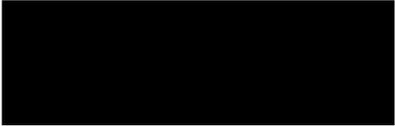


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

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



MAY 07 2003

File: EAC 98 214 53332 Office: VERMONT SERVICE CENTER Date:

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:



Identifying data deleted to
prevent
invasion of
warranted

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 (AAO) 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 and as a member of the professions holding an advanced degree. The petitioner seeks employment as an international business development and trade consultant at SPEDD, Inc., Wexford, Pennsylvania. 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 with post-baccalaureate experience equivalent to 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. -- The Attorney General may, when he 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.

The first issue to be decided is whether the petitioner is a member of the professions with an advanced degree, and/or an alien of exceptional ability. 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 director stated that the petitioner qualifies as a member of the professions with post-baccalaureate experience equivalent to an advanced degree. This finding, however, is based on an incorrect reading of the evidence and therefore cannot stand. Specifically, the director stated that the petitioner "holds a

B.S. degree in business and international trade from the University of Sarajevo.” Review of the record shows that the petitioner does not hold, or claim to hold, any degree in that field.

The petitioner graduated from the University of Sarajevo (then in Yugoslavia, now in Bosnia-Herzegovina) in 1986 with a diploma as a *Gradevinski Inzenjer* (“Construction Engineer”). Counsel states that the petitioner has submitted “[a] copy of the Immigrant Inspector’s Handbook showing an engineering diploma from the University of Sarajevo to be the equivalent of a Bachelor’s Degree in Engineering.” The referenced document does not discuss Engineering degrees from the University of Sarajevo; it only mentions Architecture degrees from that institution. The document does, however, state that Engineering diplomas from the Universities of Skopje and Zagreb are equivalent to bachelor’s degrees in Engineering. (The documents mention Civil, Mechanical, Electrical, and “Certificated” Engineering, but not Construction Engineering.) While the document does not support counsel’s exact statement, it justifies the inference that the petitioner’s diploma most likely qualifies as the equivalent of a U.S. baccalaureate.

One witness of record [REDACTED] Chairman and CEO of SPEDD, claims that the petitioner’s diploma “is the equivalent of a Master’s degree under the American educational system,” but does not explain the reasoning behind this conclusion or his own qualifications for making this determination. In addition to the above-mentioned *Immigrant Inspector’s Handbook*, another record document which contradicts Mr. [REDACTED] is an excerpt from the National Association for Foreign Student Affairs’ *Handbook on the Placement of Foreign Graduate Students*, 1990 edition, which indicates that a diploma in engineering represents the equivalent of four to five years of postsecondary education at a U.S. institution. The higher degrees of *Specijalist* or *Magisterijum*, representing an additional two years of study, appear to be much closer to a U.S. master’s degree than the diploma which the petitioner holds.

Furthermore, a master’s degree in a field unrelated to trade consulting would not qualify the petitioner for the visa classification sought. The purpose of this visa classification is to recognize the enhanced expertise which results from extended study, rather than to reward an alien for his or her perseverance in obtaining a second degree. Congress signified this distinction by limiting eligibility to members of the professions holding advanced degrees, rather than all aliens who hold advanced degrees.

The petitioner claims two years of course work in “Information Science in Business” at the University of Mostar in what is now [REDACTED] but he states that he received no degree from this study. The regulatory definitions cited above clearly require an actual degree, rather than incomplete coursework.

Because the evidence indicates that the petitioner does not hold an advanced degree, he must show five years of progressive employment experience. The petitioner claims to have worked as a self-employed trade consultant between unspecified dates in 1991 and 1994, but offers no first-hand documentation of this activity. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On his Form ETA-750B, Statement of Qualifications, the petitioner states that he has served as executive director of Lindi Trading Company, first in Tirana, Albania from December 1994 to October 1996, and thenceforth in Wexford, Pennsylvania. On his resume, however, the petitioner states that from 1996 onward he has been the "CEO of 'Lindi trading co.' in Pittsburgh." On this second document, the petitioner makes no mention of prior employment for Lindi in Albania. The record contains a translation of a contract between Lindi (in Albania) and the petitioner, dated December 20, 1994, naming the petitioner "technical economic manager of the Company." Another document of record identifies the petitioner as the "General Manager" of Lindi in Pennsylvania; another individual is identified as "President . . . [with] executive responsibility." These documents therefore contradict information on the Form ETA-750B, which the petitioner signed under the attestation "I declare under penalty of perjury the foregoing is true and correct."

Other documents and letters offer overlapping and occasionally inconsistent information about the petitioner's past employment history. The evidence shows that the petitioner has over five years of experience in the general sphere of "business," but it does not consistently show that the petitioner has had at least five years of progressive employment as an international trade consultant.

