



U.S. Citizenship
and Immigration
Services

ES



FILE: WAC 03 144 54607 Office: CALIFORNIA SERVICE CENTER Date **OCT 27 2004**

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:

SELF-REPRESENTED

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.

Robert P. Wiemann, Director
Administrative Appeals Office

identification is limited to
prevent unauthorized
privacy

PUBLIC COPY

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 an alien of exceptional ability. The petitioner seeks employment as an urban planner. 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 does not qualify for classification as an alien of exceptional ability and 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.

On appeal, the petitioner requests oral argument so that he can present his work portfolio. Oral argument is limited to cases in which cause is shown. A petitioner or his counsel must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. The regulations do not allow for a subjective evaluation of the quality of petitioner's past projects. Rather, the petitioner must submit objective evidence of his exceptional ability and his impact on the field. Therefore, the petitioner's request for oral argument is denied.

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 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.

As stated above, the petitioner seeks classification as an alien of exceptional ability. The petitioner, however, holds a bachelor's degree in urban studies from the University of Toronto and claims more than five years of progressive experience. Specifically, on his Form ETA-750B, the petitioner claims to have worked for ARC Design and Planning from May 1998 to November 2002 and for EN Engineering, Inc. from November 2002 to May 2003. The regulation at 8 C.F.R. § 204.5(k)(2) permits the substitution of a bachelor's degree plus five years of progressive experience for an advanced degree. The petitioner's occupation falls within the pertinent

regulatory definition of a profession.¹ Thus, the petitioner would qualify as a member of the professions holding an advanced degree if the petitioner had submitted sufficient evidence of his employment.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence relating to experience “shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien.” The petitioner submitted a letter from the former Regional Manager of EN Engineering, Inc., asserting that he hired the petitioner in October 2002. The petitioner did not submit a letter from ARC Design and Planning. The petitioner did submit a letter from [REDACTED], the petitioner’s supervisor at Govan Azzalino, Inc., but the letter fails to include the petitioner’s dates of employment. Thus, the petitioner has not supported his employment claims, which, if true, would make him an advanced degree professional. Thus, we will consider, as did the director, whether the petitioner has established that he is 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.

The petitioner claims that the director found that the petitioner meets three criteria and on appeal he claims to meet two more, but does not identify which five. The director did state that “simply meeting these criteria” is insufficient. While this statement may, by itself, imply that the petitioner meets three, a review of the director’s discussion of the criteria reveals that the director did not make any such finding. Moreover, we do not read this statement by the director as asserting that a petitioner can establish eligibility under the regulations but still not qualify as an alien of exceptional ability. A more rational interpretation of the director’s language is that the petitioner submitted documentation that *related to* or *addressed* the criteria, but that the evidence itself did not establish a degree of expertise significantly above that ordinarily encountered.

A petitioner cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria. The regulation at 8 C.F.R. § 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.”

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

As acknowledged by the director, the petitioner has a bachelor’s degree in urban studies. As also stated above, however, most entry-level jobs in the petitioner’s field require a Master’s degree. While the petitioner’s post-baccalaureate experience may, if established, be equivalent to a Master’s degree, that

¹ 8 C.F.R. § 204.5(k)(2) provides that a profession is any occupation that requires at minimum a bachelor’s degree. The Occupational Outlook Handbook, available at www.bls.gov/oco/home.htm, indicates that the position of urban planner usually requires a Master’s degree, with some jobs requiring only a bachelor’s degree. Thus, the occupation of urban planner is a profession.

experience will be considered under a separate criterion. It remains that his actual degree is not indicative of a degree of expertise significantly above that ordinarily encountered. In fact, a higher degree is usually required in the field. Thus, while the director appears to have concluded that the petitioner meets this criterion, the petitioner does not.

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

As stated above, the petitioner has not submitted letters *from former employers* documenting at least five years of experience, let alone ten. Thus, the petitioner does not meet this criterion.

