

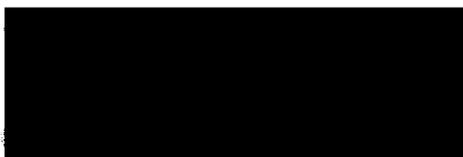
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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS  
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Washington, D.C. 20536



File: WAC 02 265 52748 Office: CALIFORNIA SERVICE CENTER

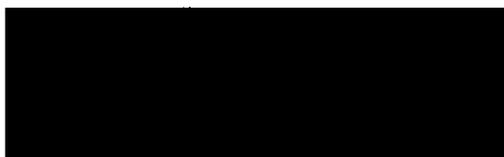
Date: AUG 13 2003

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)

ON 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 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant 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 is a provider of Internet-based computing systems for the insurance industry. It seeks to employ the beneficiary permanently in the United States as a database design analyst. 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 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.

On appeal, counsel asserts that the evidence sufficiently establishes that the beneficiary's unique skills in advanced information technology would bring benefits to the insurance industry that outweigh the national interest in protecting United States workers via the labor certification process.

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 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 record indicates that the beneficiary received a bachelor's degree in business administration from Northern Arizona University in 1992. He obtained a master's degree in business administration from National University, San Diego, California, in 1996. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary thus 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 pertinent 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 that 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.

The director does not contest that the beneficiary's field of endeavor in advanced information technology has substantial intrinsic merit and that the proposed benefits of his work in designing and developing databases and related interfaces to create Internet-based insurance enterprise systems would have national scope. The remaining issue is whether the petitioner can establish that the beneficiary will serve the national interest to a substantially greater degree than would an available United States worker having 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 it must also qualify for a national interest waiver. At issue is whether this alien's contributions in the field are of such unusual significance that the alien 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 that

the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Matter of New York State Dept. of Transportation*, at 219, n.6.

Along with background materials about outsourcing technology, printed material about the petitioning company, copies of the beneficiary's paychecks, and copies of the beneficiary's diplomas and transcripts, the petitioner submits two letters from the beneficiary's past employers.

██████████ President of Ameritex in Santa Fe Springs, California, confirms that the beneficiary worked for his company during 1993 and from 1996 to March 1999. Mr. ██████████ states that "we were highly satisfied with [the beneficiary's] performance. When he left Ameritex to accept other employment we were able to recommend him for his expertise in automated production and business computing systems." Mr. ██████████ further provides:

Ameritex is a manufacturing company, and [the beneficiary] managed a variety of operations, including exercising responsibility for supervising, upgrading, documenting and maintaining the company's computerized information systems and database systems. He performed programming in machine language and Assembly for the automation of laboratory and production equipment.

██████████ a vice-president of Netgateway, Inc., confirms that the beneficiary was employed with his company from July 1999 to November 2000 as a market research and database design analyst. His duties included "configuring virtual storefronts and building knowledge-based features into the system managing systems, expansion and database development, plus customer technical support." Mr. ██████████ concludes that "we wish him well and do not hesitate to recommend him for his expertise in Internet-enabled database systems."

As noted above, both these letters come from two of the beneficiary's past employers. Although they provide a summary of the beneficiary's duties with their respective companies, they do not distinguish the beneficiary from other talented database design analysts or describe how he has influenced his field as a whole. They do not provide any information as to why the benefit the beneficiary's background or skills will provide to the United States outweigh the inherent national interest in protecting United States workers through the labor certification process. *See id.* at 221. As noted by the director in his denial, these are basically ordinary reference letters that do not set the beneficiary apart from others with the same qualifications.

The petitioner also includes a copy of a letter written by ██████████. He is a senior manager of system operations with the petitioner. The letter basically commends the beneficiary for managing a project to move the petitioner's equipment and data warehouse. In the letter, Mr. ██████████ tells the beneficiary that he is a "key member of the organization," and an "able performer and leader who will step up to the challenge when assigned such tasks." This does little to explain why the labor certification process should be waived. It is clear that the beneficiary is a responsible employee. The issue is the effect of such services on the national interest when compared to others in the profession.

The record contains copies of the covers of several professional trade publications. The mailing labels on these copies indicate that the beneficiary is a subscriber. The petitioner's cover letter submitted with the initial filing of the petition contends that this evidence shows that the beneficiary participates in international forums on computer related subjects for advanced users. The petitioner argues that this constitutes "membership in professional associations" within the meaning of 8 C.F.R. 204.5(k)(3)(ii), one of the criteria establishing an alien of exceptional ability. We do not concur with this conclusion based on the evidence submitted. Even if it were to be considered as evidence of membership in professional associations, that is only one criterion for exceptional ability found at 8 C.F.R. 204.5(k)(3)(ii)(E), a classification that normally requires a labor certification. We cannot conclude that satisfying one, or even the requisite three criteria, for a classification that normally requires a labor certification warrants a waiver of the labor certification requirement in the national interest. As set forth in *Matter of New York State Dept. of Transportation*:

Because, by statute, 'exceptional ability' is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the 'achievements and significant contributions' contemplated in the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F). Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

*Id.* at 218-219.

We note that the basic argument the petitioner advances as to why it is requesting a national interest waiver on the beneficiary's behalf is because of the lengthy delay connected with obtaining a labor certification. It remains that Congress mandates the labor certification process through the job offer requirement. As long as that requirement remains the law, it is not persuasive to argue that labor certification itself is inherently flawed or time consuming, and therefore a waiver is in the national interest.

In his denial, the director notes that although the beneficiary appears to be a competent database design analyst, there is little evidence to support a national interest waiver. We concur. The petitioner's documentation of the beneficiary's services as a database design analyst does not overcome the statutory mandate of a labor certification for this occupation. We cannot conclude that the benefit that the beneficiary presents to his field "greatly exceeds the 'achievements and significant contributions' " contemplated in 8 C.F.R. 204.5(k)(3)(ii)(F) for an alien of exceptional ability. *Id.* at 218.

As is clear from the plain wording of the statute, it is 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 the national interest. Similarly, 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. Based on the evidence submitted, the petitioner has not

established that a waiver of the requirement of an approved labor certification would 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. In this case, the petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.