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U.S. Department of Justice  
Immigration and Naturalization Service

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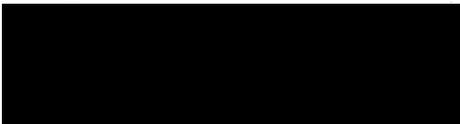
Date: JUN 13 2002

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 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, 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 a member of the professions holding an advanced degree. The petitioner seeks employment as a senior bridge engineer at Parson's Transportation Group, a civil engineering firm headquartered in New York City. 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 has 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 holds an M.S. degree in Mechanical Engineering from Washington University, St. Louis. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding 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.

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.

Along with documentation pertaining to his projects and his employer, the petitioner submits several witness letters. [REDACTED] geotechnical oversight coordinator for the Utah Department of Transportation's I-15 Corridor Reconstruction Project, states:

[The petitioner] is currently working with [REDACTED] as part of the joint venture of [REDACTED] for the \$1.6 billion design-build I-15 Corridor Reconstruction Project in Salt Lake City, Utah. He has been involved in the modeling, evaluation, and design of bridges. The I-15 corridor, an economic lifeline to the nation, is a 17-mile stretch with 135 bridges in a high seismic near-fault zone with lake deposits. The I-15 project is the largest public-funded freeway reconstruction in the nation to be handled in the design-build mode. . . .

[The petitioner] has put his knowledge and expertise to work on the I-15 Reconstruction Project. He has analyzed and designed the substructure and superstructure of several concrete and steel fly-over and overpass bridges, including steel plate girder bridges with transversely post-tensioned concrete decks and precast concrete Nebraska type girder structures. The I-15 bridges [are] located in a high seismic zone with poor soil condition. This work requires skills and experience beyond the capabilities of most structural engineers.

[The petitioner] has contributed significantly to the earthquake safety of buildings and highways in the United States. . . . His expertise and experience can be applied in many places and certainly exceed what we encounter and expect of an average person in his field.

We note that, while several letters identify the petitioner as a current employee of [REDACTED] these letters were written several months before the petition's filing date. By the time of filing, the petitioner was working for another of [REDACTED] subsidiaries [REDACTED]

[REDACTED] technical liaison manager at [REDACTED] and senior project manager at [REDACTED] [REDACTED] states that the petitioner's "leadership in several prior earthquake retrofitting projects proves invaluable to the operation of the team" and provides an example of the petitioner's past experience:

[The petitioner] played a critical role in emergency and interim rehabilitation of the Gowanus Expressway for the New York State Department of Transportation. . . . He developed emergency rehabilitation and seismic retrofit designs for the deteriorated components to upkeep its structural integrity and ensure its functionality in the event of earthquakes.

[REDACTED] now deputy director of Engineering at [REDACTED] was formerly a senior project manager [REDACTED] provides more information about the petitioner's work in New York with a prior employer:

During his six years with [REDACTED] (LEAPC), [the petitioner] has played leading roles in many critical seismic retrofit projects. One of these projects was the [REDACTED] for New York State Department of Transportation. The elevated viaduct portion of the Gowanus Expressway over the Gowanus Canal is a major artery in the New York City transportation system, handling a large portion of commercial traffic from out of state. The seismic retrofit of this structure was of great importance and urgency to the region from an economic and public safety point of view. [The petitioner] was the key member of the LEAPC team, in that he was responsible for the analysis and development of retrofit details for the bridge elements that did not meet design or safety standards due to deterioration and/or increased live load demand. [The petitioner] was also in charge of monitoring overall structural integrity of the project and preparing special earthquake-resistance reports for submission to the NYSDOT. His professional services went well beyond ordinary design requirements due to the unique structural framework of the viaduct resulting from several major structural modifications to the viaduct in the 1940's and 1960's. [The petitioner's] contributions were instrumental in the successful completion of this truly difficult and significant task.

