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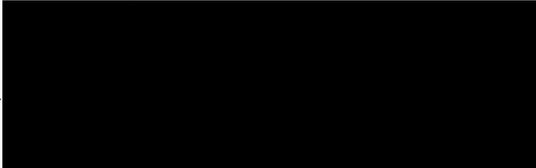
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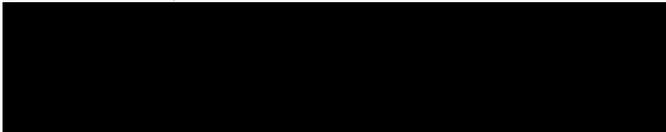
FILE: SRC 02 190 52239 Office: TEXAS SERVICE CENTER Date:

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:



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.

Mari Johnson
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas 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 is a county school board, which wishes to employ the beneficiary as an elementary school math teacher. 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 found that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in the director's decision 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.

CIS regulations at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this form, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not note this deficiency. Therefore, we will consider the merits of the claim.

██████████ the petitioner's assistant superintendent for human resource services, states "[w]e believe there is a great shortage [of] math teachers in Florida and in the Nation. We believe keeping [the beneficiary] as a math teacher will provide our students with a very qualified math teacher." The petitioner submits letters from various school administrators and personnel, who assert that the beneficiary is a valued part of the school system.

The director instructed the petitioner to submit evidence to meet the guidelines published in *Matter of New York State Dept. of Transportation*. According to that decision, "[a] shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification."¹ *Id.* at 215. The director also requested evidence to show that the beneficiary's work is national in scope. With regard to this issue, a footnote in the precedent decision is exactly on point, indicating "while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Id.* at 217, n.3.

In response to the director's notice, the petitioner repeats the argument that the county is experiencing a shortage of math teachers, and submits a lengthy list of vacant positions within the district. Given that the director had already informed the petitioner that a local shortage is not sufficient grounds for a waiver, it cannot be persuasive for the petitioner simply to repeat the claim that such a shortage exists.

The director denied the petition, acknowledging the intrinsic merit of the beneficiary's occupation, but finding that it lacks national scope. The director also reiterated the policy that a local worker shortage is not generally grounds for a national interest waiver.

¹ Congress has created a limited exception to this policy. Section 203(b)(2)(B)(ii) of the Act indicates that certain physicians in shortage areas qualify for the waiver. There is no comparable statutory provision for schoolteachers.

On appeal, the petitioner submits documentation showing that the petitioner has applied for a labor certification, with “a priority date of 02/27/2003.” Counsel requests that the present petition remain open “for its pending labor certification to be processed.” The fact that the petitioner has applied for a labor certification, several months after the filing of the petition, has no effect on the disposition of the appeal. In the event that the labor certification is approved, the petitioner would need to file a new petition with appropriate evidence and fee. In petitions with labor certifications, the petition’s filing date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Because, in this instance, the application for labor certification was accepted for processing in February 2003, the petitioner cannot retain the June 2002 filing date that attaches to the present petition. The petition was originally filed with a waiver request, and a subsequently obtained labor certification cannot be incorporated into the petition at this late date.

Counsel, on appeal, acknowledges the petitioner’s filing of the application for labor certification, and asserts “[t]he Petitioner agrees that the filing of a labor certification is only an inconvenience, but that [in] the instant case it runs the risk of the Petitioner being without a qualified math teacher.” Counsel does not explain why the beneficiary, who has thus far taught under a nonimmigrant visa, cannot continue in this fashion while the labor certification is pending. As for labor certification being “an inconvenience,” the petitioner’s desire to avoid inconvenience, while quite understandable, does not rise to the level of national interest. Congress created the labor certification requirement, and did not provide any blanket exemption for public school teachers. We must, therefore, conclude that Congress intended for the statutory job offer requirement to apply to such individuals.

With regard to the national scope of the beneficiary’s work, counsel contends that the beneficiary’s students “could conceivably move to any other part of the United States. . . . If these students were deficient in math after they have moved, this would have a profound economic effect on the local school board’s burden to bring these students up to the prescribed standards.” We reject this unsubstantiated argument, which is so general that it could easily be modified to give “national scope” to virtually any profession.

Certainly, students move from one school system to another for various reasons, but the petitioner has not shown that remedial mathematics classes represent a “profound . . . burden” to local school boards. Some schools are able to offer volunteer tutors from the community, and teachers can often provide some assistance after school or during free periods. Even if every student in the beneficiary’s class were to disperse across the country, and every single new school had no choice but to pay additional wages to an instructor, the economic impact on a national impact would appear to be negligible.

The grounds cited in the director’s decision are sufficient to warrant denial of the petition. Review of the record, however, reveals another issue regarding the beneficiary’s eligibility for the underlying classification of member of the professions holding an advanced degree. The director found that the beneficiary holds a master’s degree, but the record indicates that the beneficiary did not hold a master’s degree at the time the petition was filed. A beneficiary for an employment-based immigrant visa petition must be eligible for the classification at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The petition was filed on June 5, 2002. At that time, the petitioner indicated that the beneficiary “is slated to receive a master’s degree in August 2002.” The petitioner submitted a transcript from Nova Southeastern University (NSU), dated March 21, 2002, indicating that the beneficiary’s magisterial studies were still ongoing. The petitioner has subsequently asserted that the beneficiary received the degree in August 2002,

but there is no official documentation from NSU to confirm this. Even if there was, the petitioner has stipulated that the beneficiary held no advanced degree as of the petition's filing date.

CIS regulations at 8 C.F.R. § 204.5(k)(3)(i)(B) indicate that an alien will be considered to have the equivalent of a master's degree if the petitioner submits documentation that the alien has at least five years of progressive post-baccalaureate experience in the specialty. The record shows that the beneficiary received a bachelor's degree from Southeastern College of the Assemblies of God in December 1995. The petitioner first hired the beneficiary in August 1996. As of the date of filing, therefore, the beneficiary had nearly six years of post-baccalaureate experience as a math teacher. The record, however, does not demonstrate that the experience was progressive. The record does not, for example, show that the beneficiary has been promoted, or taken on an increased range of duties and responsibilities. Simply working in the same job for five years is not necessarily progressive experience.

The beneficiary clearly did not hold an advanced degree at the time of filing. The petitioner has not shown that the beneficiary had progressive post-baccalaureate experience equivalent to a master's degree as of the filing date. The petitioner has never claimed that the beneficiary qualifies for classification as an alien of exceptional ability. Therefore, the petitioner has not established that the beneficiary is eligible for the classification sought.

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 petitioner has also failed to establish that the beneficiary's post-baccalaureate experience is equivalent to a master's degree.

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.