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U.S. Department of Justice

Immigration and Naturalization Service

identifying 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

[redacted]

File: [redacted] Office: Texas Service Center Date: 17 JAN 2002

IN RE: Petitioner: [redacted]
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:

[redacted]

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 sustained and the petition will be approved.

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 in business. The petitioner, which provides "engineering design and consulting services to [the] industrial process industry," seeks to employ the beneficiary as its president and chief engineer. 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 dispute the beneficiary's classification as an alien of exceptional ability. 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.

In a statement accompanying the petition, Robert R. Kerr, the petitioner's senior vice president,[1] describes the company's work and the beneficiary's role therein:

> [The petitioner] provides design, engineering, and consulting services in connection with the design and supply of equipment to the Industrial Process Industry in the areas of pollution control, combustion, drying, and process heating. [The

[1]The Form I-140 petition indicates that the petitioning company has only two employees, presumably the beneficiary and Mr. Kerr.

> petitioner] has thus far emphasized service to the Wood Processing Industry, although [the petitioner's] technologies are also applicable to a broad spectrum of Processing Industries. . . .
>
> [The beneficiary] is responsible for designing, developing, and implementing process heating, combustion engineering, drying technology, and pollution control systems and products utilized in the Industrial Process Industry. . . . These responsibilities also require [the beneficiary] to negotiate contracts for services with clients and to hire subcontractors and employees.
>
> [The beneficiary's] continued services in the Industrial Processing Industry will substantially benefit the United States in four primary ways: (1) by ***reducing Volatile Organic Compound ("VOC") emissions***, a noxious gas pollutant emitted during the drying phase of wood processing; (2) by ***conserving natural resources*** by maximizing the yield of usable product from each log and providing alternatives to high consumption of natural gas and resin; (3) by engineering a ***safer work environment*** for U.S. employees by designing equipment with a reduced risk of fire and machine breakage; and (4) by enabling the Industrial Processing Industry to produce ***higher quality wood products*** by introducing superior technologies to producers.

(Emphasis in original.) Mr. Kerr asserts that the beneficiary has addressed the above problems by participating in the development of improved wood processing equipment, such as the flat line dryer that "heats wood strands more evenly and at significantly lower temperatures" than conventional rotary wood drying equipment.

The petitioner submits letters from various witnesses. William C. Nowack, president of Industrial Technology Midwest, states that the beneficiary "was instrumental in [the] development" of the above flat line drying system, and that the beneficiary's "knowledge of bio-mass energy systems and thermal transfer technology have been instrumental in the success of the overall design."

Donald E. Miller, district sales manager for George Koch Sons, Inc., states that the beneficiary "was a vital resource in developing our low temperature drying technology." He continues:

> The development of low temperature flatline drying in the OSB [Oriented Structure Board] industry is a major advancement. It addresses the VOC emissions at its source and not at the "end of the pipe" approach that has been widely accepted in the past. . . .

> [The beneficiary's] technical skills and talents were critical to the design of Koch's low temperature strand drying systems. His continued involvement is just as important to enhance the performance of our Generation 2 future dryers.

Bruce S. Grebe, vice president of OSB Operations for Norbord Industries, Inc., states that the beneficiary was first invited to participate in the development of the flatline drying system because he "was highly regarded in the field [of] bio-mass energy systems and thermal oil heating and control system for the dryers." Mr. Grebe asserts that, because flatline dryers operate below 350°F, as opposed to rotary dryers that operate at over 800°F, "emissions from OSB plants can be reduced 90-95% through pollution prevention rather than control" and less wood is burned away during the drying process. Mr. Grebe asserts that the beneficiary "is a brilliant engineer who . . . was integral to the development of this extraordinary new technology and is equally integral to its ongoing improvement and refinement."

To show the beneficiary's role in developing the above system, the petitioner submits a copy of a U.S. Patent Certificate showing that the beneficiary is the sole inventor of the "multi-zone method for controlling VOC and NOx emissions in a flatline conveyor wafer drying system." To demonstrate the national scope of the beneficiary's work for the petitioning company (which the beneficiary founded), the petitioner submits a "List of Past/Present/Future Customers" showing clients throughout the United States and Canada, as well as in other countries such as Sweden and Mexico. It is not clear how many of these customers have already done business with the petitioning company, or how a "future customer" can be distinguished from a company that simply has never done business with the petitioner. Because it is simply a list prepared by the petitioner, it has no weight as documentary evidence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Other documentation, however, does establish that the use of the system designed in part by the beneficiary has spread beyond the local level.

An article from the November 1996 issue of the trade magazine PanelWorld highlights the use of flatline dryers at three Norbord facilities. We note that this article, which extols the benefits of the flatline dryers, was written by Donald Miller, identified above as a district sales manager for the company that manufactures the dryers. Thus, while this article may have served to publicize the drying system, it is more akin to an advertisement or press release than to a work of objective, journalistic reportage.

