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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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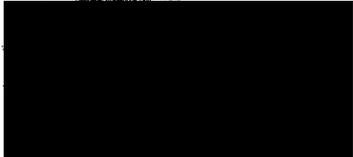
File: [Redacted] Office: Nebraska Service Center

Date: JUL 22 2002

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:



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, Nebraska 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 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 holding an advanced degree. The petitioner is a manufacturer of custom-engineered rubber, plastic and metal components and systems. At the time of filing, it employed the beneficiary as its chief operating officer. More recent documents in the record refer to the beneficiary as the president of the company, although it is not clear whether the beneficiary still holds that particular position. 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 petitioner has sought to classify the beneficiary as an advanced degree professional and as an alien of exceptional ability. The director did not dispute that the beneficiary qualifies for the classification sought, nor did the director specify which of the two classifications applied to the beneficiary. The beneficiary appears to qualify more readily as a member of the professions holding an advanced degree, but for our purposes it is not significant which of the classifications applies to the beneficiary. 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.

The petitioner's national interest claim rests primarily on a series of affidavits, to be discussed below. In the excerpts to follow, we have omitted the paragraph numbers contained in the original affidavits.

As noted above, counsel asserts that the beneficiary has served the national interest through three contributions, the first of which is the invention of a plastic bowling pin. The petitioner submits an affidavit from [redacted] who states:

I have been involved in the bowling industry for over 50 years in a number of capacities. . . .

I hold several patents in the bowling industry and have been responsible for the introduction to bowling of most of the chemical and mechanical technology that exists in the sport today.

I have known [the beneficiary] for over eight years and am acquainted with his plastic bowling pin invention and his patent application which is currently pending with the U.S. Patent and Trademark Office.

The plastic bowling pin product [the petitioner] seeks to patent is unique to the bowling industry, both in the U.S. and abroad, in that all bowling pins are

typically constructed of hardwood maple covered by a nylon sleeve and generally have a useful life of 3,000-4,000 games.

Based upon test results, we anticipate that [the beneficiary's] pin will have a useful life of more than 7,000 games and may possibly last indefinitely. . . .

A conversion from wood bowling pins to plastic pins would have the following benefits:

Because the plastic pin has a longer life, bowling alley operators will save an estimated \$100 per year per lane . . . and an estimated aggregate \$13.5 million for [all] the lanes in the United States.

As the plastic pin requires no maintenance other than periodic washing, bowling alley operators will save current maintenance costs estimated at \$50 per year for each bowling alley operation in the U.S.

The use of plastic bowling pins rather than those made from hardwood maple will conserve at least 400,000 hardwood maple trees annually. . . .

[W]e estimate that sales of plastic pins to markets abroad . . . will approximate 2 million plastic pins per year, with an export value of approximately \$15 million.

With regard to another of the beneficiary's contributions, the petitioner submits an affidavit by Joseph Markham, president and CEO of the Kong Company. [REDACTED] states:

The Kong Company is engaged in the design, production and marketing of high-performance rubber training and oral hygiene products for dogs. Our products are used by professional dog trainers, veterinarians, and police academy professionals who work with K-9 teams.

Until our association with [the petitioning company] which began in November 1993, Kong Company had limited sales and supply capabilities due to production capacity and engineering limitations. . . .

Through [the beneficiary's] expertise and the production engineering processes he developed, our annual production rapidly increased 500%. . . .

As a consequence of the technology designed by [the beneficiary], we have increased our workforce from 13 (9 full-time and 4 part-time) to 60 (35 full-time and 25 part-time) employees.

At a recent national veterinarian conference in February 1998, we conducted a survey of 1,200 veterinarians, and learned that Kong Company rubber products were recommended by veterinarians 33% more frequently than our nearest competitor. We attribute this to [the beneficiary's] knowledge and expertise.

The final affidavit is from [REDACTED] western regional sales manager for Aqua-Aerobic Systems and former regional sales manager/civil engineer for [REDACTED]. Both named companies manufacture and distribute waste-water treatment and aeration equipment. [REDACTED] states:

Gummi-Jaeger [the petitioner's parent company] . . . has been engaged in the manufacture of aeration equipment components for 15 years. One of the principal components of aeration equipment is the diffuser, a device which facilitates the introduction of compressed air into wastewater and stimulates the growth of bacteria which eliminates contaminant, including nitrates and phosphates. . . .

[REDACTED] then lists numerous benefits of rubber diffusers over older ceramic diffusers.]

[The beneficiary] was involved in the development of the rubber diffuser design and material composition through Gummi-Jaeger. . . .

[The beneficiary] is the inventor of a new rubber diffuser product that materially improves upon the earlier Gummi-Jaeger design, and has obtained a patent on the new design . . . [which] reduces the diffuser system life cycle cost by approximately 10-20%.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. The director also requested evidence of the petitioner's ability to pay the beneficiary's wage. This latter request was not required under the regulations, because documentation of ability to pay is part of the job offer requirement, which the petitioner seeks to waive. The director appears to have requested such evidence in the face of the petitioner's statement that the company posted a significant net loss in 1998. The petitioner maintains that this was a one-time loss rather than part of a sustained pattern of unprofitability.

In response to the director's request, the petitioner has submitted copies of previously submitted exhibits, along with additional affidavits and documents. Much of this documentation pertains to the petitioner's ability to pay, which as we have explained is not a relevant issue in a waiver case.

