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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: EAC 01 002 50047 Office: VERMONT SERVICE CENTER Date: JAN 2 4 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 Associate Commissioner for Examinations 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 an alien of exceptional ability or as a member of the professions holding an advanced degree. The petitioner seeks employment as a chief technology officer in the computer consulting/telecommunications field. 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 did not contest that the petitioner qualifies for the classification but 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.

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.

The petitioner holds a Master of Technology from the University of Calcutta. In 1986, he completed a PhD from Jadavpur University in the field of the Application of Cybernatics in Microprocess Engineering.[1] The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree.

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[1] The record submitted indicates that this degree is the U.S. equivalent of a PhD in Computer Science.

It appears from the record that the petitioner also seeks classification as an alien of exceptional ability. This issue is moot, however, because, as stated above, the record establishes that the petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue 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.

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.

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. The director's notice of denial, however, does not appear to address this omission. Below, we shall consider the merits of the petitioner's national interest claim.

In this case, the director made no findings as to whether the petitioner's proposed employment is in an area of substantial intrinsic merit or that the proposed benefit of his employment would be national in scope. We find that the petitioner's area, computer science, has substantial intrinsic merit. We also agree with the petitioner's counsel that the proposed benefits of the petitioner's work in developing communications systems using new computer technology would be national in scope.

The remaining issue in contention 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.

Along with the petitioner's personal statement of qualifications and copies of educational degrees, the petitioner submits a letter from Pai-chun Ma, Associate Professor of Computer Information Systems at Baruch College –The City University of New York, in which [redacted]eviews the petitioner's employment history and offers his evaluation:

> The successively ascendant positions held by [redacted] during this time, and the progressively sophisticated projects executed under his watch, indicate an increasingly strong command of advanced concepts in the areas of network management, system design, wireless communications, and network protocols, and evince the ongoing development of exceptional abilities across those areas....
>
> Most recently, from 1997 through the present,...[the petitioner] has been responsible for the installation, configuration, and subsequent consultation of advanced SAP R/3 management information packages, toward the full automation of financial accounting functions.

> In addition, he has been responsible for the design and implementation of eBusiness applications, requiring the deployment of innovative new technologies (such as Periphonics voice response/speech processing software products), and of innovative wireless Internet telephone systems. These duties necessitate a firm grasp of cross-disciplinary issues in the major technology skill areas of computer science and communications. Further, he has assisted in the establishment of Internetworking partnerships with major outside provision companies, with an aim toward creating improved data networks (such as linked packet-based enterprise networks).
>
> [redacted] career path evinces clearly delineated, exceptional ability in the field of computer science....

Professor Ma states that the petitioner will continue to be a significant asset to the national interest of the United States, but does not explain how the petitioner's work has had any measurable influence in the larger field of computer science which would distinguish him from countless other highly skilled computer consultants. Listing the petitioner's accomplishments does not show their significance. The labor certification process is available to delineate an applicant's experience and education.

The petitioner also submits with the petition various copies of business correspondence relating to negotiations the petitioner has conducted as an information technology consultant, and copies of two 1994 articles from Calcutta newspapers. They described the petitioner as the director of international business development for the India and South Asia regions for Digital Control Systems, Inc. which was involved in a proposed modernization program of the security systems at the Calcutta and Madras airports. The petitioner also offers a copy of a confirmation letter indicating that he is a member of the Institute of Electrical and Electronic Engineers (IEEE) and a copy of a certificate from Cisco Networking Academy confirming that he received training to use Cisco networking and telecommunication products. We note that the IEEE has over 325,000 members. The record contains no evidence that the membership is exclusive. Additionally, the regulations provide that "recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations," 8 C.F.R. 204.5(k)(3)(ii)(F), and "memberships in professional associations," 8 C.F.R. 204.5(k)(3)(ii)(E), are evidence of exceptional ability, a classification normally requiring a labor certification. 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.

The director requested further evidence from the petitioner pursuant to the guidelines set forth in *Matter of New York State Department of Transportation.* The director subsequently denied the petition concluding that while the alien is the holder of an advanced degree, the evidence in the record did not establish that a waiver of a job offer was in the national interest. We concur with the director's decision.