Furthermore, the burden is on the petitioner to demonstrate that trade consulting constitutes a "profession" as that term is defined above; i.e., that one must possess at least a baccalaureate before entering into the occupation. The fact that the petitioner actually holds a baccalaureate is irrelevant to whether that degree is a requirement for entry into the occupation.

The petitioner states that he was self-employed as a consultant for several years, and there is no evidence that he was under the authority of any licensing board or other governing body at the time. Such information suggests that anyone can establish a consulting business, regardless of one's qualifications. Whether such an individual would experience any success as a consultant is a separate question, irrelevant to the issue of who can work as a consultant. The crucial point is that the petitioner has not shown that anything would prevent an individual without a baccalaureate from working as a consultant.

While section 101(a)(32) of the Act states that engineers are professionals, and the petitioner has worked as an engineer in the past, he now seeks employment not as an engineer but as a trade consultant. The petitioner's membership in the profession of engineering cannot qualify him for a benefit predicated on non-professional employment.

For the above reasons, the petitioner has not established that he qualifies as a member of the professions holding an advanced degree.

Because the petitioner has not demonstrated eligibility as an advanced-degree professional, the petitioner cannot receive a visa under section 203(b)(2) of the Act unless he qualifies as an alien of exceptional ability. 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.

It is noted that 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.” 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’s only college degree is in construction engineering, and is not related to his area of claimed exceptional ability.

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 most generous reading of the petitioner’s employment history establishes fewer than ten years of experience in the field. The petitioner’s employment as an engineer cannot fulfill this criterion, and even counting the petitioner’s somewhat related employment as a municipal employee in 1990 and 1991, the petitioner did not have ten years of experience in the occupation as of the petition’s July 1998 filing date. More strictly, “the occupation . . . sought” in this case is as a consultant, an occupation in which he claims to have worked from an unspecified date in 1991 to December 1994.

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

The petitioner claims no licenses or certifications.

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

The petitioner states that he seeks an annual salary of \$50,000. He offers no evidence as to the salary that he “has commanded” in the past, or that such salary demonstrates exceptional ability by significantly exceeding the median salary in his occupation.

Evidence of membership in professional associations.

The petitioner claims no such memberships.

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

The record offers no evidence of institutional recognition of the petitioner’s achievements as a consultant. Private letters of recommendation, solicited by the petitioner to support this petition, do

not constitute recognition as described above. The letters submitted by the petitioner will be considered below, in the context of the national interest waiver.

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. This issue is moot, because the petitioner is ineligible under the classification sought, but the issue will be discussed because it was central to the director's decision.

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 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.

The petitioner submits letters from several witnesses describing his contribution to trade between the U.S. and Eastern Europe. Louis A. Vidic of SPEDD states:

SPEDD, Inc. is a non-profit economic development agency specializing in entrepreneurial development using business incubators as a primary tool in business development and job creation. . . .

Our goal in international partnerships is to create markets for United States manufactured products and sources abroad for products and raw materials needed in the United States. [The petitioner's] unsurpassed knowledge of the economic, business, political, and cultural conditions and climates in the independent states of Central Europe will immeasurably enhance our ability to engage in development and trade activities in that region.

Documentation in the record shows an agreement between the International Finance Corporation and SPEDD, with the petitioner acting on SPEDD's behalf.

Country Director of the Albanian-American Enterprise Fund, states:

[The petitioner] was the only Albanian who was able to describe to me in a clear way the financial problems of the country that would lead to Albania's collapse into anarchy in March 1997. He has an understanding of economics; he can organize and plan a business; and, he can communicate his vision and purposes to both employees and potential investors. . . .

I believe [the petitioner] will contribute to the economy of the US and will, through his experiences, remind his colleagues and neighbors that democracy everywhere is fragile and requires constant care.

Executive Director of the Open Society Fund for Albania (also known as the Soros Foundation), states:

[In 1991, the petitioner] was advising and managing the first and largest [Albanian] opposition newspaper, Rilindja Demokratike (Democratic Renaissance). . . . [The petitioner] quickly established a reputation as a superb manager, communicator, and a person that both Westerners and locals relied on for advice and guidance.

His later activities as a Director of Siemens for Albania proved his abilities in the business field. [The petitioner's] knowledge of the economic, political, and cultural conditions in the region will also enhance [the] United States' ability to engage in development of trade activities in the region.

The director instructed the petitioner to submit additional evidence to show that the petitioner meets the tests set forth in *Matter of New York State Dept. of Transportation*. In response, counsel asserts that the promotion of international trade has substantial intrinsic merit, while the petitioner's work with such entities as SPEDD has national scope. With regard to the third prong of the test, counsel states "[t]he clearest statement of [the petitioner's] abilities may be found in the letter from Mr. [redacted] of the USAID-sponsored Albanian-American Enterprise Fund."

