

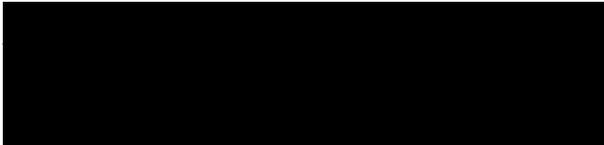


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC-99-064-50063 Office: California Service Center Date: 12 MAR 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:
[Redacted]

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), as an alien of exceptional ability. 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, 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.

8 C.F.R. 204.5(k)(2) provides, in pertinent part:

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.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because as noted by the director, the record establishes that the petitioner holds a bachelor's degree in engineering from Tianjing University and has more than five years of progressive experience. 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.

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.

We concur with the director that the petitioner works in an area of intrinsic merit, engineering, and that the proposed benefits of his work, less waste for landfills and alternative energy sources, would be national in scope. The director also concluded that the petitioner had not demonstrated that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications would. On appeal, counsel reiterates previous arguments and asserts that the petitioner "has a very matured revolutionary plan to handle the waste and reduce the pollution, which is in the national interest."

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. 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. Id. at note 6.

In response to the director's request for additional documentation, counsel asserted that the petitioner had a past record of achievement, which justifies the projections of future benefit to the national interest. Counsel states that the petitioner was the chief designer for a waste recycling, energy producing plant in Arizona. Counsel asserts that the petitioner designed the equipment and directed the project and that "his creative ideas and the equipment and technology provided by the company won wide acclamation [sic]." Counsel claims that the pyrolytic technique together with the petitioner's system "includes creative original technologies nobody else has ever achieved when compared with traditional pyrolysis." The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The references letters in the record do not support counsel's assertions.

Huanli Yu, President of Harbin Huaying Pressure Container Co., Ltd. where the petitioner worked from 1993 to 1996, writes:

[The petitioner] directed the research and design of a rolling model of Daily Waste Automatic Sorting System, and also of SW-1 Model of Daily Trash Burning System. These systems together with other equipment designed by the R&D Department made great contribution to environment protection as well as economic benefit. The average revenue coming from the equipment was about 5 million RMB annually.

Because of his contributions to the research and economic development as well as environment protection, he was highly appraised by the provincial and local governments. Although he has already left our company for a few yeas, we still appreciate the direction of research he laid for us. That is the direction of studying and inventing proper machinery systems for recycling of wastes and environment protection.

Mr. Yu does not explain how the petitioner's work influenced the field as a whole. The record does not include letters from independent Chinese experts discussing the petitioner's influence on their own projects.

Greg Fisher, President of GBS, Inc. and former Director of Environmental Business Development for the State of Arizona, indicates that he met the petitioner at an Arizona Department of Environmental Quality meeting in 1997 and was impressed by the petitioner's proposal. He continues:

[The petitioner] co-designed the prototype machine in Bullhead City, AZ. This machine recycles scrap tires as well as daily trash (Municipal Solid Waste). It uses a pyrolysis technique to convert the scrap tires into alternative fuel, carbon

black, and steel. [The petitioner] and I spoke on many occasions as I reviewed his recycling project.

Through these conversations, I discovered that [the petitioner] has significant knowledge and experience in chemical equipment and machinery. [The petitioner's] expertise and technology would yield significant benefits in both Environmental Protection and Economic Development. I appreciate his contribution and wish him great success.

Dennis McGee, CEO and President of Enviro-Tech Enterprises, Inc., indicates that he met the petitioner while consulting on the Bullhead City waste recycling project. Mr. McGee asserts that he looks forward to a "partnership" with the petitioner due to his experience in chemical and mechanical engineering, knowledge of solid waste management needs within the Chinese market place, demonstrated knowledge of power generation systems, a mutual interest in alternative fuel development and utilization, and his keen vision of global ecological principles and stewardship.

John L. DeVine, Director of Operations at Energy Answers International, Inc., who worked with the petitioner on a previous project asserts that the petitioner is "familiar" with waste recycling and pyrolysis and has experience with power generation. He then discusses the importance of this type of project.

Cathy Li, a specialist with the Arizona Department of Environmental Quality, indicates that she was impressed by the petitioner's knowledge of the waste recycling field when she met him at a meeting in 1997.

All of the above letters merely attest to the petitioner's knowledge of the pyrolysis technique, and do not identify any specific contributions to the field of waste recycling. There are no letters from independent experts attesting to how the petitioner has influenced their own projects or other independent projects. These letters do not support counsel's assertion that the petitioner has improved upon the pyrolysis technique.

John Jiang, President of Huxing International, Inc., where the petitioner is currently employed, discusses the importance of the project for which the petitioner was hired. While Mr. Jiang anticipates that the petitioner will be successful with this project, he does not provide any examples of the petitioner's contributions to that project prior to the filing of the petition.

The petitioner also submitted local newspaper articles regarding the building of the waste recycling plant in Arizona in which the petitioner participated. These articles fail to indicate that the petitioner's work on the Arizona project was influential in the field.

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.