[REDACTED] senior technical manager at [REDACTED] states that the petitioner "has made great contributions to the modeling, evaluation, design, and retrofit of many bridges and buildings in the United States," and that the petitioner "has been a central figure" in many such projects:

1) Coscob Transmission Towers, Metronorth. [The petitioner] used STAAD III software to perform windload and seismic analysis on the towers. He presented the repair details for the corroded steel members and the concrete foundation which had been exposed to extreme environmental conditions. 2) Pennsylvania Station Redevelopment Project, AMTRAK. [The petitioner] was responsible for the evaluation of seismic safety of the main post office that sits on top of the passenger platforms and rail tracks. He prepared a design proposal to the construction management company that stressed the importance of improving the earthquake resistance of the historic building. 3) Bridge and Viaduct Rehabilitation, Long Island Railroad. [The petitioner] was in charge of rehabilitating or replacing the bridges on the main line from Manhattan to Long Island. He designed steel superstructures and concrete substructures according to seismic codes. 4) Emergency and Interim Rehabilitation of the Gowanus Expressway, New York State Department of Transportation. [The petitioner] prepared seismic evaluation reports for the Department which projected problems in structural elements and recommended corrective measures. He also developed emergency rehabilitation and retrofitting designs for failed viaducts to ensure public safety.

[The petitioner] has put his expertise and experience gained in prior projects to work in the I-15 Reconstruction. His input has been invaluable to his colleagues in the designing team. . . . Without his participation, the successful completion of the project will be in jeopardy.

With regard to the I-15 Reconstruction project, we note that the Utah Department of Transportation reports that this project was completed on July 15, 2001 ([www.dot.state.ut.us](http://www.dot.state.ut.us), accessed May 9, 2002). The record also indicates that the petitioner had ceased working on the I-15 project several months before the petition was even filed. Necessarily, any arguments to the effect that the petitioner needs the waiver in order to complete the I-15 project are now moot, and the assertion that the project cannot be completed without the petitioner have been proven not to be true, as the project was in fact completed, under budget and ahead of schedule, several years after the petitioner left the project for reasons unrelated to his immigration status.

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 witness letters. [REDACTED] regional administration manager of Parsons [REDACTED]

In January of 1998, immediately following his hiring, [the petitioner] was assigned to the I-15 Reconstruction project in Salt Lake City. Upon completion of the design phase of that project in late 1998, his services were requested in our New York City office to participate in the Gowanus Expressway Project. . . .

[The petitioner] has been involved in [a] number of ongoing projects since his arrival in the New York City office of PTG. . . . He has been involved in seismic analysis study of the Gowanus Expressway (1-278); Study of Alternatives for replacement of the elevated portion of the Gowanus Expressway modeling, and analyzing the proposed alternatives; Route 9A-Construction Support Services; Marine Parkway Bridge-Rehabilitation; and Brooklyn Battery Tunnel Ventilation Buildings rehabilitation proposal.

We note that [redacted] indicates that the petitioner stopped working on the I-15 project "in late 1998," and then went on to the Gowanus Expressway Project. This assertion, however, appears to conflict with the chronology in earlier letters. For instance, [redacted] letter, dated September 23, 1998, indicated that the petitioner "played [past tense] a critical role in emergency and interim rehabilitation of the Gowanus Expressway." [redacted] adds that the petitioner "[c]urrently . . . is working . . . on the \$1.6 billion design-build I-15 Reconstruction Project."

The record contains evidence to indicate that the petitioner had ceased working on the I-15 project by late 1998, and was working in New York in 1999. Nevertheless, on his Form ETA-750B Statement of Qualifications, which he had signed under penalty of perjury on March 8, 1999, the petitioner stated that he was, at present, working on the I-15 project. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

[redacted] senior engineering manager at Lichtenstein Engineering Associates, states that the petitioner has been involved with several "projects that are critical and of national importance," which other witnesses have already identified. [redacted] asserts that the petitioner "was always well regarded by his peers and fellow employees during his employment here," and that the petitioner's professional qualifications are "well above the minimum qualifications of bridge or structural engineer." As has been observed in Matter of New York State Dept. of Transportation, a plain reading of the statute and regulations shows that aliens of exceptional ability are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one's field of endeavor does not, by itself, compel the Service to grant a national interest waiver of the job offer requirement.

[redacted] project manager with Lichtenstein Engineering Associates, offers some specific information about the petitioner's work with that firm:

One of the projects that he worked on was the Wappinger Creek Single Leaf Bascule Movable Bridge. This bridge carries Metro-North and Amtrak commuter trains on [the] New York City-New Haven Line. Due to excessive settlement of the main concrete pier, the bridge could no longer be opened to allow for the marine traffic. Bridge machinery were jammed shut and no longer operational. . . . [The petitioner] was responsible to develop a jacking scheme to set the bridge level and provide repair design to unjam the rack and pinion of [the] bridge mechanical system.