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

The petitioner submitted an October 29, 2002 job offer as a Senior Urban Planner with a proffered wage of \$65,000 annually. The director noted that the petitioner had not submitted evidence "relating to his compensation in comparison to other urban planners." The petitioner does not address this concern on appeal and we concur with the director. The record lacks evidence that this salary is indicative of a degree of expertise significantly above that ordinarily encountered.

Evidence of membership in professional associations

As acknowledged by the director, the petitioner submitted evidence of his membership in the American Planning Association and his provisional membership with the Canadian Institute of Planners. As stated by the director, the petitioner did not submit any materials regarding the association's membership requirements. Once again, the petitioner does not address this concern on appeal. The record remains absent evidence that membership in this association is indicative of a degree of expertise significantly above that ordinarily encountered.

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

While the petitioner submitted several letters from peers, recognition in the field independent of the preparation of the petition (or application for a job) is more persuasive. The record contains no evidence that the petitioner has received any formal recognition, such as an award, from his peers, government entities, or professional or business organizations.

As the petitioner has not demonstrated that he is an advanced degree professional or an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was addressed in the director's decision.

Neither the statute nor 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 the 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 Dep't. of Transp., 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 director did not contest that the petitioner works in an area of intrinsic merit, national level consulting as an urban planner, and that the proposed benefits of his work, more environmentally sensitive and energy efficient designs, would be national in scope. We accept these claims. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In response to the director's request for additional evidence, the petitioner asserted that a waiver of the labor certification process was warranted because he intended to open his own consulting business. Thus, according to the petitioner, the labor certification process is inapplicable because he will not deprive an American of a job, but, instead, will be creating jobs. Citizenship and Immigration Services (CIS) acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5. Further, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process.

Moreover, the bare assertion that the petitioner will create jobs is insufficient. Congress, however, has created a separate immigrant classification, entitled employment creation, to address this issue. *See* section 203(b)(5) of the Act; 8 C.F.R. § 204.6. This classification, with a lesser preference than that sought by the

petitioner, requires an investment of at least \$500,000 and the creation of 10 jobs for qualifying employees within two years. We cannot conclude that a lesser claim of employment creation warrants a waiver of the labor certification process in the national interest.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

██████████ former Regional Manager at EN Engineering, asserts that the firm hired the petitioner as the best candidate and that the petitioner's expertise and experience would be valuable to the United States. In a joint letter, ██████████ and ██████████ of J.W. Zunino and Associates assert that they have worked with the petitioner and opine that his expertise and experience would be a valuable asset to the United States. ██████████ President of Mile Stones Unlimited, asserts that she invited the petitioner to write a proposal for a project and praises the professional manner in which the petitioner completed the assignment. An ability to secure employment and experience in a field do not warrant a waiver of the labor certification process. None of these letters identify specific successes in the field that have influenced the field as a whole.

██████████ the petitioner's supervising architect at Govan Azzalino, Inc., provides some details of the petitioner's past projects. He asserts:

During his tenure he planned, acquired, financed and constructed an 11,300 sf, two building, commercial retail plan with six a [sic] market value of about \$2,500,000. He was responsible for securing the major tenants and oversaw their planning and move-in requirements as well.

During his work he also developed and constructed a 6,150 sf retail plaza with six retail stores and leased the premises to a national tenant. The project had a market value of about \$1,500,000.

We also had numerous interactions when [the petitioner] was an Urban Planner with the Town of Markham where he did an excellent job of reviewing and advising the Town (not always to my clients' delight[]) officials about the impacts of multiple projects that my clients were developing.

While this letter provides more detail, the details are merely those of the petitioner competently performing his job duties. ██████████ does not explain how the petitioner has influenced the field of Urban Planning as a whole. For example, the record contains no evidence that the petitioner has authored widely cited articles in the field or letters from several city planning boards nationwide attesting to the petitioner's influence on their own urban planning.

Finally, the petitioner has discussed his family ties to the United States through his grandfather and his community work. These are not appropriate considerations for this classification.

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.