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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: EAC 01 225 61977 Office: Vermont Service Center

Date:

APR 21 2003

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

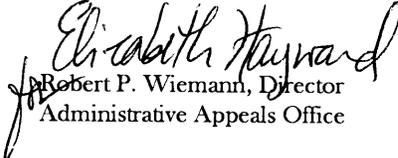
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office 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 Bureau of Citizenship and Immigration Services (Bureau) 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.


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 Administrative Appeals Office 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 or an alien of exceptional ability. The petitioner seeks employment as a computer systems engineer. In a letter accompanying the petition, the petitioner stated: "Since my arrival here [in 1997], I have had offers [of employment], but was in no position to accept, having already overstayed my B-2 visa for too long." 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 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.

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements 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 or an alien of exceptional ability. 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 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 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.

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 field is so important that any alien qualified to work in that field 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 sought. 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.

The petitioner initially submitted a statement regarding her exceptional ability, two employment verification letters from IBM, a “Pre-interview Agreement” for a subcontractor position, a personal bank statement, information pertaining to her family members, and immigration documents.

A letter from [REDACTED] Manager of Technical Operations, IBM France, states:

[The petitioner] was employed at IBM France for 13 years as an IBM Computer Systems Engineer. She was a brilliant employee, much appreciated by clients and colleagues alike. During her career, she successfully managed several difficult assignments at home and

abroad (Paris, West Africa, the Caribbean, the Pacific.) Her international background, and excellent mastering of both French and English, were useful assets in many situations.

Her principal clients were commercial banking institutions and government administrations, where she specialized in database administration activities (DL1, BD2), and telecommunications (VTAM, NCP, NPSI, and Netview). She is also knowledgeable in CICS and COBOL, and practiced these in different SCP environments: VSE, VM, and MVS.

As an IBM employee, she has benefited from several years of theoretical and practical training on many of IBM's hardware and software products, ranging from PS2, S/390, 3745, 3172, and 47xx (ATM's).

During her career, she received several promotions. At her departure she had the rank of Senior Consulting Engineer. She is a quick learner, with an intuitive grasp of complex problems, an extraordinary ability to adapt to new product and processes, and performs well in highly stressed environments.

I have known her throughout most of her career, and her first line manager for her last two years at IBM. She would be a great asset to any employer.

While professional competence is undoubtedly important, it is not grounds for a national interest waiver. The petitioner may have benefited various projects undertaken by her employer, but her ability to impact the field beyond her company's projects has not been demonstrated. The performance of computer services for a given client is of interest mainly to that particular client. *Matter of New York State Dept. of Transportation* indicates that while education and pro bono legal services are in the national interest, the impact of an individual teacher or lawyer would be so attenuated at the national level as to be negligible. *Id.* at 217, note 3. We find such reasoning applicable to the petitioner's occupation as well. In this case, the petitioner's impact would generally be limited to her employer and the clients that she directly serves.

At the time of filing on April 27, 2001, the petitioner claimed that she had not worked since entering the United States on a B-2 visa on February 2, 1997. Due to constant innovation and continual technological advancement in the computer field, it is certainly reasonable to question how the petitioner's work would serve the national interest to a substantially greater degree than others in her field, particularly when she offers no evidence of her employment as a systems engineer during the four years prior to the petition's filing. We further note the absence from the record of any computer training or system certifications obtained by the petitioner subsequent to 1997.

On December 9, 2001, the director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted a statement addressing the three-prong test established by *Matter of New York State Dept. of Transportation*, a copy of the above letter from Lamene Krim, and duplicate copies of Form ETA-750B.

The petitioner described how her work is national in scope, stating: “[Systems Architecture and Application Design] can benefit any and all industries, not only in coast to coast operations, but also in international connections... My proficiency in the French language is also very useful for any company with operations in a foreign country...”

The fact that computers are in use around the country, and indeed around the world, does not establish that the work of every individual computer systems architect or systems engineer is national in scope. As noted previously, the design of a system for a given client is of interest mainly to that particular client. Further, we note that any objective qualifications, such as fluency in French, can easily be articulated in an application for alien labor certification.

The petitioner also stated:

Individuals with cross-system skills are engaged by very large corporations, but are more often employed as consultants, working on several projects simultaneously, or one project for a brief period of time, before moving on... The labor certification process is above all a long one, and by the time it is concluded, the concerns of a prospective employer would have been passed over, or patched up in a non-optimal way... Given the nature and particularities of this position, the national interest waiver option seems to be an ideal one.

Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. The Bureau 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 must still demonstrate that she will serve the national interest to a substantially greater degree than do others in the same field. By law, advance degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. With regard to Congressional intent, a statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule. The national interest waiver is not merely an option to be exercised at the discretion of the alien or her employer. Rather, it is a special, added benefit that necessarily carries with it the additional burden of demonstrating that the alien's admission will serve the national interest of the United States.

