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Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: Nebraska Service Center

Date: FEB 27 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)

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 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, Nebraska 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. The petitioner indicated that he is seeking employment as a construction management consultant for U.S. contractors seeking international construction contracts. The petitioner also indicates that he could serve as a university instructor teaching U.S. students "the latest management style and techniques of construction in Asia and the Pacific region." 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 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.

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

The director did not dispute that the petitioner 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 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.

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 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 application for the national interest waiver cannot be approved. 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 job offer requirement. On November 30, 2000, the director issued a request for evidence instructing the petitioner to submit "a fully executed ETA-750B... in duplicate." The petitioner was granted twelve weeks in which to respond to the director's request, but failed to submit the requested form. The director's notice of denial, however, does not appear to

have informed the petitioner of this critical omission. Below, we shall consider the merits of the petitioner's national interest claim.

The petitioner's initial evidence included his resume, educational credentials and training certifications, several employment verification letters, and two recommendation letters.

Professor of Civil Engineering, Bangladesh University of Engineering and Technology, taught the petitioner engineering courses states: "[The petitioner] has a sound knowledge of Engineering Science and is capable of doing research works."

Air Vice Marshal, Chief of the Air Staff, Bangladesh Air Force, states:

During his tenure in the Air Force, [the petitioner] carried out, most creditably, the following services in the Air Headquarters and at the Air Base- Design and supervision of Air Force Headquarters, Academy Complex, High Power and low looking Radar stations, Runway, Taxiway, Tarmac, Hanger, Water and Sewerage Systems. Maintenance of Generators, Transformers, Motors and others Electrical Machineries and Line Systems. Design of Barracks, Offices, Workshops, Officer's Mess and Quarters, over head water tank and explosive stores. As an Engineer Executive he was responsible for preparation of project estimates, schedule of rates, bills of quantities, control of annual budget and management of the construction accounts. He was also entrusted with the management of quality staffs and different trade personnel numbering more than 300.

In the year 1989-90 while he was the Garrison Engineer in the Air Force base Matiur Rahman he was exclusively responsible for the construction of the Academy complex and thus fulfilled a long term dream of the Air Force in establishing an Air Force Academy which has since then become a pride institution for the future Military Aviations. [The petitioner] was credited to cause a large saving to the National exchequer by personally managing to cut the construction cost thus making the prestigious project one of the cheapest in terms of money and yet one of the finest pieces of architecture in the country. This particular achievement is a unique example of the ability of this enterprising Engineer who I am sure will continue to endeavor in realizing even a larger project with greater laurels in future days.

The petitioner may have benefited various projects undertaken by his employers, but his ability to impact the field beyond his employers' projects has not been demonstrated. The performance of engineering services for a given employer is of interest mainly to that particular employer. The evidence submitted describes the petitioner's job duties, educational expertise, and value to various engineering/construction projects, but it does not demonstrate petitioner's ability to impact the U.S. construction industry or the greater engineering field. We note here that the analysis followed in national interest cases under section 203(b)(2)(B) of the Act differs from that for standard exceptional ability cases under section 203(b)(2)(A) of the Act. In the latter type of case, the local labor market is considered through the labor certification process and the activity performed by the alien need not have a national effect. In this case, the petitioner has not

shown that his individual work or methodologies have captured the attention of independent experts throughout the construction industry. It appears that the petitioner's individual impact on the U.S. construction industry would be so attenuated at the national level as to be negligible.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*.

In response to the director's request for evidence, the petitioner submitted a statement describing how he will serve the national interest. The petitioner states that his "past experience and educational qualifications justify projections of future benefits to the national interest."

It cannot suffice for the petitioner to state that he possesses a unique combination of "past experience and educational qualifications." Pursuant to *Matter of New York State Dept. of Transportation*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification. The issue in this case is whether the petitioner will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. The petitioner must demonstrate a past history of significant accomplishment in construction management/engineering having some degree of measurable influence on one or both of those fields.

The petitioner states: "I have published a few articles and am currently pursuing research works in construction risk management in my doctorate degree. I am preparing another article to send for publication to the American Society of Civil Engineering's journal in the coming month." New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date. 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.

The record in this case contains no actual evidence showing that any of the petitioner's articles have been published in scholarly engineering journals. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment."

Thus, this national organization considers publication of one's work to be "expected," even among individuals who have not yet begun "a full-time academic and/or research career." When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is no evidence that other engineering scholars have relied upon the petitioner's

findings. Few or no citations of an alien's articles suggests that that work has gone largely unnoticed; it is therefore reasonable to question how widely that alien's work is viewed as a significant influence in his field. It is also reasonable to question how much impact — and national benefit — a researcher's work can have, if that research does not influence the direction of future research.

The record does not contain citation records or other evidence to establish that engineering experts (outside of the petitioner's circle of collaborators and professors) regard the petitioner's articles as especially significant. While heavy citation of the petitioner's past articles would carry considerable weight, the petitioner has not demonstrated such citations here.

The petitioner further states:

I would be able to operate a management consultant firm to help U.S. contractors and advise them how to secure international construction contracts and be competitive in tendering. From my teaching experience and skill, I can extend my knowledge to U.S. universities' students to learn the latest management style and techniques of construction methods in Asia and the Pacific region.

The petitioner, however, offers no statements from officials from any U.S. construction companies or U.S. universities describing how the petitioner's efforts will serve the national interest.

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. The director's decision noted that the petitioner had not provided evidence to demonstrate that his services could be characterized as national in scope. The director stated: "[I]t appears that [the petitioner's] services would benefit individual companies and perhaps students, and thus be predominantly local in nature."

On appeal, the petitioner argues that he qualifies as an alien of exceptional ability. Because the petitioner qualifies as an advanced-degree professional, however, an additional finding of exceptional ability would be of no further benefit to the petitioner in this proceeding. In accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. 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 remainder of the petitioner's argument relates to how his knowledge and work experience in construction management will benefit the future interest of the United States. General statements as to the petitioner's potential to make future contributions cannot suffice to demonstrate his eligibility

for a national interest waiver. The assertion that the petitioner is capable of future success does not persuasively distinguish the petitioner from other competent construction managers and engineering scholars. The petitioner offers no specific evidence that his contributions as construction manager or engineering scholar are substantially greater than the contributions made by others in those fields.

We cannot ignore the complete absence of letters from construction companies and universities in the United States attesting to the petitioner's individual importance to the national interest. The evidence in this case falls well short of distinguishing the petitioner from others in his field. The record generally describes the petitioner's work rather than offering a valuation of its overall significance to the fields of engineering and construction management. The record contains no evidence showing that the petitioner's individual contributions have significantly impacted the construction industry or have national implications. The record does not establish the extent to which other engineers have relied upon the petitioner's methods and research findings as a model, or that a significant number of construction companies have implemented the petitioner's management techniques resulting in a significant improvement upon existing methods. Although the petitioner may have authored a few articles, the weight of this evidence is diminished by the lack of direct evidence that these articles have directly influenced the engineering field.

In this case, the petitioner has failed to submit evidence setting himself apart from others in his field. The available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement that, by law, normally attaches to the visa classification sought by the petitioner.

At issue is whether this petitioner's contributions to the field of engineering/construction management 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. Without evidence that the petitioner has been responsible for significant achievements in his field, we must find that the petitioner's assertion of prospective national benefit is speculative at best.

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.