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 additional letters and other documents. Counsel cites Board of Alien Labor Certification Appeals case law to show that "[l]abor certification is frequently denied to aliens who are also investors, officers or directors of the sponsoring employer." In this instance, the beneficiary is the original incorporator of the petitioning company, as well as its president. The cited cases indicate that, in instances where a given alien creates and/or controls a company, there can be "no genuine test of [the] labor market."

Robert Kerr, identified above, asserts that the beneficiary "possesses a profound understanding of the technology's strengths and shortcomings and a vision of its potential that cannot be objectively articulated as a job requirement on an application for labor certification."

Terry Morin, president of Southgate Process Equipment, states:

> As a supplier to the wood products industry, we know [the beneficiary] as a leader in technological innovations for heating systems in flatline strand dryers. . . .
>
> [The beneficiary] has continued to advance flatline dryer technology and its benefits to the environment and the OSB industry with a second generation of flatline dryers. . . .
>
> In addition to the second generation dryer products, our company is supplying [the beneficiary] with equipment for his development of an improved heating method for the patented flatline dryer system. . . . [T]he new heating method will substantially reduce the energy necessary to achieve precise drying of the wood flake.

Charles Summers, CEO of Thermal Fluid Systems, Inc., states that the beneficiary's work "targets one of the main sources of pollution in the OSB manufacturing process, the drying process," and that the beneficiary's "technological innovations . . . were critical to the development of the first generation of dryers currently in use in Mississippi and Minnesota as well as Canada."

Documentation from the U.S. Forest Service states:

> Atmospheric emissions from composite wood products manufacturing facilities have been of concern since the 1970s. The concern has centered primarily around the opacity of emissions from wood dryers ("blue haze") caused by particulates and condensable organic materials. More recently, concern has

also focused on the emissions of hazardous air pollutants (HAPs) and VOCs during the production of wood products.

Other government documentation confirms that wood dryers are a source of considerable pollution, although this documentation does not mention the petitioner or the beneficiary. Therefore this documentation serves solely as background information.

The director denied the petition, stating "[t]here is little evidence in the record addressing specifically how the alien would benefit the national interest to a substantially greater degree than a similarly qualified U.S. worker." The director stated that the petitioner has not "shown why a labor certification is not applicable" in this instance.

On appeal, counsel argues that the petitioner has, in fact, submitted detailed arguments from case law to show that "established precedent . . . would clearly prohibit the beneficiary from qualifying for a labor certification," because the beneficiary is an owner and officer of the company with hiring authority, and because he "is totally inseparable from the petitioner." The bulk of the appeal brief concerns the unavailability of a labor certification in this instance.

Counsel states that the petitioner has submitted "[c]opious evidence of [the beneficiary's] prior and ongoing contributions to his field." Counsel observes that the beneficiary holds a U.S. patent[2] for technology that has already been implemented in several states, with additional projects in development, and counsel contends that the beneficiary's "remarkably successful" career demonstrates his eligibility for the waiver.

Upon careful consideration, we conclude that this petitioner has satisfactorily established the beneficiary's eligibility for the national interest waiver. While the record would have been more persuasive had it contained (for instance) documentation from the U.S. Environmental Protection Agency, recognizing that the beneficiary's work has been especially significant in fighting pollution from the wood processing industry, we conclude that the record as it stands is sufficient to establish the petitioner's eligibility.

The petitioner has established that the beneficiary has played a major, possibly irreplaceable, role in the continuing development

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[2]Counsel fails to note that, according to Matter of New York State Dept. of Transportation, supra, the very fact that a given beneficiary holds a patent is not *prima facie* evidence of eligibility for the waiver. We must consider the importance or significance of the patented invention.

of equipment that successfully addresses one of the major sources of pollution in the wood processing industry. The petitioner has also shown that this technology is being implemented nationally, gradually but at an increasing rate. The director, in denying the petition, has listed the exhibits submitted but the decision contains no discussion of the merits or shortcomings of the listed exhibits.

Counsel acknowledges that the unavailability of a labor certification is not, itself, sufficient grounds for a national interest waiver. Nevertheless, pursuant to Matter of New York State Dept. of Transportation, supra, the unavailability or inapplicability of a labor certification is one of many factors that the Service must take into consideration. As counsel argues at length on appeal, the record contradicts the director's finding that the petitioner has not explained why the labor certification process is not appropriate in this instance, and thus the director failed to take this factor into account.

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 field of endeavor, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that others in the petitioner's industry recognize the significance of this beneficiary's work rather than simply the overall occupation or field of endeavor. The benefit of retaining this alien's services outweighs the national interest which is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has 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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.