The petitioner's statement cited statistics indicating a shortage of workers in the technology field. 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. See *Matter of New York State Dept. of Transportation, supra*. Similarly, arguments about the overall importance of a given occupation may

establish the intrinsic merit of that occupation, but such general arguments cannot suffice to show that an individual worker in that field qualifies for a waiver of the job offer requirement.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States.

We concur with the director that the petitioner works in an area of intrinsic merit, but we withdraw the director's finding that the proposed benefit of the petitioner's work would be national in scope. The director's statement that the "field of information technology" is national in scope does not in any way establish that this particular petitioner's work for a given client or employer would be national in scope. This issue has already been addressed in detail above.

On appeal, the petitioner argues that the national interest would be adversely affected if she were required to obtain a labor certification. The petitioner's appeal was accompanied by two letters of support.

██████████ President, Nigerian-American Chamber of Commerce and Industry, Inc. ("NACCI"), which is located in New York, states:

The petitioner was my Special Assistant at the Nigerian-American Chamber of Commerce and Industry, Inc. for almost two years, and since then works as an independent consultant on special issues in the field of Information Technology and Market Development.

Her assistance in both areas is invaluable. Her special knowledge in Computer Technology, International Trade, and African markets and [their] economies made her the ideal candidate for the setting up of our computer systems, our databases, and the connection of our national systems to national and international network systems.

* * *

One of the main tasks of the Chamber is to act as a facilitator for U.S. companies in their approach to and navigating of the unpredictable but promising Nigerian economy.

[The petitioner] has been a key staff in these efforts [sic], from the scheduling of seminars and conferences here in the United States, as well as in Nigeria, to setting up contacts for U.S. businessmen in Nigeria, and facilitating their stay there. Her diverse expertise (in maintaining our computer systems, databases, and networks, as well as in our role as facilitator for U.S.-Nigerian business exchanges) is crucial for the continued development and success of NACCI.

Dr. ██████████ letter fails to explain how contributing to the success of one's own employer and its clients constitutes a significant contribution to the field or industry, beyond what would normally be expected of a special assistant/systems engineer. While the petitioner may have contributed in some way to facilitating U.S.-Nigerian business exchanges on NACCI's behalf, Dr. ██████████ does not

indicate what level of benefit can be ascribed specifically to the petitioner. In this case, we must take into account the scale of the petitioner's contribution. For example, a company that exports \$100 worth of goods is, in a small way, contributing to the U.S. economy and improving the balance of trade, but the effect of this \$100 is negligible at a national scale. The petitioner has offered no evidence from business publications or governmental agencies showing that U.S. foreign trade to Nigeria has shifted discernibly as a result of her individual efforts, and therefore any arguments regarding her impact on national trade would carry little weight. Simply being a capable employee cannot suffice to demonstrate eligibility for a national interest waiver. The issue in this case is whether the petitioner's past record of accomplishment is at a level that significantly distinguishes her from others in her field.

It appears that the events described in Dr. [REDACTED] letter (pertaining to the petitioner's work for NACCI) came into existence subsequent to the petition's filing. *See Matter of Katigbak*, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that aliens seeking employment based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

A letter from [REDACTED] U.S. Congressman from New York's 10th District, states: "[The petitioner's] many and varied contributions to the community are invaluable; the sooner her skills and talents become available, the better we would be for it. In fact, in my opinion, she is THE ideal candidate for a National Interest Waiver."

The petitioner's ability to impact the field or industry beyond the companies that she directly serves, however, has not been demonstrated. The performance of computer systems engineering services for a given company is of interest mainly to that particular company. The scope of the petitioner's work, therefore, appears limited to those businesses that she directly serves, rather than being national. We do not dispute the witnesses' assertions that the petitioner is talented in the field of information technology; however, the petitioner has not shown that her work has attracted significant attention beyond those companies directly utilizing her services.

Upon review of the director's decision, we note an important issue not addressed by the director. Because we concur with the findings in the director's decision, which are sufficient to warrant denial of the petition, the director's omission of this issue does not constitute an error that prejudiced the outcome of the decision.

The director's decision stated that the petitioner "obtained a Master of Science and Technology" degree from Sorbonne University in Paris, France (1979) and therefore she "is the holder of an advanced degree."¹ The record, however, lacks documentary evidence to support the director's conclusion.

The regulation at 8 C.F.R. § 204.5(k)(2) states, in pertinent part:

¹ This information was apparently obtained from the petitioner's Form ETA-750B, Statement of Qualifications of Alien.

