that the beneficiary’s salary was low given the abilities professed, the petitioner submitted the beneficiary’s current employment contract for his position as vice-president of technology for the petitioning company’s parent company, Whale Media, reflecting significant compensation. While we acknowledge that the director raised this issue, we do not find the beneficiary’s salary to be decisive. Moreover, the contract is dated several months after the date of filing and cannot establish the beneficiary’s eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In response to the director’s other concerns, counsel asserted:

The beneficiary has been actively involved in research at national levels since obtaining his Ph[.]D[.] in 1990. [The petitioning company] has hired him specifically for these sought after skills to work in the area of research and development of its core business products. One notable product is the Dynamic Travel Exchange (DTE), [for] which [the beneficiary] is heading a group of consultants to research the cutting edge required for this complex system. He is presently serving as the VP of Technology of the company and devotes much of his time to the DTE system. The specification for the DTE is very broad in nature and requires the use of complex mathematical models as well as neural software for building artificially intelligent subsystems. He is collaborating closely with internationally recognized research groups from prominent universities including New York University and Aalborg University in Denmark. He is also working with a company[,] Silicon Recognition[,] to investigate their neural hardware systems to provide an unparalleled level of intelligent data matching required for the DTE with potential benefits in other market areas.

...

The beneficiary heads the Technology Department of [the petitioning company], an online company based in New York City being utilized by hundreds of thousands of consumers across [the] United States for booking airline tickets, hotel accommodations, vacations, cruises, car rentals etc. [T]he importance of interstate travel and commerce can not be overemphasized in the economic well b[e]ing of the United States. At this time, [the beneficiary] is in collaboration with other researchers from New York University and Aalborg University in Denmark i[n] working on Dynamic Travel Exchange (DTE). The aim of this research is to

enhance the efficiency as well as evolve a new level of experience for buyers and sellers relating to online booking in the United States.

On appeal, counsel further asserts:

Much as there are a number of sites on the Internet providing similar services to customers, the Director fails to consider the fact that the web site is a small portion of the petitioner's business activities. The petitioner is also engaged in primarily serving the growing business to business market. Some of the petitioner's unique products including automating an entire call center with their range of smart booking and inventory management system. This provides a complete system administered over the web, allowing for bookings, reservations and cancellations including full reporting. The petitioner has just completed their first deliverable product called the "SmartBooker" to the company PGI. . . . The petitioner is also developing systems to accommodate multiple hotels on one type of reservation system. This requires scalable architecture with both hardware and software which is also in continued development. The continued success of the project relies on [the] beneficiary's presence and the continuation of the said project is in the national interest.

The assertions of counsel do not constitute evidence. Matter of Obaighena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). On appeal, the petitioner submitted letters from Reservations Plus and its parent company, PGI; the Strategic Marketing Group (SMG); and Hilton. All but one of these letters are addressed to the vice-president or chairman of NYC & Company. The remaining letter is addressed to "whom it may concern."

In his letter to the vice-president of NYC & Company, Larry Peterson, director of sales and marketing at Reservations Plus, a PGI company, confirms that his company has entered into an agreement with Whale Media to develop a web-based single-image booking system apparently for NYC & Company. Mr. Peterson expresses his confidence that the combination of PGI's comprehensive call center management and Whale Media's advanced system will best serve NYC & Company. Mr. Peterson does not claim that the beneficiary's involvement in the project is crucial, nor does Mr. Peterson even mention the beneficiary by name.

The letter from Cynthia Engel, addressed to the chairman of NYC & Company, is unsigned and is not on company letterhead. It appears from the letter that Ms. Engel may be the president and chief operating officer of PGI. Regardless, the letter asserts that it is accompanying financial reports "reinforcing our commitment to fulfill responsibilities to NYC & Company should Whale Media cease to do business, although unlikely." While she concludes that PGI and Whale Media "are confident to provide our mutual clients with unparalleled technology solutions and support services," the letter does not reflect on the beneficiary's accomplishments in his field.

The above letters to NYC & Company, a client, from Whale Media's collaborator are of limited value. The letters are promoting PGI's own services to its client and can be expected to be worded favorably. While we do not find any misrepresentation, the letters simply do not represent an independent, disinterested evaluation of Whale Media's project or the beneficiary's contribution to that project.

In his November 3, 2000 letter to the vice president of NYC & Company, Bruce Rosenberg, senior vice-president of Hilton, recommends the work of Whale Media. In his November 4, 2000 letter "to whom it may concern," Carl Ribaud, president of SMG, asserts that SMB has reviewed a variety of real time booking systems on behalf of its clients and recommends the Whale Media/Ten Online system without reservation. These letters suggest that the beneficiary's current employer has produced a reputable reservation system and has satisfied customers. The record does not establish, however, the role that the beneficiary played on this system prior to November 1, 2000, the date of his contract with Whale Media and only three days prior to Mr. Rosenberg's letter. The record does not establish that the beneficiary worked on this project while working for Whale Media's subsidiary, the petitioning company. Even if the beneficiary did work on this project, the letters are not evidence that the beneficiary's work on this project constitutes an influence on the field. Neither letter singles out the beneficiary's contributions to the project as significant. Unlike the non-precedent case issued by this office in July 2000 cited by counsel on appeal, the record does not include letters from other, independent experts in the beneficiary's field attesting to the influence that his project, and specifically he as an individual, has had on his field. Also unlike the case cited by counsel, the record does not even include letters from the beneficiary's own collaborators asserting that he is irreplaceable on his project.

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.