

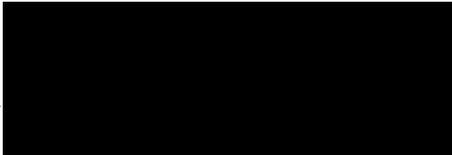


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC-98-202-50263 Office: California Service Center

Date: 28 JAN 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 which 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 which 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 which 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, 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), a member of the professions holding an advanced degree. 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 did not contest that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but concluded 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 contest that the petitioner was a professional with an advanced degree. This issue will be discussed in more detail below. As the basis of the director's decision was that the waiver of the labor certification would not be in the national interest, we will discuss that issue first.

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.

The petitioner is a flight instructor/helicopter tour guide who continues these duties despite his promotion to vice president of Offshore Helicopters, Inc., a company with approximately four employees. He has also apparently been instrumental in marketing the services of his employer.

The director concluded that the petitioner had not persuasively demonstrated either that he worked in an area of intrinsic merit or that the proposed benefits of his employment would be national in scope. Finally, the director concluded that the petitioner had not established that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

On appeal, counsel inexplicably resubmits the entire record with no new documentation, and argues that the petitioner meets all three prongs of Matter of New York State Dept. of Transportation. Specifically, she argues that the petitioner's work is in an area of intrinsic merit because he is responsible for the success of a small business and 80% of businesses in the United States are small businesses employing 50% of the work force. Counsel further argues that the proposed benefits of the petitioner's employment will be national in scope because he brings tourists to the United States and advertises in major U.S. newspapers and because small businesses as a whole are so significant to the U.S. economy. Finally, counsel argues that the petitioner is an unusually talented pilot and marketing executive.

We conclude that the petitioner does work in an area of intrinsic merit. Tourism is a major economic mainstay in Hawaii, where the petitioner works, and given that no one can fly a

helicopter without intensive training, the petitioner performs an essential service by providing skilled instruction.

We agree, however, with the director's finding that the petitioner has not shown that his activities are national rather than local in scope. While the petitioner's activities have been beneficial for his employer and pupils, claims of wider benefit are tenuous at best. While small businesses as a whole may make up a significant portion of the United States economy, the effect of a single small business on the national economy is negligible. The petitioner has not demonstrated that his strategies are being modeled successfully by small businesses nationwide.

Regarding the final prong, at issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner 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 a past history of achievement with some degree of influence on the field as a whole. Matter of New York State Dept. of Transportation, supra, note 6.

The evidence that the petitioner is responsible for the success of a small business is minimal. As evidence that the petitioner has contributed to the success of Offshore Helicopters, Inc, the petitioner submits the company's 1996 tax return, a list of local companies and travel agencies with which Offshore Helicopters, Inc. contracts, a stack of travel agency flight contracts with flight rates and times, and promotional materials. The president of Offshore Helicopters, Inc. writes that the petitioner worked with him to capture the Japanese flight training market and is entirely responsible for the success of the company's helicopter tour business. The 1996 tax return, however, reflects only \$1,139 net income and a negative net worth.

Regardless, the petitioner has not demonstrated a past track record of achievements with some degree of influence on his field as a whole.

The petitioner submitted endorsement letters from other Hawaiian business executives providing general praise of his professionalism and students praising his ability as an instructor. These letters simply do not explain how the petitioner as a vice president or flight instructor has influenced the tourism or flight instructor industries.

The record also includes a copy of the Offshore Helicopters, Inc. flight training manual allegedly composed by the petitioner. The record contains no evidence, however, that flight instructors nationwide have adopted these manuals.

In addition, the petitioner submitted newspaper articles crediting him with leveling out a helicopter after the wing of an airplane being filmed for a promotional video for the Cosmo Flying School contacted the helicopter's rotors. The petitioner also included an article about the dubious safety record of the Cosmo Flying School. While it is certainly commendable that the petitioner was able to level out a damaged helicopter and save the film crew aboard, this one incident does not relate to the petitioner's abilities as a business executive. In addition,

protecting the safety of one's passengers is a fundamental and essential duty of every aircraft pilot. Even if this incident were considered evidence of his talent as a pilot and, perhaps, an instructor, it does not demonstrate that the petitioner has a track record of achievement in aviation that has influenced the field as a whole.

