



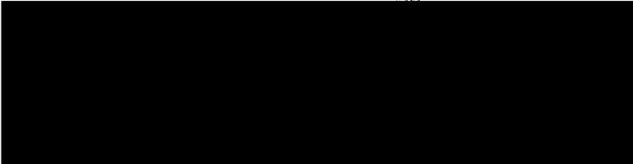
U.S. Department of Justice

Immigration and Naturalization Service

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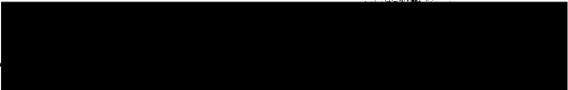
OFFICE OF ADMINISTRATIVE APPEALS
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ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 01 145 53924 Office: VERMONT SERVICE CENTER

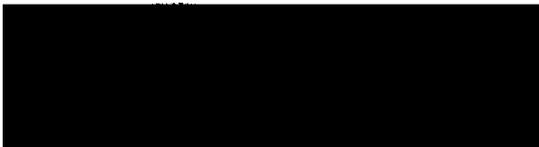
Date: FEB 26 2003

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)

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.


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 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 or an alien of exceptional ability. The petitioner seeks to employ the beneficiary as a project manager for an architectural firm. 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 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 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.

(ii) Physicians working in shortage areas or veterans facilities.

Service regulations also mandate specific evidentiary requirements to show that a beneficiary possesses an advanced degree. 8 C.F.R. § 204.5(k) provides:

(3) *Initial evidence.* The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) 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 a United States advanced degree or 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.

In this case, the record contains a letter from an academic coordinator at the University of Pennsylvania and letters from two University of Pennsylvania professors describing the beneficiary's educational credentials. No documentation representing the *official academic record* of the beneficiary has been submitted. As such, we do not concur with the director's finding that the beneficiary can be considered an advanced degree professional, because the record does not contain the regulatory evidence that he possesses an advanced degree. The non-existence or unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2). The petitioner may submit secondary evidence to establish relevant facts following a showing that the primary evidence is unavailable, or, in some cases, may submit affidavits from persons who are not parties to the petition, if the both the primary documentation and secondary evidence is not available. In all cases, "secondary evidence must overcome the unavailability of the primary evidence, and affidavits must overcome the unavailability of secondary evidence." *Id.* Here, the petitioner has not demonstrated that the primary evidence of the beneficiary's official academic record is unavailable.

The record also shows another evidentiary deficiency that precludes approving the petitioner's request for a national interest waiver. The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part: "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this document, and therefore, by regulation, the beneficiary cannot be considered for a waiver of the labor certification process. However, as the petitioner's failure to establish the beneficiary's eligibility for the national interest waiver was the central basis for the director's denial, this issue will be discussed further.

Before the applicability of the national interest waiver may be considered, a preliminary determination must be made as to whether the petitioner has established that the beneficiary is an alien of exceptional ability. Because the beneficiary cannot be classified as an advanced degree professional, he cannot qualify for a visa under section 203(b)(2) of the Act unless he is eligible as an alien of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which the beneficiary must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. The criteria are discussed below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered." The evidence submitted to establish exceptional ability must place the alien above others in the field in order to fulfill the criteria; qualifications

possessed by every member of a given field cannot demonstrate “a degree of expertise significantly above that ordinarily encountered.”

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other

As discussed above, the record does not contain an official academic record.

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 record contains letters from two of the beneficiary’s employers, Perkins Eastman Architects, PC and the University of Pennsylvania. These letters do not establish that the beneficiary has ten years of full-time experience as project manager of an architectural firm, and do not demonstrate the beneficiary’s skill as a project manager significantly above others in the field. The petitioner also submits the beneficiary’s resume that indicates that he has worked in various construction and architectural pursuits over the years, but no specific dates are given describing the duration of the employment. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not presented sufficient evidence to satisfy this criterion.

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

The record contains no evidence to fulfill this criterion.

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

The record contains the beneficiary’s W-2 tax statement issued by his employer, Perkins Eastman Architects, PC, showing that he earned \$39,708.12 in the year 2000. The record contains no evidence, nor does the petitioner contend, that this level of salary demonstrates exceptional ability for a project manager in architectural design in New York.

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.

