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U.S. Department of Justice
Immigration and Naturalization Service

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

PUBLIC COPY



16 DEC 2002
Date:

File: WAC 99 169 50898 Office: CALIFORNIA SERVICE CENTER

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:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California 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 an alien of exceptional ability and as a member of the professions with post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as an electrical/mechanical maintenance engineer at InteSys¹ Technologies. At the time of filing, the petitioner also taught two courses as a certified adjunct instructor at GateWay Community College, Phoenix, Arizona. 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 does not qualify for classification as an alien of exceptional ability and 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. The director offered no finding regarding the petitioner's eligibility for classification as a member of the professions holding an advanced degree or the equivalent.

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.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements 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 petitioner holds a bachelor's degree and has over five years of progressive post-baccalaureate experience in his field. The definition of "profession" at section 101(a)(32) of the Act includes engineers, and 8 CFR 204.5(k)(2) indicates that five years of progressive post-baccalaureate experience in the specialty is equivalent to a master's degree. The petitioner thus qualifies as a member of the professions with post-baccalaureate experience equivalent to 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.

¹ Some documents show the name capitalized as "Intesys" rather than "InteSys."

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.

Counsel describes InteSys and the petitioner’s work there:

InteSys (ITI) is a full service, vertically integrated, custom engineering, plastic injection molding, and assembly (value-added) company. ITI provides a comprehensive package of services, working primarily with Fortune 500/world-class companies in the design, development and production of tight-tolerance, thin-wall, highly cosmetic, high-volume, difficult-to-make plastic parts and assemblies. . . .

[The petitioner] is conducting a work of a unique and valuable nature. This work will ultimately increase the cost effectiveness of the company, which will in turn benefit the state of the project as a whole.

[The petitioner] is the Electrical Maintenance Engineer for the InteSys facilities in the U.S. including Arizona and California and in Mexico. His main role is to improve the industrial controls used to support the injection molding and manufacturing process. This includes electrical distribution and energy management, process water and air controls, material delivery systems, robotics and data interfaces for the quality control system. . . .

[The petitioner] has been the lead engineer behind the company's automated control improvements to its water treatment facilities which have continued to provide higher quality water and reduce consumption. This ground breaking work of [the petitioner] has led to environmental and energy saving efficiency for the company which allows for both cost savings and environmental improvement.

Counsel states that the petitioner's "effect on the economy in turning around companies in many different fields shows that his experience as a diversified businessman will have a positive effect on the U.S. economy." Counsel states "it is in the national interest to single out [the petitioner] as a professional engineer and educator."

Counsel states that the petitioner "is a computer engineer of repute in the world of technology." The petitioner submits a copy of the job description for his position at InteSys. The description lists the following "essential duties and responsibilities":

- Provides general electrical/mechanical maintenance support for molding operations.

- Trouble-shoots electrical systems to determine the proper corrective action on electrical problems.

- Performs preventive and corrective maintenance to minimize electrical problems.

- Maintains Mattec system through programming to maximize its effectiveness in supporting manufacturing goals.

- Installs and programs systems on robots, water treatment facilities, material loading, and automation systems.

- Performs a variety of related duties as needed and/or assigned.

The job description also indicates that the duties entail the use of tools and occasional heavy lifting. While computer programming skills are involved for some of the job elements, the overall description of the position does not appear to be essentially that of a computer engineer.

Along with background documentation pertaining to the petitioner's occupation in general and InteSys in particular, the petitioner submits several witness letters. Nick Smeed, vice president of Corporate Services and a principal owner of InteSys, states:

[The petitioner] is conducting work of a unique and valuable nature. This work will ultimately increase the cost effectiveness of the company, which will in turn benefit the state of the project as a whole.

[The petitioner] is the Electrical Maintenance Engineer for the Intesys facilities in the U.S., including Arizona and California, and the facilities in Mexico. His main role is to provide the industrial controls used to support the injection molding and manufacturing processes. This includes electrical distribution and energy management, process water and air controls, material delivery systems, robotics, and data interfaces for the quality control computer system.

[The petitioner's] last two years at Intesys have been extremely valuable for the corporation. The company has been extremely pleased with [the petitioner's] continued improvements to the electrical distribution plan, which has increased the company's energy efficiency.

[The petitioner] has been the lead engineer behind the company's automated control improvements to our water treatment plant which have continued to provide higher quality process water and reduced consumption. This ground breaking work . . . has led to environmental and energy saving efficiency for the company which allows for both cost savings and environmental improvement.

[The petitioner] has made other noteworthy contributions by providing expert engineering support in making our Mexico operation a success. . . .

[The petitioner's] dedicated and successful completion of the new QS-9000 complete maintenance program for the injection molding machines at the Gilbert plant was highly organized, well presented, and fully implemented for successful 1999 compliance. The QS-9000 compliance is essential for the competitive success of Intesys in the world market.

Kritina Mohr, coordinator of the Department of Business and Industry at GateWay Community College ("GWCC"), states:

GateWay is one of the ten colleges within the Maricopa Community College District. GWCC focuses on occupational training as well as transfer programs to universities. . . .

A large portion of our apprenticeship program involves the Arizona Builders Alliance (ABA). . . . [The petitioner] was recently selected as an instructor for the ABA Electrical Apprenticeship program. . . . [The petitioner's] education and experience exceeds all of GWCC's and the District's expectations for instructors.

It is my opinion that [the petitioner] has effectively demonstrated his importance to our community by providing invaluable knowledge and service to his students, the community college staff and the electrical industry in the state of Arizona.

