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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

File: WAC-02-062-52944 Office: California Service Center

Date:

MAY 06 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)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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.

A handwritten signature in black ink that reads "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California 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. 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 does not qualify for classification as an alien of exceptional ability and that he 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) . . . 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.

As stated above, the petitioner seeks classification as an alien of exceptional ability. The director concluded that the petitioner did not qualify for that classification. This issue is moot, however, because the record establishes that the petitioner holds a bachelor's degree in engineering from the University of the Philippines, Diliman. The petitioner also has at least five years post-baccalaureate experience, which is equivalent to an advanced degree pursuant to 8 C.F.R. § 204.5(k)(2). 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. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term 'national interest.' Additionally, Congress did not provide a specific definition of 'in the national interest.' The Committee on the Judiciary merely noted in its report to the Senate that the committee had 'focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .’ S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the ‘prospective national benefit’ [required of aliens seeking to qualify as ‘exceptional.’] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State 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.

We concur with the director that the petitioner works in an area of intrinsic merit, engineering, and that the *proposed* benefits of his work, converting the kinetic energy of the ocean into electricity, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In support of the petition, the petitioner submits evidence of his academic achievements and degrees, his engineering license, his professional memberships, an employer letter listing his projects, a magazine article about the professional success of the petitioner and his wife despite their marriage as teenagers, and two research proposals. The petitioner’s degrees, license and professional membership are evidence relating to the requirements for aliens of exceptional ability, a classification normally requiring a labor certification. We cannot conclude that meeting one, two, or even the requisite three requirements for that classification warrants an waiver of the labor certification process.

Moreover, the regulation at 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.’ While the issue of whether the petitioner is an alien of exceptional ability is moot because the alien is an advanced degree professional, we will briefly discuss the issue since the director raised it and the petitioner continues to assert that he is an alien of exceptional ability on appeal.

Degrees and licenses that are required for practice in the field are not evidence of an “expertise significantly above that ordinarily encountered in the field.” While the regulations do not require that professional memberships be in associations that require outstanding achievements of their members as implied by the director, the director’s concern that the petitioner did not provide evidence of the membership requirements is valid. On appeal, the petitioner submits evidence that the Rotary Club requires members to be “of good character and good business and professional reputation.” It is not clear that this membership requirement is indicative that the petitioner has engineering expertise above that ordinarily encountered. Finally, while the petitioner asserts that his salary is evidence of his exceptional ability, the petitioner did not provide evidence of average and high-end salaries for engineers in the Philippines. 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).

In addition, the magazine article is merely about how the petitioner and his wife managed to complete their education despite getting married and starting a family at a young age. While it discusses their ability to complete their education and secure good jobs, the article does not allege that the petitioner has made any contributions to the field of engineering. Moreover, the petitioner’s alleged awards at student science fairs are not persuasive evidence of exceptional ability. Professional engineers do not enter such competitions. As the petitioner’s projects were not compared with the work of engineers working in the field, the awards for these projects cannot be considered evidence that his work is above that performed by others in his field.

Ultimately, the petitioner’s eligibility claim rests on his research proposal. In this proposal, the petitioner discusses efforts to harness the tides as an energy source by the French and Russians. The petitioner asserts that he intends to harness both the tides and the “natural movement of the ocean.” The petitioner further asserts that he “already has the idea of how the device will work but further study and refining is still needed.” Yet, the petitioner’s schedule for developing such technology reflects that the first two years will be devoted solely to “familiarization with the existing regulations, engineering standards, market behavior and existing competition in the electricity industry.” Year three will be spent on the “formulation of theoretical basis,” and only in year four will the petitioner begin “computational studies” and “pilot-scale testing.” The petitioner asserts that no funding will be required until pilot-scale testing begins.

As evidence of his qualifications to undertake this ambitious project, the petitioner asserts that he has “shown success at every stage of his life.” In support of that assertion, the petitioner submits a self-serving statement of his accomplishments including his secondary school accomplishments, the raising of a family while completing his education, his engineering degree, his work at an electric company, his professional memberships, the magazine story featuring his family, his business degree, and his son’s achievements. Conspicuously absent from this list are any recognized contributions towards designing systems to harness tides or other ocean movements.

The letter from Meralco, one of the petitioner’s employers in the Philippines, lists the petitioner’s projects involving “the review and creation of standards for overhead transmission and distribution lines, underground distribution lines, and substations.” A manager at Furukawa

Electric Company, another of the petitioner's employers, asserts that the petitioner supervised the construction of a transmission line and the installation of ducts for a fiber optic cable and direct-buried cable. None of these projects involved the conversion of water movement (tides or otherwise) into electricity.

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.

Moreover, 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 he seeks. 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. *Matter of New York State Dept. of Transportation, supra*, at 219, n. 6. The petitioner was specifically advised of this requirement in the director's request for additional documentation.

The record contains little evidence that the petitioner has ever worked on the type of research he proposes to undertake in the United States. It is unclear whether the petitioner's bicycle water pump and chemical water pump, which won awards at student science fairs, relate to his proposed project. Regardless, the record contains no evidence that he continued to work on hydrodynamics or hydroelectricity after college, where he admittedly took a few courses in hydrology and hydraulic engineering. The record certainly does not reflect that the petitioner has already influenced research into harnessing the ocean's energy or any other area of engineering. For example, the record does not contain any letters from researchers pursuing this goal (in France, Russia, or elsewhere) discussing the petitioner's influence on the field in general or their own work specifically. Further, the record does not reveal that the petitioner has published any articles in peer reviewed journals on this topic (or any topic) or that such articles have been widely cited.

In addition, while a patent in and of itself is not evidence that a waiver is warranted in the national interest, *id.* at 221, n. 7, where a petitioner bases his eligibility on his alleged ability to invent a technology, a lack of previously patented inventions is of some concern. The record does not demonstrate that the petitioner has patented any inventions, let alone an invention related to harnessing energy from the ocean. That the petitioner allegedly received awards for two pumps at student science fairs is not significant. As stated above, the petitioner's work was not compared with the work of professional engineers at these fairs.

In light of the above, the proposition that the petitioner could accomplish his proposed project is entirely speculative.

On appeal, the petitioner asserts that the labor certification would limit his employment options to companies willing to file a labor certification application on his behalf. The petitioner has not provided any evidence that any company in the United States is interested in his proposals, regardless of whether they are willing to file a labor certification application for a prospective employee. Moreover, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5.

Finally, the petitioner also relies on the potential contributions of his wife and son. An alien may not pool his accomplishments with those of his family in order to establish eligibility for the national interest waiver or any other employment-based classification. Rather, the petitioner must establish that the alien alone qualifies for the classification sought and any waivers requested. As such, the documentation regarding his wife and son is irrelevant and the director correctly disregarded such evidence.

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.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.