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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, DC 20536

File: [REDACTED] (LIN-98-045-53036) Office: Nebraska Service Center

Date: **AUG 21 2003**

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)

ON BEHALF OF PETITIONER:



**PUBLIC COPY
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DISCUSSION: The approved employment-based immigrant visa petition was revoked by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary 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 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 initially approved the petition.

On February 24, 2000, the director issued a notice of intent to revoke based on the revelation during adjustment of status proceedings that the beneficiary had left the employ of the petitioner to work for a private company. The petitioner responded to the director's notice. After considering this response, the director revoked the prior approval of the petition. The director concluded that the petitioner had not established that an exemption from the labor certification requirement was still in the national interest of the United States. In reaching this decision, the director concluded that the prior approval only waived the labor certification process since the beneficiary had a job offer from the petitioner. Thus, once the beneficiary had changed jobs, he could not rely on the approved petition. The director also cited *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215 (Comm. 1998), issued after the petition was approved. Relying on that precedent decision, the director concluded that the beneficiary's employment for a private company would not provide benefits on a national scale in the same way as his employment for an institution of higher learning.

On appeal, counsel asserts that after the AAO issued *Matter of New York State Dep't. of Transp.*, it was the policy of the Service (now the Bureau) not to apply that decision to aliens whose petitions were already approved but whose adjustment to permanent resident status was still pending. Counsel further argues that the beneficiary's employment with Eastman Chemical Company is within the boundary of the national interest waiver approved by the director.

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) . . . 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.

At the time of filing the petition, the beneficiary held a Master's degree in chemistry from West Texas A&M University. 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 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 pertinent 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 the 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 Dep't. of Transp., supra, 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.

As noted by counsel, this precedent decision was issued after the petition was approved. The precedent decision at issue is clearly interpretive, and does not create new rights or duties. *Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001). Nevertheless, we acknowledge that it was Service policy not to revoke approved petitions based on *Matter of New York State Dep't. of Transp.* This policy extended to all aliens who sought employment "in the professional activity which provided the basis of the approval," not merely those who remained with the same employer. Thus, the director should not have relied upon that decision.

In addition, we disagree with the director that the prior approval only waived the labor certification process and not the job offer requirement. The statute and the regulations

specifically provide for a waiver of the “job offer.” That the beneficiary’s prospective employer filed the petition in behalf of the beneficiary did not limit the Bureau’s statutory authority to waive the job offer. We note that the petitioner continues to support the petition, submitting a new letter of support in response to the director’s notice of intent to revoke. In this letter, the petitioner indicates that the beneficiary continues to work in the same professional activity as when the petition was filed and even continues to collaborate with the petitioner despite his employment with Eastman Chemical Company.

The director did not state that the petition was initially approved in error. For the reasons discussed above, we find that the sole basis of the director’s decision, the beneficiary’s change in employment, was an insufficient basis to revoke the approval of the petition.

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 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.