Included in the record is a letter from Joseph Rykwert, professor of architecture and the beneficiary’s thesis advisor at the University of Pennsylvania. The petitioner also submits a letter from Richard Wesley, head of the Department of Architecture at the University of Pennsylvania.

Both identify the beneficiary as a highly talented student. A copy of selected pages from two of Professor Rykwert's books acknowledging contributions from the beneficiary as one of his research assistants is included in the evidence. The evidence also includes a letter from Bradford Perkins of Perkins Eastman Architects, PC, who asserts that the beneficiary is exceptional because he holds a Ph.D. from the University of Pennsylvania, has been an architectural instructor there, has been cited in several books, and has received excellent letters of recommendation.

The beneficiary's witnesses do not identify or explain how being a talented research assistant or instructor, or being listed on an acknowledgment page by one's professor, constitutes a significant contribution to the field of architecture as a project manager or practicing architect. Simply asserting that the beneficiary was a talented student who obtained a higher degree or was a reliable research assistant is insufficient to establish exceptional ability. To find otherwise would create an over-inclusive designation. The record contains insufficient evidence to satisfy this criterion. Even if it did, this would represent only one of the regulatory criteria relating to exceptional ability.

In light of the above, the record does not contain sufficient evidence to establish that the beneficiary can be considered an advanced degree professional or qualify as an alien of exceptional ability. As noted above, although the remaining issue of whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest, is moot, the issue will be addressed.

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.

While the unavailability of a U.S. employer to apply for a labor certification will be given consideration in appropriate cases, the inapplicability or unavailability of a labor certification is not sufficient cause for a national interest waiver; the petitioner must still demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in same field. *Id.* at 218, n.5.

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 qualifications rather than with the position sought. It is generally not accepted that a given project is of such importance that any alien qualified to work on it must also qualify for a national interest waiver. The 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 219, n.6.

We concur with the director that the beneficiary works in an area of substantial intrinsic merit, architecture. The director made no findings as to whether the proposed benefit of the beneficiary's employment would be national in scope. We find that the proposed benefit relating to the beneficiary's employment as a project manager in the design of assisted care living and medical facilities can be concluded to have national scope.

The remaining issue in contention is whether the beneficiary will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The petitioner submits several witness letters and documentation relating to the beneficiary's H1-B status, the beneficiary's resume and a statement describing his current employment. Doreen Carbone, the human resources director for the beneficiary's current employer, describes the beneficiary's work as providing "substantial benefit to the United States because he is playing a large role in the design and construction of health care facilities and assisted living facilities for sick and elderly citizens."

A letter from Professor [REDACTED] of the University of Pennsylvania confirms the beneficiary's appointment as a lecturer for the spring semester of 2001 at a salary of \$2,500.

A letter signed by [REDACTED] academic coordinator, states that the beneficiary was a full-time student at the University of Pennsylvania in the Ph.D. program and was also employed there as a research assistant. The letter states that the beneficiary graduated in May 2000.

Professor [REDACTED] two letters praised the beneficiary's work at the University of Pennsylvania. He states in the earliest letter:

When [the beneficiary] applied to join the doctoral program, we examined the portfolio submitted with surprise. [The beneficiary's] portfolio was not merely exceptional among doctoral applicants, but would have stood out among any group of architects or students for skill, verve and fluency of draughtsmanship.

....

While working on his thesis, [the beneficiary] also served as my research assistant and proved himself both resourceful in approaching a number of problems with which he was unfamiliar, and completely reliable - a virtue rare among academic research assistants.

Professor Rykwert's second submission contains the following:

As a research assistant [the beneficiary's] services were very valuable to me as he is familiar with the material on which I am working (nineteenth-century Art and Architecture in Western Europe and the USA) and - as in his office - I have found him to be completely reliable. As a teacher he has the essential virtue of being firm and authoritative without ever being overbearing. He will, I am sure, be one of the outstanding teachers of architecture of his generation.

....

To sum up, I regard [the beneficiary] as an extremely - and unusually - valuable individual. He is a scholar who is beginning to make a name for himself in contributions at conferences etc. But he is also an outstandingly skilled professional, and an architect who has proved himself over a number of years and is completely familiar with US building methods and site procedures.

As noted previous [REDACTED] from the University of Pennsylvania also submits praise of the beneficiary as a student and notes that "the combination of [the beneficiary's] educational background and outstanding personal qualities leads me to firmly believe that Dr. Al-Dhourri has the potential to greatly impact the architecture profession on a national level."

