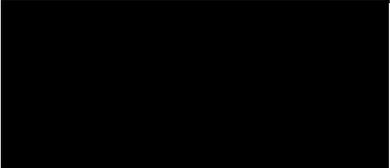




B5

U.S. Department of Justice
Immigration and Naturalization Service

Identifying 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: [Redacted] Office: Nebraska Service Center

Date: OCT 18 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: SELF-REPRESENTED

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, Nebraska 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 or 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 did not address whether the petitioner qualifies for classification as an alien of exceptional ability or as a member of the professions holding an advanced degree, 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.

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, 22 I&N Dec. 215 (Comm. 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.

Initially, the petitioner submitted his Master of Engineering Studies diploma, his resume and his memberships in the College of Electrical Engineers and the Institution of Engineers. On June 2, 2000, the director requested that the petitioner submit the Form ETA-750B required under 8 C.F.R. 204.5(k)(4)(ii). The director also advised the petitioner of the requirements set forth in Matter of New York State Dept. of Transportation, and offered the petitioner additional time to submit evidence addressing those requirements. The notice states:

Your response must be received in this office by August 25, 2000. Your case is being held in this office pending your response. Within this period you may:

1. Submit all of the evidence requested;
2. Submit some or none of the evidence requested and ask for a decision based upon the record; or
3. Withdraw the application or petition. . . .

You must submit all of the evidence at one time. Submission of only part of the evidence requested will be considered a request for a decision based upon the record. No extension of the period allowed to submit evidence will be granted.

In a letter dated June 26, 2000 and received by the director July 3, 2000, the petitioner advised the director that he had been unable to obtain Form ETA-750B from the United States consulate in Australia, and requested a copy of the form and an extension of time in which to file a response. On August 14, 2000, well within the original deadline of August 25, 2000, the petitioner filed his complete response with Form ETA-750B and other documentation.

On August 31, 2000, the director denied the petition, citing only the July 3, 2000 response. On appeal, the petitioner questions whether the director received the August 14, 2000 response.

It appears that the director failed to consider the petitioner's August response pursuant to 8 C.F.R. 103.2(b)(11). That regulation provides:

Submission of *evidence* in response to a Service request. All evidence submitted in response to a Service request must be submitted at one time. The submission of only some of the requested *evidence* will be considered a request for a decision based on the record.

(Emphasis added.) The petitioner's July "response" was a request for the required form that the petitioner was unable to obtain where he resided. It did not include any evidence. Subsequently, within the initial time period prescribed, the petitioner submitted a single response consisting of several pieces of evidence. As the petitioner submitted only one submission of evidence and as that submission was timely, the director's failure to consider this evidence constitutes reversible error.

The director's error, however, in this case does not amount to a reversible error. In his decision, the director considered all of the information on the petitioner's resume. We note that the information submitted in response to the request for additional documentation simply affirmed the training and employment experience that is already listed on the petitioner's resume. The director did not question the reliability of the information on the resume. As such, the director's failure to consider the new documentation does not appear to have been material to his final decision.

We concur with the director that the petitioner works in an area of intrinsic merit, engineering. The director concluded that since the petitioner had not specified his area of proposed employment, he had not established that it would be national in scope. On appeal, the petitioner does not specifically address this issue other than to assert that the technology with which he works is available in the United States. As the petitioner has not explained the project on which he plans to work, we cannot conclude that its impact will be national in scope.

Finally, it remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. 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.

As stated above, the petitioner has submitted numerous training course certificates and confirmation of his employment at Lucent Technologies and Optus Administration Pty Ltd. Only

the letter from Lucent discusses his employment in any detail. The letter indicates that the petitioner completed several technical projects for Lucent and represented Lucent before the Australian Communications Industry Forum and at the Convergence and Regulation Conference organized by the RMIT University Research Group.

The record does not contain any evidence of the petitioner's influence on the field as a whole. There is no evidence that other communications companies have been influenced by his work at Lucent such as letters from industry leaders independent of the petitioner, widely cited articles, or influential conference presentations. We note that all of the petitioner's experience and training could be articulated on a labor certification application.

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.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

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.