

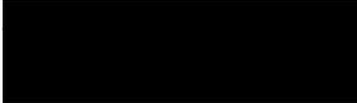


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: EAC 98 271 52493 Office: Vermont Service Center

Date: **MAY 06 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:



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INSTRUCTIONS:

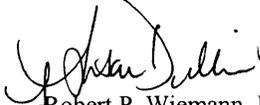
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 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 a member of the professions holding an advanced degree. The petitioner seeks employment as an HIV/AIDS prevention consultant. 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 director did not dispute that the petitioner 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.

Counsel cites evidence to show the devastating toll of HIV/AIDS, and statistics indicating that prevention efforts among gay men have significantly reduced the new infection rate. Counsel asserts that the petitioner is “a potent figure in the all important arena of prevention program design and implementation.”

Along with documentation pertaining to AIDS prevention efforts, the petitioner submits several witness letters. We will consider examples of these letters here. Richard Elovich, director of HIV Prevention at Gay Men’s Health Crisis (“GMHC”), states that the petitioner “is one of the leading figures in the UK in the development of the way of working we use here at GMHC.” Robin Gorna, chair of the Community Planning Committee at the 1998 World AIDS Conference, states “[t]he outcome of [the petitioner’s] work has been the UK’s largest lesbian, gay and bisexual service centre, providing a range of services.” Anna Molesworth, senior scientist at the Public Health Laboratory Service AIDS and STC Centre, states:

While I have known [the petitioner] for only a brief period . . . I have been aware of him by reputation for several years . . .

[The petitioner] has more experience in this field than most others, and combined with his wider knowledge of HIV prevention he has been a very valuable asset to HIV prevention in UK.

Allan Clear, executive director of the Harm Reduction Coalition (a national public health policy organization), has endorsed the petitioner as a leading proponent of harm reduction theory, who “has overseen the growth of the Metro [a UK organization] from a small local agency to what is now one of the country’s largest lesbian, gay and bisexual health organizations.”

Numerous other individuals, involved with health projects and other HIV/AIDS prevention organizations throughout the UK and the US, assert that they are familiar with the petitioner’s work because it has served as a model for many large organizations. Many of these individuals have not worked with the petitioner. Those who have worked with him represent such a broad spectrum that their letters demonstrate the extent of the petitioner’s involvement in the field.

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 background information, an additional witness letter, and arguments from counsel regarding the sufficiency of the initial submission and the supplementary documentation. The new letter is from Ceri Hutton, who had been the petitioner’s supervisor at the London-based MetroThrust project. Ms. Hutton states that the petitioner “managed to consolidate and expand what is now a thriving organisation.”

The director denied the petition, acknowledging the intrinsic merit of the petitioner’s work but finding that the petitioner’s own contribution is not national in scope, and does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director stated that it is not clear how the petitioner will continue to work in his field in the U.S., and that the petitioner has not established that he is more essential to the fight against AIDS than other dedicated professionals in the same field.

On appeal, counsel states “[t]he Service erred in applying the New York State Department of Transportation matter to this case.” Counsel offers no explanation for this claim. By law, the director does not have the discretion to reject published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers. To date, neither Congress¹ nor any other competent authority has overturned the precedent decision, and counsel’s disagreement with that decision does not invalidate or overturn it. Therefore, the director’s reliance on relevant, published, standing precedent does not constitute error. Counsel’s assertion that Matter of New York State Dept. of Transportation “has been called the death knell to national interest waivers” refers to comments made immediately after the issuance of the precedent decision, before sufficient time had elapsed for its true impact to be felt. Subsequent history confirms that approval of national interest waivers did not cease with the issuance of that decision.

¹After the filing of this appeal, Congress amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress’ willingness to modify the national interest waiver statute in response to Matter of New York State Dept. of Transportation. The narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

Counsel argues that the petitioner has developed methods and theories that are now in use by national organizations in the UK, which establishes that the petitioner has carried on work of national scope. We concur with counsel's argument that the director did not sufficiently consider the petitioner's record of achievements in the UK, instead finding that the petitioner has not yet had such an impact in the United States. Similarly, counsel cites specific examples of evidence to contradict the director's finding that the petitioner is not responsible for significant "breakthroughs" in his area of expertise.

While not all of counsel's arguments are germane or persuasive, counsel has indicated several flaws in the director's decision. The record indicates that the petitioner in this instance has had a discernible national impact in the field of AIDS prevention, and in doing so has earned the respect and attention of experts throughout the UK and the US. The preponderance of the evidence of record indicates that the petitioner has had, and is likely to continue to have, an impact substantially beyond that of other fully qualified professionals in his field.

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 community recognizes the significance of this petitioner's work rather than simply the general area of AIDS prevention. 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.