

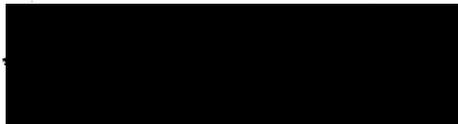


B5

U.S. Department of Justice  
Immigration and Naturalization Service

Identification 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



File: EAC-99-171-54201 Office: Vermont Service Center

Date: 6 MAR 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)

Public Copy

IN BEHALF OF PETITIONER: Self-represented

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, 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 an alien of exceptional ability, although he also claims to be 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 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.

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 a Bachelor of Law degree (equivalent to the U.S. Juris Doctor) from the University of Essex. 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 remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

On appeal, the petitioner challenges the director's determination that he is a "mere professional who holds an advanced degree" and reiterates that he seeks classification as an alien of exceptional ability.<sup>1</sup> In addition, he asserts "This distinction has a profound impact on the beneficiary's application." A review of the petitioner's arguments previously reveals his conviction that a determination of exceptional ability presumptively also meets the national interest test.

---

<sup>1</sup> The petitioner does not claim which three of the six regulatory criteria for exceptional ability set forth at 8 C.F.R. 204.5(k)(3)(ii) he allegedly meets, relying almost exclusively on his class rank in law school and a single academic award.

As will be discussed below, the exceptional ability classification normally requires a labor certification. There is simply no presumption that aliens of exceptional ability qualify for the national interest waiver. As stated above, the record establishes that the petitioner holds an advanced degree and is a professional. As the petitioner already meets one of the two types of aliens who can qualify for the national interest waiver, a determination of exceptional ability provides no additional benefit to the petitioner. Thus, the issue of whether the petitioner is an alien of exceptional ability is moot and will not be addressed. The remaining issue 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.

Instead of addressing each prong of the test set forth in Matter of New York State Dept. of Transportation, the petitioner picks small quotes out of the decision and asserts that they support his

eligibility. The petitioner argues that he is eligible for the national interest waiver because he intends to perform 300-400 hours of pro bono work per year, the United States has a "dire need" for pro bono attorneys, and, "alternatively," because the labor certification process is inapplicable to a self-employed attorney. The petitioner seriously misinterprets Matter of New York State Dept. of Transportation. That decision did not state that if an individual was unable to meet the three-prong test, he could rely, instead, on the inapplicability of the labor certification process. Rather, that issue is simply one of the considerations for the third prong and will be discussed below.

A petitioner must establish that he meets each prong of the test set forth in Matter of New York State Dept. of Transportation. We acknowledge that practicing law, and especially pro bono work, has intrinsic merit. Next, however, we must consider whether the proposed benefits of the petitioner's work, serving the disenfranchised, would have a national impact. The director concluded that the petitioner would not have a national impact. On appeal, the petitioner fails to explain how an attorney doing pro bono work in New York City will have a national impact beyond reiterating that the U.S. desperately needs pro bono attorneys. While not quoted by the director, Matter of New York State Dept. of Transportation specifically states:

We note that the analysis we follow in "national interest" cases under section 203(b)(2)(B) of the Act differs from that for standard "exceptional ability" cases under section 203(b)(2)(A) of the Act. In the latter type of case, the local labor market is considered through the labor certification process and the activity performed by the alien need not have a national effect. *For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible.*

(Emphasis added.) *Id.* at note 3. Thus, Matter of New York State Dept. of Transportation clearly and unambiguously states that the pro bono activities of one attorney do not have a national impact. While the petitioner complains on appeal about the director's "mechanical application of NYSDT to the present case," we find that the director correctly applied the plain language of that case which directly addresses pro bono attorneys. This case is a published precedent and binding on the director pursuant to 8 C.F.R. 103.3(c). This precedent decision supercedes any contradictory statements which may appear in the non-precedent decision issued previously by this office that the petitioner quotes frequently.

As the petitioner's proposed services would not have a national impact, he has not met the second prong. As stated above, a petitioner must meet all three prongs in order to qualify for the waiver. Thus, a waiver of the labor certification in this case is not in the national interest. Nevertheless, we will also consider the third and final prong, whether the petitioner will benefit the national interest to a greater degree than an available U.S. worker with the same minimum qualifications.

The record contains evidence of the petitioner's academic achievements. The petitioner acknowledges that he must demonstrate that his past record justifies projections of future benefit to

the national interest but notes that Matter of New York State Dept. of Transportation does not limit the petitioner's past record to prior work experience.

The director concluded that the petitioner had not established that he had made contributions of major significance to his field or that his contributions had garnered sufficient recognition in the field. On appeal, the petitioner reiterates that he graduated in the top 5% of his class and states "there is a clear and convincing presumption that an excellent graduate will perform better than an average one." The petitioner continues that his academic achievements are unique and reflect a degree of influence on the field as a whole because he went to law school at the age of 32 and because he accomplished his academic achievements even though English was not his native language.

The petitioner's arguments are not persuasive. Even if the petitioner's class standing were a regulatory factor in determining exceptional ability, which it is not, Matter of New York State Dept. of Transportation states:

Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F)."

Id. Moreover, graduating at the top of one's class is impressive, but not unique. There are hundreds of law schools in the United States and each school has several students who graduate at the top of their class every year. Furthermore, a petitioner cannot be considered to be more skilled than similarly qualified U.S. workers simply because he overcame the acknowledged difficulties of learning English. Such a conclusion would elevate every alien who is not a native English speaker above every U.S. worker regardless of accomplishments.

Regardless, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Even assuming the petitioner's skills are unique, the benefit those skills will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process.

In a footnote expanding on the principle that a petitioner's past record must justify projections of a future national benefit, the AAO stated that a petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Id. at note 6. The record contains no evidence that the petitioner's academic achievements influenced his field whatsoever. For example, there is no evidence that the petitioner authored a paper which was published in a law school journal and was widely cited. In fact, the record contains no evidence that the petitioner was involved with legal clinics while in law school, thereby preparing him for the issues which often arise in pro bono cases. The petitioner's mere assertion that he will dedicate 10 times more hours to pro bono cases than the average attorney is entirely self-serving and unsupported by a record of pro bono work whether as a law student in a legal clinic or as a practicing lawyer. As the petitioner has

not even demonstrated any academic experience with pro bono issues, he has certainly not established that he has influenced the practice of pro bono legal counseling as a whole.

Finally, as stated above, the petitioner argues that since he plans to be self-employed (a situation which is not inherent to the legal profession, many attorneys work for firms), the labor certification process is inapplicable. As quoted by the petitioner, Matter of New York State Dept. of Transportation states:

The Service acknowledges that there are certain occupations wherein individuals are essentially self-employed, and, thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification *cannot be viewed as sufficient cause for a national interest waiver*; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

(Emphasis added.) In other words, contrary to the petitioner's assertion that this is an alternative ground for eligibility, the inapplicability of the labor certification process is merely one factor to be considered among the others discussed in the decision in determining whether the petitioner meets the third prong. A petitioner must still demonstrate that he meets all three prongs of the test set forth above. For the reasons discussed above, the petitioner has not demonstrated that the proposed benefits of his pro bono services will have a national impact or that he has a past record, academic or otherwise, of influence on his field as a whole.

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.