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20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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**U.S. Citizenship
and Immigration
Services**

[Redacted]

FILE: WAC 03 035 55654 Office: CALIFORNIA SERVICE CENTER Date: FEB 20 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:

[Redacted]

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.

so *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 to classify the beneficiary 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, a biopharmaceutical research and development firm, seeks to employ the beneficiary as an area finance manager. 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 beneficiary 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] 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.

██████████ the petitioner's human resources manager, explains the beneficiary's role with the company:

To remain competitive and to fund the crucial areas of discovery research and pre-clinical investigations toward FDA approval of our products, we need to have the most efficient and effective business units and internal operations. . . .

[The beneficiary's] duties include review, examination and evaluation of organization structures, administrative policies, and management systems of the company. He prepares reports [and] performs business systems analysis . . . with the aim of improving the business systems and procedures. . . .

The position is in the national interest since it will directly benefit our core business of discovering and delivering major new therapeutics. . . . In this regard, the employment of [the beneficiary] as an Area Finance Manager benefits both the national economy, and has a direct public health benefit in the delivery of life saving pharmaceuticals.

The above statement addresses the intrinsic merit of the beneficiary's occupation, but the statute and regulations contain no provision for a blanket waiver for area finance managers of pharmaceutical companies. ██████████ statement contains no information that would distinguish the beneficiary from other qualified workers in the same occupation, and thereby establish that the beneficiary qualifies for an exemption from a requirement that normally applies to advanced degree professionals in his field.

The above letter was not even written in support of the waiver request. Rather, it was written in support of a request for an extension of the beneficiary's nonimmigrant visa "to the year 2006." The record contains no statement from any official of the petitioning company in support of the waiver request. The only evidence that the company is even aware of the immigrant visa petition is ██████████ signature on the I-140 petition form.

Apart from documentation of the beneficiary's education and work history, the only evidence submitted with the initial filing consists of copies of the petitioner's 2001 annual report and several newspaper and magazine articles regarding the petitioning company. These documents do not mention the beneficiary, nor do they establish that the beneficiary qualifies for a waiver. We cannot accept the general argument that area finance managers, as a class, should all be exempt from the job offer/labor certification requirement, and the

petitioner's initial submission offers nothing to distinguish the beneficiary from other qualified workers in that occupation.

The director instructed the petitioner to submit further evidence, in order to meet the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted copies of several previously submitted documents, background materials about arthritis and cancer, and information from the Bureau of Labor Statistics regarding financial managers. None of the newly submitted documents have anything to do with the beneficiary as an individual, nor do they establish that the statutory job offer requirement does not apply to area finance managers of pharmaceutical companies. We do not dispute that the beneficiary fulfills an important role for his employer, but the same can be said of all competent area finance managers, including American workers protected by the labor certification process.

Counsel argues "the national interest would be adversely affected if [the petitioner] is required to take the time to obtain a labor certification for [the beneficiary]." Counsel notes that the labor certification process "could literally take years." Counsel does not explain why the petitioner could not continue to employ the beneficiary as a nonimmigrant while the labor certification is pending. Considering that this assumption lies at the heart of counsel's argument, the lack of supporting evidence is not a trivial matter.

The director denied the petition, stating that the petitioner has not distinguished the beneficiary from other workers in the field to an extent that would justify a waiver. The director stated that general arguments about the overall importance of the beneficiary's occupation do not establish that this particular beneficiary merits the special benefit of a national interest waiver.

On appeal, the petitioner submits several exhibits and counsel asserts that a brief is forthcoming within 30 days. To date, over seven months later, the record contains no supplemental submission. Considering that the appellate submission consists primarily of documents already submitted twice before, it is far from clear what new documents counsel had intended to present at a later time.

The petitioner submits, on appeal, copies of everything submitted in response to the director's previous notice. Most of that response, in turn, had already been submitted with the petition. Counsel offers no explanation for the redundant submission of these materials, which become neither more persuasive nor more relevant with repeated submissions.

Counsel alleges several abuses of discretion by the director, asserting, for instance, that the petitioner "[p]resented sufficient evidence that [the beneficiary] is an alien with an advanced degree." The director, however, never contested the beneficiary's degree, and in fact clearly acknowledged this degree on page 2 of the decision.

Counsel also contends that the petitioner has established that the beneficiary "has exceptional abilities in a highly specialized field." The petitioner had never, prior to the appeal, claimed that the beneficiary qualifies as an alien of exceptional ability. It is not an abuse of discretion for the director not to address a claim that had never been made. Almost nothing in the record is directly relevant to the beneficiary at all, except for documentation to establish his college degrees and work experience. In any event, the statute clearly indicates that aliens of exceptional ability, like advanced degree professionals, are generally subject to the job offer requirement.

Counsel, on appeal, again argues that the petitioner cannot afford to lose the beneficiary's services while awaiting a labor certification. Counsel also again fails to explain why applying for a labor certification would

necessarily interrupt the beneficiary's employment. Furthermore, counsel offers no evidence to show that any such delay would have a detectable impact on the U.S. pharmaceutical industry, or health care in general. The petitioner's desire to outpace its competitors, while understandable, is not a matter affecting the national interest. Counsel merely speculates, without any foundation, that the petitioner's ability to develop and distribute "life-saving and life-enhancing therapeutics" hinges on the approval of this petition.

Throughout the course of this proceeding, counsel has repeatedly relied upon the assertion that because area finance managers are important to the pharmaceutical industry, and the beneficiary is an area finance manager, the beneficiary should therefore receive a national interest waiver. While any corporation, large or small, has a clear interest in making the best use of its financial resources, it does not follow that aliens engaged in this work are exempted, wholesale, from provisions of immigration law. There is no explicit blanket waiver for area finance managers, and nothing in the statute implies the authority to issue such blanket waivers. Indeed, section 203(b)(2)(B)(ii) of the Act creates a blanket waiver specifically for certain physicians. This section of law would be redundant if other sections of law implied such a blanket waiver. This same section of law also demonstrates that Congress can create specific blanket waivers if it so chooses. To date, it has not done so for aliens in the beneficiary's occupation. Instead, Congress has indicated that, as a rule, an alien member of the professions holding an advanced degree is subject to the job offer requirement. The petitioner's apparent reluctance to pursue labor certification on the beneficiary's behalf does not entitle the beneficiary to a waiver by default, and the petitioner has provided nothing to show that the beneficiary should be treated any differently than any other alien worker in his 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.