[REDACTED] team leader for Equipment Specifications and Certifications at Bowling Inc., which tests equipment on behalf of the American Bowling Congress, states in an affidavit that his tests of the petitioner's plastic bowling pin showed the pin to be totally acceptable and more durable than hardwood pins. [REDACTED] states he "would anticipate that as the bowling industry becomes more familiar with the plastic bowling pin and its savings, the use of the plastic pin will increase significantly."

[REDACTED] president of Drive Technologies, LLC, which designs "universal joints and drive shafts for application in the automotive, farming, marine, industrial and aerospace industries," states that his company and the beneficiary "developed a plastic seal bonded to a unique rubber compound formulated by [the beneficiary]. . . . The rubber compound developed by [the beneficiary] and [the petitioner] is unique in that it bonds to plastic and permits the rubber bonded

plastic seal to replace the [less desirable] steel seal.” [REDACTED] estimates “cost savings . . . in excess of 40%” will result from this innovation.

Counsel discusses business factors that would make approval of a labor certification unlikely. Counsel notes, correctly, that according to Matter of New York State Dept. of Transportation, supra, the unavailability of a labor certification is one of many factors that can be considered. We stress, however, that such unavailability is not by itself sufficient grounds for a waiver. To hold otherwise would effectively make the job offer requirement meaningless, because failure to meet that requirement would create no impediment to the approval of any petition.

The director denied the petition, stating that the petitioner has not shown that the beneficiary’s work affects more than a small segment of the economy. The director also noted possible negative impact from the beneficiary’s work, for instance finding that increased use of plastic pins “would be potentially detrimental to wood pin manufacturers” while at the same time shifting pin manufacture from a renewable natural resource (wood) to a nonrenewable synthetic one (plastic). The director additionally found that many of the assertions regarding long-term benefits arising from the beneficiary’s work are speculative, based on projections of future events.

The petitioner submits further affidavits on appeal. [REDACTED] Tyne of the Colorado School of Mines states “[t]he development by [the beneficiary] of the rubber compound which can be directly bonded to plastic is a very significant and innovative contribution to the nation.” [REDACTED] asserts that “[t]hese types of bi-materials have been available for a number of years,” but that the beneficiary’s version can be produced more economically. [REDACTED] states that he “would anticipate that [the beneficiary’s] rubber compound will be used rapidly and extensively by industry in a number of applications.” [REDACTED] estimates that the beneficiary ranks “in the top 5% of manufacturing/industrial engineers in the U.S.,” and he states that the beneficiary “has made material modifications which will enhance manufacturer ability and better performance in use.”

[REDACTED] president of Done-Rite Bowling (which distributes plastic bowling pins manufactured by the petitioner), states in an affidavit:

From February 1, 2000 through August 31, 2000, we have sold 30,000 plastic bowling pins (\$600,000) and anticipate that sales through December 31, 2000 will reach 75,000 pins (\$1,500,00). We project that by 2002 sales will reach 600,000 pins (\$12 million). Wooden pin sales have maintained their normal sales volume for Done-Rite Bowling. . . .

It is my opinion that the plastic pin will replace all wood pins in the world over the next five years.

[REDACTED] also notes that the manufacturers of wood bowling pins are primarily large corporations for which bowling pins are only a small proportion of their business.

We acknowledge the director’s concern with the use of wood as a renewable resource. Nevertheless, the evidence of record indicates that wooden bowling pins are discarded after about one year of use, and that one maple tree produces only ten to twelve pins. The materials in the

record suggest that the environmental disadvantages (wasteful production and the quantities of trees felled) outweigh the advantages of using a renewable natural resource.

Paul Cornay of Drive Technologies supplements his earlier comments with a new affidavit in which he states that his company is incorporating the beneficiary's plastic/rubber seal into products created for Drive Technologies' clients. Mr. Cornay states "[t]he plastic/rubber has the potential to change the configuration of machine parts and introduce a new arena of design of better parts. [The beneficiary's] rubber formulation is unique in the industry and will have a significant impact on parts design."

Some of the comments offered in support of the petition are, indeed, speculative and rely on assumptions of events beyond the petitioner's control. Still, the petitioner has shown that the beneficiary's work has had measurable past results, such as the substantial growth of client companies, and the growing acceptance of the synthetic bowling pin (which has won the approval of the American Bowling Congress and was the official pin of the 98th annual ABC National Championships Tournament). The expertise of many of the witnesses of record is beyond dispute, and these individuals attest to the significant impact of the beneficiary's contributions to a variety of client industries. Some witnesses have had little connection with the beneficiary apart from being asked for opinions to support the petition.

The director's decision was well reasoned and contained observations that demonstrated attention to the record, but upon careful and extensive review of the record (including new material submitted on appeal), we cannot conclude that the record as it now stands supports the finding of ineligibility. Some of the director's findings are clearly erroneous, such as the finding that the beneficiary's work will directly affect only the owners of bowling alleys. The record shows that the plastic bowling pin is only one of many diverse projects undertaken by the beneficiary.

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 the business community recognizes the significance of this beneficiary's work rather than simply the general area of endeavor, and the statements from reliable witnesses amount to more than simply general statements of client satisfaction. The benefit of retaining this alien's services outweighs the national interest that 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.