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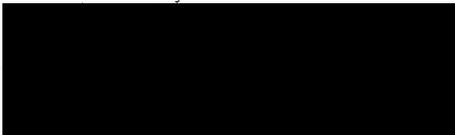
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U.S. Citizenship
and Immigration
Services



FILE: WAC 03 078 53781 Office: CALIFORNIA SERVICE CENTER Date: FEB 10 2004

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

For *Mari Johnson*
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 a member of the professions with post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as an “access technology expert,” specializing in “technology for [the] visually impaired.” 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 the classification sought, but that the petitioner has 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 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.

The director did not dispute that the petitioner qualifies as a member of the professions with progressive post-baccalaureate experience equivalent to an advanced degree, as defined at 8 C.F.R. § 204.5(k)(2). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services] 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.

Counsel states that the petitioner's work "is essential in allowing visually impaired individuals to enjoy greater autonomy and independence and by creating opportunities, both socially and professionally, that were once closed to the blind." The petitioner describes his work:

My knowledge in the area of establishing and maintaining Assistive Technology systems and protocols for individuals with disabilities is extensive and unparalleled.

I am one of the few individuals who possess the requisite knowledge, skills and abilities to effectively address issues and identify trends in this highly technical area of [the] Assistive Technology field.

My contributions have resulted in the creation of accessible systems, which allow persons with disabilities to enjoy equal access and opportunities, and to participate fully in programs, services and social/economic activities. . . .

On a national level I have worked with disability rights law firms who specialize in the Americans with Disabilities Act and its application to technology and the blind community to ensure that automatic teller machines (ATMs) are accessible to persons with vision impairment through speech output. . . .

As a Computer & Assistive Technology Expert, I have been responsible for, on one hand, evaluating and instructing blind and visually impaired persons in the use of PC and other electronic technologies; and on the other, designing/configuring adaptive computing systems/media and providing technical expertise to educators and employers with regard to how best to integrate sight-impaired persons into their classrooms and workplaces respectively. My work requires highly specialized knowledge . . . [v]irtually no traditionally trained IT specialist can utilize or instruct in this technology.

Jose G. Caedo, special assistant to the mayor of San Francisco for Citizen's Services, states that the petitioner "has provided technical expertise to hundreds of employers and persons with visual impairment in the field of assistive technology and reasonable accommodation in the workplace." Other witnesses who have worked

with the petitioner attest to his level of expertise in his chosen field. The witnesses are heavily concentrated in the San Francisco area.

Several witnesses attest to a shortage of qualified workers who specialize in the petitioner's area of expertise. Pursuant to *Matter of New York State Dept. of Transportation, supra*, a shortage of qualified workers is generally an argument for obtaining rather than waiving a labor certification.

The petitioner submits a sample of his work, an equipment evaluation that he conducted on behalf of an employee of the Department of State. The evaluation concludes with a list of recommended equipment to facilitate the individual's continued work. Customized evaluations of this kind are necessarily limited in scope because they directly affect only a small number of individual clients.

The petitioner submits a videocassette, containing two segments shown on the Tech TV network. One segment offers a general discussion of access technology, including footage from the petitioner's company. The other segment features the petitioner demonstrating the evolution of note-taking technology, from the simple slate and stylus for Braille writing to new electronic devices with movable Braille displays and voice synthesizers. There is no indication that the petitioner was responsible for inventing or developing the devices, only that he is familiar with them and seeks to make visually impaired people aware of them.

The director requested additional evidence to show that the petitioner meets the guidelines published in *Matter of New York State Dept. of Transportation*. The director noted that the petitioner's witnesses are predominantly close associates, and the director stated that a shortage of qualified workers is not usually a strong argument in favor of waiving the job offer requirement. The director also questioned the extent to which the petitioner's work is national in scope; providing customized services on a client-by-client basis necessarily has a very limited impact.