University study is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The beneficiary's academic accomplishments may place him among top students at his educational institution, but offer no meaningful comparison between the beneficiary and experienced professionals in the field of architecture or demonstrate that the beneficiary has had influence on the field as a whole.

As noted previously, Bradford Perkins from Perkins Eastman Architects, PC also describes the beneficiary's attributes:

[The beneficiary's] work with our firm is in the national interest in that the majority of his projects for the firm involve the design and construction of healthcare and assisted living facilities for the elderly and infirm.

....

In designing these facilities, the special spatial factors resulting from the placement, storage and use of medial equipment [sic], requires the consideration of unique design factors. [The beneficiary] has the ability to perform this analysis.

....

In addition to his prestigious advanced degree from The University of Pennsylvania, [the beneficiary] has taught several courses on architecture at the University of Pennsylvania and elsewhere, he has been cited in several books, his portfolio was selected and cited in a textbook, and he has received excellent letters of recommendation.

(Emphasis in original). The beneficiary may have been involved in various projects at Mr. Perkins's firm, but his impact on the field beyond his firm's projects or his educational institution has not been demonstrated. The importance of designing assisted living and medical care facilities is not disputed, but generalized assertions about the beneficiary's connection with such projects hardly demonstrates that his contributions warrant the special benefit of a national interest waiver.

The benefit the beneficiary presents to obtain the national interest waiver must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) for aliens of exceptional ability. It cannot suffice to say that an alien has useful skills or even unique abilities as an architect. These abilities must also substantially outweigh the inherent national interest in protecting U.S. workers through the labor certification process. The petitioner's evidence must show that he has already significantly influenced his field of endeavor.

The petitioner's witnesses all appear to be from the beneficiary's immediate circle of advisors, mentors, colleagues and employers. This does not detract from the validity of their opinions, as they are in the best position to evaluate the beneficiary's qualities. However, the record would be more persuasive if it included evidence from independent authorities attesting to the impact of the

beneficiary's accomplishments in his field of endeavor as a whole. Nothing in the witness letters contained in the record offer first hand evidence that the beneficiary, as an individual, has made a significant contribution to the field of architecture.

The director denied the petition, finding that the petitioner's claim that the beneficiary is eligible for a waiver of the job offer in the national interest was general in nature.

On appeal, the petitioner submits a brief statement from counsel and another personal statement from the beneficiary. Both reiterate the broad assertions previously made that the beneficiary's education and experience justify the waiver of the labor certification process.

In his second personal statement, the beneficiary attests that since filing the petition he has submitted four articles for publication at three journals in the United States and one in the United Kingdom.

When assessing the influence and impact that the beneficiary's written work has had, the act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may establish originality, but it cannot be concluded that a published article is important or influential if there is little evidence that other researchers have relied upon the beneficiary's findings. Similarly, frequent citation by independent researchers can be viewed as a more accurate indication that the beneficiary's work has attracted widespread interest or authoritative recognition.

Here, there is no evidence in the record that, as of the date of filing, any independent researchers or authors had cited any of the beneficiary's articles. Professor Rykwert's acknowledgment of gratitude to the beneficiary as one of his research assistants does not constitute the kind of authoritative recognition showing that the beneficiary's work has influenced the field as a whole. The petitioner offered no evidence showing that the beneficiary had actually published his own work prior to the filing of the petition. Eligibility must be established as of the filing date of the visa petition. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

The petitioner suggests on appeal that the beneficiary's recent appointment as an adjunct professor of architecture at the New York Institute of Technology and his accelerated rate of individual growth and quality support a national interest waiver, because the appointment was competitive and open to all qualified architects. We note that the record contains no evidence from the New York Institute of Technology enumerating what selection criteria were used for this position. Further, this appointment occurred after the filing date of the instant petition, and therefore cannot be considered to establish eligibility. *Matter of Katigbak, supra*.

Although the record here indicates that the beneficiary was an accomplished student, it does not establish that he has demonstrable achievements in the field of architecture, or that he has already influenced his field to any significant degree. General statements attesting to the future impact of the beneficiary's work are insufficient to demonstrate eligibility for the national interest waiver. In this case, the petitioner has failed to establish that the beneficiary possesses a proven record of achievements and contributions of significance to the architectural field.

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.