Mr. [redacted] letter, quoted above, appears to represent perhaps the weakest endorsement of the petitioner's skills in the area of international trade. Mr. [redacted] had indicated that the petitioner "has an understanding of economics; he can organize and plan a business; and, he can communicate his vision and purposes to both employees and potential investors." These statements, while clearly not derogatory, do not show that the petitioner's impact as a trade consultant would exceed that of a qualified U.S. worker. While Mr. [redacted] has praise for the petitioner's work in defense of Albania's

fledgling democracy, with regard to the petitioner's business skills Mr. [REDACTED] offers little more than an attestation of the petitioner's competence.

With regard to the job offer/labor certification requirement, counsel acknowledges that SPEDD has extended a job offer to the petitioner, but argues "[i]n labor certification, the Department of Labor disfavors offers of employment which embrace seemingly-disparate and unrelated duties and responsibilities, and for which unusual and seemingly-unrelated vocational requirements are imposed." In short, counsel contends "the activities in which [the petitioner] will be engaged . . . simply do not lend themselves to labor certification." Counsel offers no documentation to show that the Department of Labor routinely denies labor certification applications on behalf of trade consultants. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without evidence to show that the Department of Labor routinely denies labor certification applications for trade consultants whose duties are realistically described, the Service cannot accept counsel's conjectural assertion that the Department of Labor might deny such an application in the future.

Counsel's remaining arguments focus on the general importance of international trade, rather than the petitioner's specific qualifications.

The director denied the petition, stating that the petitioner had failed to demonstrate that the petitioner's impact on international trade has exceeded that of others in his field. On June 25, 1999, counsel stated that a brief, or a request for another extension, would be submitted within 60 days. Over five months later, the record contains no further correspondence and a decision shall be made based on the record as it now stands.

On appeal, counsel's arguments concern the general validity of *Matter of New York State Dept. of Transportation*, rather than assertions about the specific merits of this case. Counsel advances five arguments. Counsel states that the director's interpretation of "national interest" "is contrary to concepts of 'national interest' applied by the Service in other areas of the Immigration Act." Counsel offers no specific information as to how the director's interpretation varies from the other, unspecified uses of the term, or whether other statutory uses of the term are applicable to this case.

Counsel states "[t]he creation and application of a balancing test for a 'national interest' job offer waiver against the labor certification requirement is so vague as to violate due process and is arbitrary, capricious, and an abuse of discretion." The statute states that aliens seeking this visa classification are subject to the job offer requirement unless it is in the national interest to waive that requirement. Therefore, some type of "balancing test" is inherent in the statute. The fundamental purpose of adjudicating an application for a national interest waiver is to determine whether the national interest is better served by enforcing or by waiving the job offer requirement.

Counsel then states that the Service cannot require "that an alien have credentials that exceed those required for an alien to qualify . . . as an Alien of Extraordinary Ability or as an Outstanding Professor or Researcher." This assertion is quite reasonable, but counsel does not demonstrate how the director has purportedly held the petitioner to those higher standards. Review of the director's decision does not reveal any indication that the director expected the petitioner to exceed these higher evidentiary

standards. The director found that the petitioner's "education and experience have not been shown persuasively to be unusual for an individual in his field," but did not require the petitioner to demonstrate sustained national or international recognition as are necessary for the higher visa classifications.

Counsel protests the designation of *Matter of New York State Dept. of Transportation* as a precedent decision, claiming that it "is a violation of due process and the Administrative Procedures Act, and is contrary to public comment offered in 1995 in response to a Notice of Proposed Rule Making" pertinent to the national interest waiver.

The AAO has no jurisdiction to rule on whether its own decisions violate the Administrative Procedures Act, and counsel has cited no such ruling from any body competent to make such a ruling. Furthermore, when drafting *Matter of New York State Dept. of Transportation*, the AAO did not rely, directly or indirectly, on the 1995 proposed rule cited by counsel. It remains that the existing regulations offer no guidance as to what constitutes the national interest. Therefore, the Service must rely on criteria outside of the regulations if it is to make any decisions pertaining to requests for the national interest waiver. The factors set forth in *Matter of New York State Dept. of Transportation* derive largely from earlier Service center decisions interpreting the law, compiled and consolidated in an effort not to introduce entirely new guidelines, but rather to promote consistency between the various Service centers.

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. Furthermore, the petitioner has not demonstrated that he qualifies for the underlying visa classification, and therefore he cannot be eligible for a national interest waiver.

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.

We note that the petitioner has subsequently obtained a labor certification on the beneficiary's behalf, and filed an immigrant petition (receipt number EAC 00 096 53405) based thereupon. That petition was approved on July 26, 2000. Thus, the petitioner, in effect, seeks a waiver of a requirement that it has now already met. This denial is without prejudice to any further proceedings arising from the petitioner's approved petition on the beneficiary's behalf.

ORDER: The appeal is dismissed.