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U.S. Department of Justice

Immigration and Naturalization Service

Administrative Review Board  
Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
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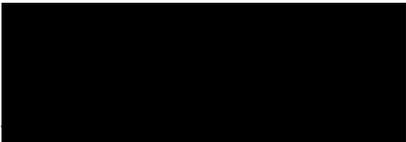
File: EAC 99 065 53335 Office: Vermont Service Center

Date: MAY 14 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, 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 works as a dentist at Dental Health Associates, a dental practice with offices in several cities in New Jersey. 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 director did not dispute that the petitioner qualifies as 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 asserts that this petitioner’s “activities would seem to fall within the parameters” of an unpublished appellate decision from 1992, which indicated that an alien can serve the national interest by improving health care. The 1992 decision has never been published as a precedent decision and therefore it is not binding with respect to other decisions. Furthermore, all contributions to health care are not equal, and therefore we must weigh the individual alien’s contributions.

Counsel observes that the petitioner works at Dental Health Associates, and “may eventually” return to City Dental, a practice in Perth Amboy where the petitioner had worked prior to moving to Dental Health Associates. Counsel states “almost all of these facilities are in among the poorest localities of New Jersey, and involve the provision of dental services to disadvantaged children.” Counsel further states:

[W]e are not basing this petition upon the claim that there is necessarily a shortage of American workers to perform the work. . . . A waiver in the “national interest” does not require a finding that any such shortage exists. The NYSDOT decision, in that aspect, appears to be introducing a factor above that which is required by the statute. Other employment-based categories, both temporary and permanent, do not require the establishment of any shortage of available United States workers . . . so why introduce such a requirement now? NYSDOT may, indeed, be flawed in this regard.

Matter of New York State Dept. of Transportation, to which counsel refers by the acronym “NYSDOT,” does not introduce any requirement that there must be a shortage of U.S. workers. Indeed, the precedent decision states that a local worker shortage is a poor argument for a waiver, because the labor certification process itself was designed to address such local shortages. Recent legislation has introduced a limited blanket waiver for certain physicians practicing in medically underserved areas, but this legislation applies only to physicians and not to dentists.

Counsel states that it is unreasonable to require a labor certification because employers “cannot delay staffing for the two or more years required to undertake such recruitment.” Labor certification, however, does not preclude employment of a nonimmigrant alien while the application for labor certification is pending. See 8 C.F.R. 214.2(h)(16)(i).

Counsel’s initial arguments say nothing about the petitioner’s individual talents or contributions as a dentist. Counsel’s principal argument is that providing dental services to underprivileged children is in the national interest, and therefore any alien who supplies such services ought to be exempt from the job offer/labor certification requirement. Counsel states “NYSDOT does not conflict with the notion that [the petitioner] merits a national interest waiver,” yet the Service specifically held in Matter of New York State Dept. of Transportation that the importance of one’s field of work is not sufficient grounds for a waiver. Qualified U.S. dentists who work with underprivileged children provide the same benefit as the petitioner, and Congress has not denied those dentists the protection of the labor certification process. Counsel has not explained why it is in the national interest to ensure that this alien petitioner, rather than a qualified U.S. dentist, works for Dental Health Associates or City Dental.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, counsel states “[w]e believe the NYSDOT decision to be so flawed it should be discarded,” and asserts that the unpublished 1992 appellate decision is “a much sounder decision than NYSDOT.” Counsel does not have the discretion to replace published, binding precedent with an unpublished, non-binding decision. Counsel revisits the precedent decision’s purported flaws on appeal, and we will address counsel’s arguments further in that context.

The director denied the petition, acknowledging the intrinsic merit of the petitioner’s work but finding that the petitioner has not established national scope or shown that her own contribution warrants a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek.

The majority of counsel’s arguments on appeal are directed against not the director’s decision in this matter, but against Matter of New York State Dept. of Transportation which, counsel states, “is basically flawed and should be withdrawn.” Counsel cites no judicial finding that would invalidate Matter of New York State Dept. of Transportation, and counsel’s personal opinion regarding the decision has no weight. The 1992 decision, which counsel cites as a better standard, is unpublished and has no weight as a precedent.

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. It would have been an error for the director not to follow a precedent decision; we cannot construe that the director erred by following the precedent. With regard to Matter of New York State Dept. of Transportation, neither counsel nor the petitioner has standing in that matter and the appeal of an unrelated visa petition is not a valid forum for challenging that decision.

Counsel asserts that many of the standards in Matter of New York State Dept. of Transportation are invalid because they are not specified in the statute. Counsel adds “Congress did not create the NI waiver just so you can deny all petitions.” Counsel cites no evidence that the Service “den[ies] all petitions,” and indeed such evidence does not exist because neither the Service in general, nor the Administrative Appeals Office in particular, denies “all petitions” with waiver requests. The petitioner’s failure to establish eligibility in this one particular instance does not, in any way, demonstrate, prove, or imply that the waiver is inherently and universally unattainable.

We note that the original statute did not allow waivers at all for members of the professions holding an advanced degree; the waiver was specifically limited to aliens of exceptional ability. Only after an amendment was enacted did advanced degree professionals such as the petitioner become eligible for the waiver. Therefore, the legislative history conclusively refutes the claim that the waiver was originally intended for situations such as the petitioner’s current situation. The statute provides no guidance at all regarding the national interest waiver, and despite two legislative amendments it does not single out dentists for special consideration regarding the waiver. Rather, the statute indicates that advanced degree professionals (a class which includes dentists) are generally subject to the job offer requirement.

Counsel, on appeal, persists in the misconception that Matter of New York State Dept. of Transportation somehow requires each petitioner to establish a worker shortage. Counsel cites no passage from the decision to support that interpretation, and a reading of the decision itself clearly contradicts that interpretation. The most unambiguous passage from the precedent decision in this regard is the headnote indicating that “[a] shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.” Counsel’s call for the elimination of Matter of New York State Dept. of Transportation carries even less weight in the face of the above evidence that the precedent decision simply does not say what counsel claims it says.

Counsel has not overcome any of the director’s findings on appeal. Instead, counsel asserts that those findings are irrelevant because they rely on a precedent decision with which counsel disagrees. The director, however, is compelled to follow published precedent. The director’s decision, therefore, stands.

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.