Given that Hawaii is almost universally recognized as a popular tourist destination, it is not at all clear how many tourists travel to Hawaii based solely or primarily on the petitioner's activities there. Furthermore, the petitioner has not demonstrated that he has trained a quantity of foreign pupils sufficient to have an economic impact discernible beyond the island of Oahu.

The petitioner's impact appears to be limited to a small local area, and to be of benefit primarily to his employer and its clients.

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.

In addition, we do not concur with the director that the petitioner is an advanced degree professional. The petitioner claims to have the equivalent of a Master's of Business Administration (MBA). The petitioner submits a report from the Foundation for International Services, Inc., concluding that the petitioner has the equivalent of an MBA. The report states:

In summary, it is the judgement of the Foundation that [the petitioner] has the equivalent [of] a bachelor's degree in civil engineering from an accredited college or university in the United States and has, as a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of a bachelor's degree in business management from an accredited college or university in the United States. Furthermore, [the petitioner] has, as a result of his having the equivalent of a U.S. baccalaureate degree followed by at least five years of progressive experiences in the specialty, the equivalent of a master of business administration degree from an accredited college or university in the United States.

8 C.F.R. 204.5(k)(2) permits the following substitution for an advanced degree:

A United States baccalaureate degree or a *foreign equivalent degree* followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

(Emphasis added.) This regulation only permits an alien to substitute a bachelor's degree with another equivalent *degree*, not with work experience which may, if the alien were seeking another visa classification, be considered equivalent to a bachelor's degree. The petitioner's bachelor degree was in civil engineering, a field unrelated to business. In light of the above, we conclude that the petitioner does not have the equivalent of an MBA. Thus, the petitioner is not an advanced degree professional.

While the petitioner never claimed to be an alien of exceptional ability, we will consider this possibility. The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The record contains evidence which relates to the following criteria.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The record includes some evidence suggesting that the petitioner has over 12 years of progressive experience in his field, including helicopter acquisitions, sales and marketing, business management, planning and management of ground training, ground and flight instruction for numerous aircraft, etc. The petitioner has submitted evidence to minimally satisfy this criterion.

A license to practice the profession or certification for a particular profession or occupation

The petitioner is an FAA Certified Flight Instructor for helicopter pilots, an Advanced Ground Instructor for helicopter pilots, a certified commercial and private helicopter pilot in the U.S. and Japan, and a licensed international radio operator. The record also includes a graduation certificate for the Robinson Factory Safety Course and the McDonnell Douglas MD500 course. These licenses are not related to the petitioner's managerial duties as vice-president of Offshore Helicopters, Inc.

Even assuming the petitioner were seeking classification as an exceptional flight instructor, the petitioner has not demonstrated that these certifications represent more than is required for a flight instructor and, thus, evidence of exceptional ability. In some fields, voluntary certification or licensure is an indicator of exceptional ability; for instance, an accountant must meet stringent criteria to qualify as a certified public accountant, but even without this certification the accountant is allowed to work in the field. Mandatory licensure or certification, however, such as for aircraft

pilots, is useless under this criterion. To hold otherwise would lead to the absurd conclusion that every pilot who is legally authorized to fly is better than most pilots.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The Aircraft Owners and Pilots Association awarded the petitioner a certificate "in recognition of your professional dedication to the success of your students and your support for the future of general aviation." Professional dedication to one's students and support for the future of one's field is not a significant contribution to the industry or field.

In light of the above, the petitioner has not established that he is an alien of exceptional ability. The petitioner is therefore ineligible for classification pursuant to section 203(b)(2) of the Act.

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.

ORDER: The appeal is dismissed.