On appeal, counsel asserts that neither he, nor the petitioner, responded to the director's request for further evidence and requests consideration of the appellate attachments which he did not have the previous opportunity to submit. We consider this an interesting argument, at best, since apparently counsel received the director's request for evidence as shown by counsel's appellate exhibit "B", the original Form I-797. At this point, however, the decision already having been rendered, the most expedient remedy is the full consideration of any evidence the petitioner would have submitted.

On appeal, the petitioner submits a copy of a letter from A. Sirkar, President of GRF Consulting. Mr. Sirkar stated:

> We are also quite satisfied in your performance in terms of Cisco and Nortel collaboration in providing Networking Technology to the large Institutions and business organization. We can proudly confess that your long expertise has given a tremendous impetus in our business venture. We also proud to have you with us as now you are one of the leading "Technological Expert in USA," in the areas of Internet speech and Telecommunications evaluated & declared by the forum of "Computer Specialists Association" in the year 1999.

The petitioner also offers a June 9, 2000 letter from Azad S. Toor, India Consul General, in which Mr. Toor endorses the petitioner as a man of "great caliber with high professionalism" and states:

> ...[the petitioner] is an alien of exceptional abilities in the field of computer Engineering and Networking including Telecommunications, with. skill areas of high value to the National interest....He is also a good academician and has achieved a great name in IT profession.

These witnesses' fairly cryptic reference letters appear to be mostly from petitioner's immediate circle of clients, collaborators and colleagues. This does not detract from the validity of their opinions, as they may be in the best position to evaluate the petitioner's products. While such letters are important in providing information about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole.

Two press releases dated January 30, 2001 and May 26, 2001 were also submitted as evidence supporting a national interest waiver for the petitioner. Both dealt with the introduction of new

products with which the petitioner was involved. The second one mentions the petitioner as "one of the rare talent available in this US as Softswitch are concern [sic]."

It is noted that the press releases were issued well after the petition's filing date of October 19, 2000. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See, Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). Similarly, the petitioner submits copies of business correspondence with Shirley Wagner, senior vice-president of AT&T Network Services Inc., dated July 2001; from Kevin Kennedy, senior vice-president of Cisco Systems Inc., dated July 2001; a copy of a March 31, 2001 e-mail from McGraw-Hill indicating that they are considering a book proposal submitted by the petitioner, and a copy of an e-mail from The Brookside Group, LLC, addressed to the petitioner as a "2001 Telecom Consulting Market Survey Participant," informing him that he was found to be among the "1st five best Telecom Consultants of USA." It is not clear how many participants were considered in this selection or what criteria was used. These materials all reference the petitioner's contributions to the field after the filing date of the petition. Even if the above submissions were sufficient to show the petitioner's influence over his field as a whole, as counsel contends, it is again noted that a petitioner cannot retroactively qualify for a national interest waiver based on a reputation gained after the filing of the petition.

Counsel also submits copies of the petitioner's September 2000 contract to instruct two classes on the Internet at the New York Institute of Technology and a July 2001 invitation to be an adjunct assistant professor at Pace University as evidence of his expertise and standing in his field. These invitations to teach fall well short of the weight of evidence necessary to demonstrate that a petitioner's accomplishments have been of such significance at the time of filing, that they have influenced the work undertaken by others in his field. We would also conclude that such teaching activity would not be held to have any national impact at all. *See, Matter of New York State Dept. of Transportation* at 217, n.3. It is not enough to assert that a petitioner has useful skills or even a unique background. The significant abilities of a petitioner for a national interest waiver must also substantially outweigh the inherent national interest in protecting U.S. workers through the labor certification process. The judgment as to whether there are similarly trained U.S. workers is an issue under the jurisdiction of the Department of Labor.

In this case, the petitioner has not shown that his work has had, and is therefore likely to continue to have, an especially significant impact on his field. Because the petitioner's occupation is generally subject to the job offer/labor certification requirement, the petitioner must sufficiently distinguish his work from that of others in the field if he is to show that he qualifies for a special exemption from that requirement.

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.