On another project, [the petitioner] was assigned to analyze and rate 120 feet high tension towers in the town of Cos Cob, Connecticut. The intent of this project was to determine the deflection of the towers due to excessive wind loading and to ascertain the extent of steel reinforcement repair. . . . [The petitioner] was able to satisfactor[il]y provide design plans for the rehabilitation of [the] towers.

While [redacted] has provided details about the petitioner's work, there is no explanation as to how the above projects were beyond the capabilities of other fully qualified engineers, or more significant than the challenges usually faced by civil engineers.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work but finding 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.

On appeal, counsel states that the director relies on faulty reasoning:

The INS wants the petitioner/beneficiary to prove that he serves the national interest of the United States to a greater degree than would an available U.S. worker. On the other side, the INS says that the petitioner/beneficiary's claim of substantially higher qualification should be tested on an application for a labor certification. The INS is contradicting itself here. This reasoning will lead to [the] convenient denial of every single national interest waiver as the INS has done in this case. That is not the intention of [the] U.S. Congress. The INS has no authority to make the law regarding waiver of labor certification obsolete.

Counsel is simply incorrect in his assertion that the denial of this one petition demonstrates that the Service intends to deny every waiver request, and thereby make the waiver "obsolete." The Service has not ceased to approve national interest waiver requests, nor was it the Service's intention to do so when it published Matter of New York State Dept. of Transportation. The intention behind the precedent decision was to provide some degree of uniformity and guidance, not to establish an unreachable standard that would effectively eliminate the waiver. The reference to "convenient denial of every single national interest waiver" makes little sense because, at the Service Center level, it requires more time and effort to deny a waiver than to

approve it. At the appellate level, a written decision is required whatever the outcome. There is no "convenience" involved in denying rather than approving a petition with a waiver request. If it is counsel's contention that the INS is exhibiting some kind of institutional antipathy toward aliens requesting the waiver, so serious an allegation demands evidence more persuasive than his client's disappointment with the outcome of his petition.

The logic of the director's decision is not self-contradictory, as counsel alleges. The director had indicated that, if a given position fundamentally requires certain qualifications and skills, then those elements can be listed on a labor certification. In other words, an alien does not qualify for a waiver simply because he or she possesses the necessary qualifications for a given position. In no way does this conflict with the finding that, to qualify for a waiver, the petitioner must show that he will serve the national interest to a greater extent than other qualified workers in his field.

Counsel maintains that the petitioner has already demonstrated that he is "an outstanding engineer," and that "experts from government agencies and established institutions are in a much better position [than the Service] to judge if [the petitioner] has made substantial contribution[s] to the United States." Obviously the petitioner's witnesses possess expertise in civil engineering which Service adjudicators lack, but it does not follow that witness letters from experts are *prima facie* evidence of eligibility. Simply listing the petitioner's projects does not establish that the petitioner's cumulative impact on the nation's transportation infrastructure is greater or more important than the impact of another given engineer.

Also, as explained above, it cannot suffice simply to establish that the petitioner is an alien of exceptional ability. Counsel has argued about Congressional intent, but the plain wording of the statute demonstrates that Congress did not intend for an alien's exceptional ability to unconditionally exempt that alien from the job offer/labor certification requirement.

The petitioner must demonstrate not only that he is a particularly well-qualified civil engineer, but that his work has had a national impact beyond the impact that is intrinsic to the profession. The petitioner has not established, for instance, that he has developed new techniques, which other engineers have adopted nationally, or that he has led nationally important engineering projects. The I-15 Rehabilitation project was nationally important, but there is no objective evidence that the petitioner played a major role in that project. The very scale of the project would appear to imply the involvement of a substantial number of engineers. The expert witnesses who have attested to the petitioner's work have been, for the most part, the petitioner's supervisors and other superiors. The record contains articles from trade publications, talking about the significance of the I-15 project. These articles identify some of the engineers involved, but they do not mention the petitioner.

Counsel cites a letter from [REDACTED] of the International Association for Bridge and Structural Engineering. The letter, dated October 28, 1999, indicates that the petitioner has co-authored a paper to be presented at a conference in September 2000. [REDACTED] states that the petitioner "certainly should be proud of the fact that his technical paper has been accepted for the Congress." The petition was filed in March 1999, and the petitioner's subsequent invitation to a

professional conference cannot retroactively establish eligibility. See Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Aside from the issue regarding the filing date, Ms. Bruschi's letter does not establish that the petitioner has made especially significant contributions to civil engineering, as opposed to simply writing a paper that cogently presents the key elements of the I-15 project (the theme of the paper).

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.