In response, counsel states that the "petition is not based on a labor shortage," but nevertheless "this shortage underlines . . . the fact that the national interest would be adversely affected if [the petitioner] were required to go through the labor certification process." It appears that, in the same sentence, counsel argues that the waiver request is, and yet is not, predicated on a shortage in the field. Counsel cannot persuasively state that, although the request is not based on a labor shortage, there is such a shortage and therefore the petitioner should receive a waiver.

Dr. John Brabyn, director of the Rehabilitation Engineering Research Center at the Smith-Kettlewell Eye Research Institute, states that the petitioner "sits on our Advisory Committee and advises us on such matters as equipment accessibility and the design of inexpensive screen-access devices and software." Dr. Brabyn does not indicate that the petitioner actually participates in research or equipment design, but rather he provides "expertise and perspective . . . [to] assure continued relevance of our research efforts." Other evidence concerns the petitioner's involvement in litigation and advocacy efforts.

The director denied the petition, stating that the record does not demonstrate that the petitioner has had significantly more impact than other professionals in the same field. On appeal, counsel asserts that the director denied the petitioner "a meaningful opportunity to submit additional information and correct deficiencies in his petition" because the denial notice "included grounds of ineligibility which were not stated in the Request for Further Evidence." While the denial notice is more detailed than the request for evidence, the director found that the petitioner had failed to overcome the grounds cited in the request for evidence. This alone establishes that the petition was not approvable. Because the director was already going to deny

the petition for the reasons listed in the request for evidence, the discussion of additional details in the denial notice did not prejudice the outcome of the decision.

Counsel argues that the director erroneously “equated prominence in one’s field to benefiting the national interest.” Certainly the standard of “national or international acclaim” applies to a different immigrant classification, and cannot be applied to individuals seeking a national interest waiver. The petitioner must, nevertheless, establish that his work has national scope and substantial impact when compared to others in the occupation. The petitioner has offered little basis for comparison in this regard, generally addressing the issue by claiming that very few others work in the field.

The assertion that few trained workers are available is not persuasive in this proceeding. The question of whether a worker shortage exists lies, properly, within the jurisdiction of the Department of Labor, via the labor certification process. Counsel’s assertion that the petitioner would rather avoid potential delays in obtaining a labor certification is not a strong argument either, because the matter at issue concerns the national interest rather than the petitioner’s own preferences and desires.

Counsel, on appeal, contends that the petitioner has, in fact, gained national prominence for his work. The evidence in the record is insufficient to support this claim. Most of the letters and documents relate to the petitioner’s work in the vicinity of San Francisco. Documentation about the technology that the petitioner uses is not persuasive, because there is no indication that the petitioner invented, manufactures, or is otherwise significantly responsible for the existence of such technology. Familiarity with new technology invented elsewhere, is not of comparable importance to actually creating such technology. *Matter of New York State Dept. of Transportation* at 221, n. 7. The petitioner’s occasional appearances on a syndicated cable television program do not establish the extent of the petitioner’s influence. Counsel observes that the program “is available in the homes of 40 million viewers,” but this does not establish the actual viewership because dozens of other cable channels are equally “available” in the same homes. This statistic, by itself, is sufficient only to establish that the program is unavailable to the majority of U.S. viewers.

Counsel interprets *Matter of New York State Dept. of Transportation* to mean that the petitioner must only establish that he presents a greater potential benefit than a minimally qualified worker in the same field. This argument disregards the following observation:

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. Thus, the assertion that the petitioner’s qualifications are above the minimum level is not a strong argument in favor of approving the waiver request.

The petitioner is clearly a dedicated advocate for improving access to technology that allows the blind and visually impaired to participate more fully in society and the workplace, and there is no disputing the value of this kind of work. Eligibility for the waiver, however, cannot rest predominantly on the overall merits of the occupation, because these merits apply to every competent worker in that occupation. Congress demonstrated

its ability to create blanket waivers with section 203(b)(2)(B)(ii) of the Act, and it has created no such blanket waiver for workers in the petitioner's profession.

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.