Steven L. Herold, apprenticeship coordinator for the ABA, states that the petitioner "brings a wealth of knowledge and understanding of the electrical industry that is needed in our advanced

classes in the electrical apprenticeship program. . . . [The petitioner] has shown exemplary performance as an instructor at GateWay Community College and has provided an enthusiastic and unmatched service to the students in his class.” Mr. Herold indicates that “[t]he ABA Apprenticeship and Craft Training Program employs 25 part-time instructors and enrolls 400 students at GateWay Community College.”

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. The director instructed the petitioner to submit evidence to show how the petitioner would benefit the United States to a greater extent than would other qualified workers in his field. In response, the petitioner has submitted copies of previously submitted documents, materials about professional associations to which the petitioner belongs, and arguments from counsel.

Counsel asserts “Intesys is a Fortune 500 company. (Please refer to original submission for a company overview).” The overview submitted with the initial filing does not indicate that InteSys is a Fortune 500 company. Rather, InteSys’ client base includes some Fortune 500 companies.

Counsel asserts that the petitioner’s work for InteSys is national in scope because “his work does not just affect Arizonans. His work product has effect in the United States and in South America.” The petitioner’s direct impact appears to be limited to the maintenance of certain systems within one of InteSys’ divisions. The scope of InteSys’ clientele, and the geographic distribution of its facilities, does not establish that every InteSys employee performs work of national scope. The petitioner’s work does not appear to involve product design or other factors that would be noticed outside of the company.

Counsel states that the alien “is a self-petitioner. Labor certification is not available to him. NYSDOT footnote 5, suggests, that where a person is a self-petitioner, and labor certification is not appropriate and the applicant meets the national interest standard he should be granted.” The cited footnote in *Matter of New York State Dept. of Transportation* (actually footnote 4) states, in full:

The Service acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

The footnote refers to individuals who are “self-employed,” not “self-petitioning.” In the present instance, the petitioner has a job offer from a U.S. employer which could pursue labor certification on his behalf. The fact that this petition happens to have been filed by the alien rather than his employer does not in any way show that labor certification is unavailable or inapplicable.

Counsel is on somewhat firmer footing with the assertion that the petitioner's work involves a combination of job duties, which can sometimes impede the approval of a labor certification, but as the above-cited footnote from *Matter of New York State Dept. of Transportation* indicates, unavailability of labor certification is not sufficient cause for a waiver.

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work but finding that the petitioner's work lacks national scope, and 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 found that the petitioner is well qualified to hold the position at InteSys but that this qualification does not translate into eligibility for the waiver. The director also found that the petitioner does not qualify for classification as an alien of exceptional ability. This last finding is of little practical significance because the petitioner readily qualifies as a member of the professions with the regulatory equivalent of an advanced degree.

In the initial appeal submission, counsel stated "[t]he applicant, through counsel, will submit a brief and new evidence" within 30 days. The record, however, contains no further submission from counsel. The petitioner himself submitted a supplement to the appeal, stating that counsel "was unavailable to forward this additional information."

Much of the petitioner's appeal statement addresses the director's finding that the petitioner does not qualify as an alien of exceptional ability. As we have noted, this finding is essentially moot because the petitioner qualifies for the parallel classification of a member of the professions holding an advanced degree or its equivalent.

The petitioner states that "the Director incorrectly characterizes the petitioner as a scientist" whereas he is actually "an **engineer** and **educator**." The petitioner asserts that this mischaracterization is prejudicial, but he does not explain how. Elsewhere in the decision, the director plainly refers to the petitioner's duties as an electrical engineer as described in the documentation of record.

The petitioner concludes by alleging abuse of discretion, stating that the director failed to consider all of the evidence of record. As part of this argument, the petitioner cites an unpublished 1992 appellate decision (incorrectly attributed to the Board of Immigration Appeals) which is not a precedent decision and therefore is not binding in this matter. The petitioner asserts that his work has already benefited the United States and therefore statements regarding such benefit are "not hypothetical but factual."

Notwithstanding such claims, the petitioner has not shown how his work for InteSys is of significance outside of that company. Certainly every manufacturing facility requires maintenance, but the petitioner has not shown how it is in the national interest that he, rather than another qualified worker, hold the position of electrical maintenance engineer for this company.

The petitioner submits two new letters on appeal pertaining to his educational work. Kritina Mohr, identified above, states that the petitioner makes valuable contributions to the training

program at GWCC such as “bringing in his own equipment on his own time and at his own expense.” Ms. Mohr asserts that quality education is a national goal, and therefore the petitioner’s work is national in scope in that “he is providing the best training possible to these students.”

Linda B. Kidder, vice president of Adult Learning Programs at Educational Resources, Inc., states that the petitioner “is in his second year of providing technical training for under-skilled workers at AT&T in Mesa, Arizona.” Ms. Kidder repeats the assertion that “education is in the national interest,” and states that as technology advances, workers must be re-trained if they are to be able to keep their jobs.

While vocational education, in the broadest sense, is nationally significant rather than a strictly local concern, the work of one classroom instructor has negligible direct impact outside of the group of students whom that instructor teaches. There is no evidence that the field of engineering has been or will be affected, at a national level, more by the petitioner’s teaching work than by the work of other instructors in the field. The general importance of education does not mandate a national interest waiver for every alien who shows competence at providing part-time training to other workers.

The record shows that the petitioner provides services that are of value to InteSys and to GWCC, but the available evidence does not demonstrate that the petitioner’s accomplishments and contributions stand out to such a degree that a waiver of the job offer requirement would be in the national interest.

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.