Advanced degree means any United States academic or professional degree above that of baccalaureate. 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.

The regulation at 8 C.F.R. § 204.5(k)(3)(i), states:

To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

On September 17, 2001, the director issued a request for evidence requiring the submission of “an advisory evaluation of [the petitioner’s] formal education.” The petitioner responded by submitting a General Certificate of Education (the petitioner describes this as a “high school diploma”), a certification from The Chartered Institute of Secretaries stating that the petitioner passed the “Intermediate Examination” (the petitioner describes this as “a First degree in Corporate Accounting”), and certified translations of a “Higher Technician Certificate” from the Academy of Paris and a “Student Card” from Sorbonne University in Paris. The student identification card from Sorbonne University indicated that the petitioner had majored in “English” during the 1979-1980 academic year. The petitioner also provided an advisory evaluation from Globe Language Services, Inc. The advisory evaluation submitted, however, only addressed the petitioner’s Higher Technician Certificate, stating that it was the U.S. equivalent of an Associate’s Degree in International Business.

The petitioner failed to provide her Master of Science and Technology degree from Sorbonne University, the official academic record of her studies related to that degree, or the requested advisory evaluation showing that she holds a master’s degree in computer systems engineering or a related field. Without such evidence, the petitioner cannot be considered to be the holder of an advanced degree. Therefore, we withdraw the director’s finding in that regard.

Because the petitioner has not presented evidence demonstrating that she is the holder of an advanced degree or its equivalent, she cannot receive a visa under section 203(b)(2) of the Act unless she qualifies as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows "exceptional" traits.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

In this case, "the area of exceptional ability" would be computer systems engineering. It is apparent from the preceding discussion that the educational credentials provided by the petitioner do not relate to computer systems engineering and therefore they fail to satisfy this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

The two letters from ██████████ Manager of Technical Operations, IBM France, provided in support of the petition satisfy this criterion.

A license to practice the profession or certification for a particular profession or occupation.

The record contains no evidence to satisfy this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

The purpose of this criterion is to demonstrate that the petitioner's exceptional ability has earned her compensation that exceeds that of others in her field. Other computer systems engineers clearly form the baseline against which the petitioner's salary or remuneration must be measured.

In her first letter (petitioner's Exhibit A) ██████████ states: "At the time [the petitioner] voluntarily departed from the company in 1992, her monthly salary was 55,000 francs." The petitioner, however, has presented nothing as a basis for comparison; she has simply provided evidence verifying her 1992 salary and has offered no evidence regarding the salaries of other computer systems engineers.

The record also includes a Pre-interview Subcontract Agreement (1998) from ISES, Inc., offering the petitioner an hourly rate of \$55.00 per hour for work as a systems programmer. The plain wording of the regulation, however, requires "evidence that the alien has commanded a salary, or other remuneration for services" demonstrating exceptional ability. The petitioner offers no evidence to show that she actually earned that amount while working for ISES or that the amount was higher than that earned by other systems programmers throughout the U.S.

Evidence of membership in professional associations.

The record contains no evidence to satisfy this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

In a statement accompanying the petition, the petitioner stated:

During my career at IBM, I've pioneered and lead software teams on major projects in many areas of the world: in Africa, in France, in the Caribbean, and in the Pacific. At my departure from IBM, I was recognized as, and had the official level of, Senior Consulting Engineer.

I departed IBM to set up a personal business which failed in the general European economic crisis of the mid-nineties, but continued my interests in the computing field. I would very much like to get back on track, doing the work I know and do best.

The record does not reflect that the petitioner has earned any formal recognition for her work. Simply being promoted within one's own company would not constitute an "achievement or significant contribution to the industry or field." The two IBM employment verification letters (issued by [REDACTED] offered no information regarding the petitioner's specific contributions or achievements of significance to her field. The more detailed of the two letters merely described the petitioner's personal qualities, computer skills, and practical computer training.

On appeal, the petitioner submitted letters from her supervisor at NACCI and a U.S. Congressman from New York. The letters provided represent, in essence, private communications to the U.S. Immigration and Naturalization Service rather than open recognition of the petitioner's work, and they came into existence not because of the petitioner's achievements, but because the petitioner solicited the letters to support her immigration petition. Furthermore, the letters do not demonstrate specific significant contributions or achievements; they merely attest in general terms to the petitioner's computer skills and international business experience.

A general reputation as a capable employee would not constitute *prima facie* evidence of exceptional ability in computer systems engineering.

In this matter, the petitioner has not shown that her accomplishments are of demonstrably greater value than the achievements of other computer systems engineers. The available evidence does not persuasively demonstrate that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

In sum, the petitioner has not established that she qualifies for the underlying immigrant classification, or the added benefit of the national interest waiver.

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, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.