

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: EAC 00 084 50470 Office: Vermont Service Center

Date: **MAR 19 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 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, Vermont 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 an alien of exceptional ability. At the time of filing, the petitioner was working as Director of the United Nations Political Office in Bougainville, Papua New Guinea. 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 held 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 regulation at 8 C.F.R. § 204.5(k)(2) states, in pertinent part:

Advanced degree means any United States academic or professional degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part:

The director may exempt the requirement of a job offer, and thus of a labor certification... if such exemption would be in the national interest. To apply for the exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate.

The first issue to be determined is whether the petitioner qualifies as a member of the professions holding an advanced degree, and/or an alien of exceptional ability. In the request for evidence dated April 6, 2001, the director specifically requested "evidence to establish that [the petitioner] is a 'professional holding an advanced degree'" and that the petitioner "[s]ubmit, in duplicate, a completed and signed Form ETA-750B."

In response to the director's request, the petitioner submitted two additional witness letters and a letter from counsel stating: "The applicant does not pursue this application based on an advanced degree but rather because of exceptional ability which will substantially benefit the United States." In this case, the petitioner has offered no evidence showing that he holds a degree in his field above that of a baccalaureate. Therefore, we withdraw the director's finding that the petitioner "is the holder of an advanced degree."

Further, we find that the petitioner cannot be considered for a national interest waiver because he has not provided the requested Form ETA-750B (in duplicate). 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 crucial document, and therefore, by regulation, the petitioner cannot be considered for a waiver of the job offer requirement. The director's request for evidence and notice of denial clearly informed the petitioner of this critical omission. Thus, the application for the national interest waiver cannot be approved.

We will further consider whether the petitioner qualifies as an alien of exceptional ability and also render a finding regarding the merits of the petitioner's national interest claim. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows "exceptional" traits.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

The petitioner has submitted no evidence to satisfy this criterion.

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 letters and evidence provided in support of the petition satisfy this criterion.

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

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

Evidence of membership in professional associations.

The record contains no evidence to satisfy the above three criteria.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The petitioner served as Ambassador of Guyana to the United Nations between 1979 and 1987. During that time the petitioner served briefly as President of the U.N. Security Council in 1983. From 1987 to the filing of the petition, the petitioner held positions such as Director General of Guyana's Ministry of Foreign Affairs, Deputy Secretary General of the Latin American Economic System, and Director of the United Nations Political Office in Bougainville, Papua New Guinea.

The petitioner submitted transcripts from three U.N. Security Council meetings from 1983. The transcripts contain congratulatory remarks either welcoming the petitioner to serve as President of the U.N. Security Council or expressing thanks to the petitioner upon completion of his one-month term. For example, the incoming President, Representative ██████ of ██████ stated: "I should like to pay a tribute, on behalf of the Council, to the President for the month of September, [the petitioner], permanent representative of Guyana to the United Nations, for the great diplomatic skill and courtesy with which he conducted the Council's business last month."

Ambassador Troyanovsky of the Former Soviet Union, in addressing the new President Salah, stated:

I should like to begin with words of welcome to you, ██████ as President of the Security Council. In view of your wealth of experience in high diplomatic posts, we have every hope that this month the work of the Security Council will be successful. We also wish to express

our sincere gratitude to your predecessor, the representative of Guyana, [the petitioner] for the impartiality and efficient way in which he conducted the Council's proceedings in September.

We find that the accolades exchanged by members of the U.N. Security Council to incoming and outgoing presidents of the Council are more reflective of traditional courtesy among diplomats rather than first-hand evidence of the petitioner's significant contributions and achievements in international diplomacy.

The petitioner also submitted letters from his former acquaintances at the U.N. commending his diplomatic skills and roles in various international projects. The record, however, does not reflect that the petitioner has earned any formal recognition for his work. The letters provided represent, in essence, private communications to the petitioner rather than recognition of the petitioner's diplomatic achievements. Furthermore, the letters do not demonstrate specific significant contributions or achievements; they merely attest in general terms to the petitioner's skills as an international diplomat. A general reputation as a competent and experienced diplomat does not constitute *prima facie* evidence of exceptional ability in one's field.

For the reasons discussed above, the petitioner has not adequately established eligibility for classification either as an advanced degree professional or as an alien of exceptional ability. 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, because the petitioner is ineligible under the classification sought. Nevertheless, the issue will be discussed because it was central to the director's decision.

Neither the statute nor 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 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.

In a letter accompanying the petition, counsel states:

[The petitioner] is looking forward to using his unique blend of skills in the service of the United States and/or private industrial concerns within the United States that will benefit from his abilities as a negotiator who is knowledgeable in the political workings of several international governments.

The petitioner, however, offers no letters of support from officials from the U.S. State Department (or any other U.S. Government agency) or U.S.-based companies attesting to the petitioner's ability to serve the national interest. Nor has the petitioner identified the specific activities he will undertake and how those activities will benefit the United States.

In a statement accompanying the petition, the petitioner states:

In the tense, post-conflict situation existing here, Bougainville is not a family-post, as the U.N. has made very clear. My own native Guyana is not a family-station either, albeit for a different kind of reason: the present Government would neither employ me nor support me for employment elsewhere, for the simple reason that I had worked with the Government it had put out of office. While I may be good enough for the U.N., I am not so for the Government of Guyana. This leaves the United States, with which I have had a long personal and official relationship, as the easy and natural choice of a place for permanent residence for my family.

Nothing in the legislative history suggests that the national interest waiver was conceived as a

means to facilitate the immigration of United Nations personnel seeking to obtain U.S. lawful permanent residence. Section 101(a)(27)(I)(iii) of the Act outlines the requirements for immigrant petitions for retired officers or employees of certain international organizations (such as the United Nations), but the petitioner in this case has expressed no desire to retire from the U.N.

