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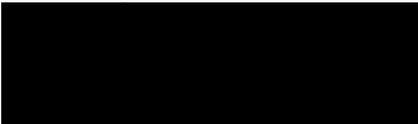


FILE: WAC 02 185 50557 Office: CALIFORNIA SERVICE CENTER Date: FEB 10 2004

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 *Marie 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 holding an advanced degree. The petitioner seeks employment as a transportation and traffic engineer. At the time he filed the petition, the petitioner was a doctoral candidate at the University of Hawaii (UH) and a project engineer at Lyon Associates. The petitioner received his doctoral degree four months after the filing date. 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 holding an advanced degree, 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 holding an advanced degree. 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 (CIS)] 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.

In a statement accompanying the initial filing, counsel states that the petitioner "has distinguished himself academically and professionally as someone with exceptional expertise in his field" and "is an ideal candidate for waiver of the labor certification requirements based on his exceptional expertise and the national importance of his research endeavors." Regarding counsel's distinction between "academically" and "professionally," we note that the petitioner was still a student at the time of filing, and had been a student for his entire adult life up to that point. The petitioner's engineering work prior to 2002 appears to have been in the context of student projects, albeit sometimes in cooperation with entities outside of the university.

Counsel describes the petitioner's work:

Since January 2002, [the petitioner] has been a project engineer with Lyon Associates, Inc., where he is involved in a project, "Traffic Calming Studies at various locations," part of a Traffic Calming Program corresponding to the Transportation and Community and System Preservation Pilot Program (TCSP) of the Transportation Equity Act for the 21st Century (TEA-21).

[The petitioner] is exploring viable measurements for communities suffering substantial accident-induced fatalities and property damage. Because of an increasing awareness of the social costs of automobile use, TEA-21 focuses on speeding and cut-through traffic, particularly on neighborhood streets. Because the public is extremely sensitive to the traffic facilities installed within neighborhoods, determining optimal traffic-calming measurements is costly and time-consuming, and can be complicated by particular locality, thereby counteracting traffic-calming measures.

[The petitioner] is determining feasible traffic calming measurements based on cost-effective plans to calm traffic, which subsequently minimizes accidents. . . . Another project, "Bus Bay Improvement," is aimed at minimizing the interference between public transportation (buses) and other street traffic. Ultimately, the project will decrease travel delays, which will subsequently reduce congestion-induced pollution. . . .

As part of the [Hawaii] Department of Transportation's ramp-closure research project with UH, [the petitioner] worked on the project, "Traffic Adaptive Control for Oversaturated Intersection," which is very important to exploiting the capacity of existing transportation facilities. Problems with traffic signal control strategies have resulted in ineffective utilization of intersection capacity and significant travel delays, which cause undue air pollution. . . . [The petitioner] developed a new traffic adaptive control strategy, called TACOS. The comprehensive simulation results have demonstrated significant improvement over the existing controls.

Certainly the petitioner's projects have the potential to improve traffic flow and bring about ancillary benefits, but these goals are at the heart of all transportation engineering. Counsel does not clearly explain how the petitioner's work in transportation engineering is more significant or important than that of other transportation engineers who, like the petitioner, seek to make transportation safer and more efficient. The numerous project reports submitted with the petition illustrate what the petitioner has been doing, but they do not inherently demonstrate that the petitioner stands apart from other transportation engineers to an extent that would justify the special benefit of a national interest waiver.

The petitioner submits several witness letters. The witnesses have all worked closely with the petitioner, whether as UH faculty members, officials of Lyon Associates, or in other capacities. The witnesses describe and praise the petitioner's work, but they do not demonstrate that the petitioner's work has had significant impact outside of this group of employers and mentors. Several witnesses praise the petitioner's proposal for TACOS, but there is no indication that TACOS has been implemented nationally or at any other level, or that the system is under serious consideration for such implementation.

The director instructed the petitioner to submit further evidence to meet the guidelines published in *Matter of New York State Dept. of Transportation*. The director requested information from "independent experts in the field" in order to establish the degree of the petitioner's impact outside of the universities he attended and the companies that employed him. In response, the petitioner has submitted copies of additional scholarly writings and new witness letters.

Professor [REDACTED] of the University of Massachusetts, Lowell, describes some of the petitioner's projects, such as TACOS, and states that the petitioner "is an innovative researcher with remarkable skills and expertise." Dr. [REDACTED] associate professor at the University of Akron, states that "TACOS has exhibited significant improvement on all examined Measurement of Effectiveness (MOE) through simulation and testing," and that the petitioner's "achievements have greatly advanced the understanding of complexities in signal optimization and the development of adaptive control strategies in the transportation system." Dr. [REDACTED] an assistant professor at Villanova University, states that the petitioner "is among the few precursors of his generation in performing excellent traffic engineering research" that "has contributed significantly to the field of transportation," although Dr. [REDACTED] says little about the specifics of the petitioner's research. Similarly, Dr. [REDACTED] senior engineer at LAW Engineering and Environmental Services, praises the importance of the petitioner's work without actually discussing it in any detail. [REDACTED] president of the Hawaii Section of the Institute of Transportation Engineers, states that the petitioner "is performing a critical role" in developing TACOS. None of the witnesses indicate that any government entity has taken steps to implement TACOS, either nationally or at any lesser level. Given that the petitioner's claim to serve the national interest is couched entirely in terms of the practical consequences of his work, the omission is a significant one.

The director denied the petition, stating that while the petitioner has been “highly productive in the early stages of his career,” the petitioner has not demonstrated that he has, thus far, realized a significant track record of measurable impact that would justify projections of future benefit to the United States.

On appeal, the petitioner submits a brief from counsel, including extensive quotations from previously submitted witness letters. Counsel argues that the petitioner’s “expertise exceeds that of most others in his field”; elsewhere in the same brief, counsel states that the petitioner “demonstrates an expertise above that normally encountered.” We note here that CIS regulations at 8 C.F.R. § 204.5(k)(2) define “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given field. It is clear from the plain wording of the statute that exceptional ability is not automatically grounds for a waiver; aliens of exceptional ability are, normally, subject to the job offer requirement. Therefore, assertions that essentially mimic the definition of “exceptional ability” are not strong arguments in favor of approving the waiver.

Counsel offers arguments in terms of future potential, without demonstrating that the petitioner has already had a demonstrable effect on the field of transportation engineering. Counsel points to scholarly papers that the petitioner wrote while he was a student, such as the TACOS proposal, but there is no evidence that any of these proposals have been implemented to any significant degree. None of the potential benefits (traffic safety, reduced congestion, lower pollution, etc.) apply when the proposal exists only on paper. The record suggests that whatever reputation the petitioner has earned outside of Hawaii rests on apparently unrealized projects, and therefore the waiver request is, at best, premature.

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.