



B5

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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



JAN 18 2002

File: [Redacted] Office: Vermont Service Center Date:

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)

PUBLIC COPY

IN BEHALF OF PETITIONER:
[Redacted]

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. The Associate Commissioner, Examinations, dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reconsider. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

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 a postdoctoral research fellow at Educational Testing Service. 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 had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, affirmed the director's decision and dismissed the appeal.

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 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.

On motion, counsel contends that the AAO failed to consider letters from "a number of independent witnesses testifying to his novel model and his past achievements such as Prof. Hariharan Swaminathan, Dr. Sandra Greenberg and Dr. Xiangbo Wang." Counsel asserts that the statements from these individuals "showed that [the petitioner's] model has national impact upon the educational testing in the U.S. and the world." Review of the AAO's initial appellate decision shows that the AAO quoted from their letters at length, and therefore it is clear that the AAO did not fail to consider those letters. Counsel has not specified how the AAO's analysis of these letters was flawed. It cannot suffice for counsel simply to contend that the AAO failed to consider the letters, when the record proves that the AAO did not ignore them altogether.

We note that, according to the aforementioned letters, Dr. Wang first learned about the petitioner in April 1999, nearly six months after the petition's filing date, and therefore Dr. Wang's letter cannot establish the extent of the petitioner's influence or reputation as of the filing date.

The petitioner's "achievements have been well recognized by the most authoritative institution in the world, [the] American Educational Research Association (AERA), which presented [the petitioner] with the 1999 Mary Catherine Ellwein Outstanding

Dissertation Award." The petitioner received this award in April 1999, and therefore it cannot establish the petitioner's eligibility as of the petition's November 1998 filing date. See Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. The AAO did not err by failing to attribute retroactive weight to the petitioner's award. Also, the award is mentioned in the appellate decision; counsel's mentioning it again on appeal does not constitute a new argument.

Counsel states that the petitioner's eligibility is established by Matter of New York State Dept. of Transportation "and other precedent decisions." The two other decisions cited by counsel are not, in fact, published precedent decisions; they are simply standard appellate decisions pertaining to petitions filed by two of counsel's other clients. These other appeals have no weight or force as precedents and are not binding on the Service in this proceeding. Furthermore, counsel fails to explain how these unpublished decisions have any bearing on the matter at hand. It cannot suffice for counsel simply to make the general claim that unspecified similarities between the petitions demand similar outcomes on appeal, and counsel's credibility suffers when he incorrectly refers to unpublished appellate decisions as "precedent decisions."

Counsel concludes that, if the petitioner does not qualify for the waiver, "literally speaking, there is no one [who] would qualify for this category, and it's not the Congress' intent for this category." Counsel offers no support for this claim, nor does counsel cite any legislative history or otherwise establish that the denial of the petition, or the dismissal of the appeal, were contrary to Congressional intent. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel requests oral argument. Oral argument, however, is limited to cases where cause is shown. The petitioner must show that a case involves facts or issues of law which cannot be adequately addressed in writing. In this case, counsel has shown no cause for oral argument; counsel simply states that he desires it. Consequently, the petitioner's request for oral argument is denied.

Counsel also indicates that a separate brief is forthcoming "within thirty days." The regulation at 8 C.F.R. 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already-submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation which allows a petitioner to submit new

evidence or arguments to supplement a previously-filed motion.¹ By filing a motion, the petitioner does not guarantee himself an open-ended period in which to supplement the record. Otherwise, a petitioner could indefinitely delay the adjudication of the motion, simply by repeatedly submitting new documents and requesting still more time to prepare still more submissions. In any event, the motion was filed nearly two years ago and, to date, the record does not contain any further supplemental submission.

Counsel's arguments on motion do not establish that the AAO's prior appellate decision on this matter was in error; general assertions to the effect that the petitioner is entitled to a new adjudication of his petition, or that evidence ought to be re-examined, cannot suffice to establish error. 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, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

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 Associate Commissioner's decision of January 31, 2000 is affirmed. The petition is denied.

¹We acknowledge that some confusion may arise from Service regulations at 8 C.F.R. 103.5(a)(1)(iii), requiring that motions be submitted on Form I-290A. This form is entitled "Notice of Appeal to the Board of Immigration Appeals," and that Board has different standards and procedures than the AAO. The form contains a space marked "I (am) (am not) filing a separate written brief or statement," but this space is for use in Board appeals rather than AAO motions. We note that the version of the Form I-290A used by counsel has a revision date of October 31, 1979, before the AAO even existed; the form has since been discontinued and its continued mention in the regulation is due to oversight. The form number was removed from the list of forms at 8 C.F.R. 299.1 effective April 1, 1997 pursuant to 62 Fed. Reg 10312 (March 6, 1997), by which time the form had already been discontinued for years.