The petitioner submitted several letters in support of the petition. A letter addressed to the petitioner from [REDACTED] Director, Special Unit for Technical Cooperation among Developing Countries, United Nations Development Program, states:

I would like to thank you for your assistance to the Unit in its effort to strengthen the capacity of the Organization for African Unity (OAU) to function as a regional focal point for technical cooperation among developing countries.

I note, with great interest, the pivotal role you played in forging collaboration with OAU's Department for Economic Development and Cooperation in the context of that Organization's responsibilities for the elaboration of economic policies for assisting decision makers in responding appropriately to the challenges of the twenty-first century. Your knowledge of the OAU, its orientation, and capacities have been of great value to this Unit.

[REDACTED] Alternate Executive Director, Inter-American Development Bank, describes the petitioner as an "accomplished Caribbean Diplomat." He further states:

I was able to secure [the petitioner's] temporary attachment to the Caribbean Community ("CARICOM") Secretariat as one of my Program Advisors. In this capacity, he was responsible for the elaboration of programs for the free movement of people within CARICOM, and joint diplomatic representation of CARICOM Governments in foreign capitals, and international organizations. [The petitioner] approached these tasks with a great deal of energy and innovative thinking, and his work constituted an important part of the foundation for ongoing initiatives in the CARICOM region in these program areas.

[REDACTED] Assistant Secretary General, Organization of American States, credits the petitioner with promoting "cooperation both within and between regions of the Third World."

The above letters (from the petitioner's organizational acquaintances) describe him as an effective diplomat, but they do not establish a past track record of achievement that would significantly distinguish the petitioner from other competent international diplomats. While letters from those close to the petitioner certainly have value, the letters do not show, first-hand, that the petitioner's individual work is attracting attention on its own merits, as we might expect with diplomatic achievements that are especially significant.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted a letter from counsel, evidence of his published work, and further background information.

Counsel's response letter stated: "It is very difficult to quantify the work that the petitioner is capable of doing... This is not a typical position by anyone's standards and unless we are talking about Americans of the caliber of Ambassadors and Secretaries of State, there are not a wealth of people in this country that can perform to the same level [as the petitioner]." A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. See *Matter of New York State Dept. of Transportation, supra*. Similarly, arguments about the overall importance of a given occupation may establish the intrinsic merit of that occupation, but such general arguments cannot suffice to show that an individual in that field qualifies for a waiver of the job offer requirement.

In an excerpt from an e-mail accompanying counsel's letter, the petitioner states that he intends to make his "talents and experience available in the United States," but he fails to specify the projects that he will undertake or how those efforts will benefit the national interest. We generally do not accept the argument that a given field of endeavor (such as international diplomacy) is so important that any alien qualified to work in that field must also qualify for a national interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. 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 petitioner also submitted two additional witness letters. Carl Greenridge, Director, Technical Center for Agricultural and Rural Cooperation, states:

[The petitioner] is currently one of that select grouping of persons who represent the Secretary General of the United Nations in the field. He is stationed in Bougainville, Papua New Guinea, in which capacity he is playing an important role of monitoring compliance with the terms of the peace agreement, presiding over peace talks between the rebels and the National Government, promoting understanding and cooperation among them, and presiding over the disarmament process. In this area he is engaged in making a valuable contribution to the strengthening of peace in the north-west Pacific, and, by implication in the world at large.

[The petitioner's] extensive experience in promoting intra-regional cooperation in the Caribbean, Latin America and Africa, and also between Europe and the African, Caribbean and Pacific countries, has combined with his experience as a peace-maker in the Pacific to produce a well-rounded and talented individual who is equipped to render further valuable service across a spectrum of human relations at the international, national or sub-national level.

As stated above, pursuant to *Matter of New York Dept. of Transportation*, we generally do not

accept the argument that a given project is so important that any alien qualified to work on that project must also qualify for a national interest waiver. [REDACTED] better demonstrates the intrinsic merit and international scope of the petitioner's work, but it does not describe how the petitioner's past efforts have significantly influenced the field of international diplomacy.

[REDACTED] a Nobel Laureate, describes the petitioner as an "active defender of the rights of the people of East Timor." [REDACTED] further states that the petitioner's unique combination of experience "makes him an asset in any context where importance is attached to finding bases of harmony and good-neighborliness among peoples."

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 acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director acknowledged the petitioner's role in carrying out the objectives of the United Nations, but questioned the speculative nature of the petitioner's claim that his future activities would benefit the interests of the United States.

On appeal, counsel states:

The clear inference which can be drawn from the record is that should [the petitioner] be granted permanent residence status, he will be able to take a position within the U.S. Government – probably in the State Department – or with a private concern which deals with diplomatic relations on behalf of the government or private corporations.

The record, however, contains no letters of support from officials from the U.S. State Department (or any other U.S. Government agency) or U.S.-based corporations attesting to the petitioner's ability to serve the national interest. We acknowledge the letters from the petitioner's colleagues at the United Nations that express a high opinion of the petitioner and his work; however, the evidence provided does not persuasively distinguish the petitioner from other capable diplomats, nor does it establish how the petitioner's efforts will specifically benefit the national interest of United States.

In this matter, the petitioner has not shown that his diplomatic accomplishments are of demonstrably greater value than the achievements of other individuals who are also engaged in international diplomacy. The available evidence does not persuasively demonstrate that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

In sum, the petitioner has not established that he qualifies for the underlying immigrant classification, or the added benefit of the national interest waiver.

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 the 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.