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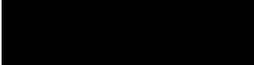
U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

FEB 20 2008

SRC 06 142 51370

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) 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. At the time she filed the petition, the petitioner was a postdoctoral researcher at the University of Texas (UT) at Austin, having earned a Ph.D. in instructional technology at UT in 2004. She has since become the Coordinator of Campus and District accountability for Austin Independent School District (AISD). 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:

(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 (Commr. 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.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

We note that 8 C.F.R. § 204.5(k)(4)(ii) states that, to apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not note this omission in the denial notice or in the prior request for evidence. We will, therefore, review the matter on the merits.

In a statement accompanying the initial filing of the petition, the petitioner set forth her arguments as to why she qualifies for a national interest waiver:

The use of bilingual education or first language programs to assist development of English skills is currently a national debate of high attention. My research has made and will continue to make an important contribution to the debate. . . .

My experience in research has provided me with the understanding of the causes of Hispanic underachievement with the ability to conduct highly complex projects that shed light on possible avenues to address this national challenge. As a Hispanic I bring unique qualifications to study this group with previous involvement studying underachievement and adolescent populations that fall through the cracks and end up in the juvenile justice system.

. . . For 25 years I was a pioneer on sex education in a conservative Hispanic culture and community, addressing the needs of health professionals, teachers, parents and students. I wrote a book that sold 10,000 copies and is now in its second edition. . . .

My personal skills to train teachers and health care workers to address sex education needs of students and the teenage pregnancy problem are very specialized and have been recognized with the endorsement of the programs I designed by the most conservative Parent-Teachers Association of Mexico. My extensive pioneering work on sex education in Mexico with a similar population as the one that needs to be served will be useful for the United States to develop pregnancy prevention interventions for Hispanic teenagers and nationwide.

. . . My dissertation research has made important contributions to the field of education for the workplace. My research demonstrates high level knowledge and expertise in applying contemporary learning and social psychology theories to further our understanding of the dynamics and critical in variables group processes [*sic*]. . . .

As Director of Information Systems and Research Specialist for the National Domestic Violence Hotline, I . . . created the largest database on Domestic Violence cases in the world. . . . Also I conducted interventions to improve data collection quality and NDVH software use to quickly find the most accessible help for the caller. My technical expertise and software report management made this possible. I am currently a member of the NDVH advisory council.

The petitioner submitted ten witness letters with her petition. Half of these letters date from 1999, when the petitioner worked for the National Domestic Violence Hotline (NDVH). The 1999 letters are all from NDVH officials ranging from the petitioner's immediate supervisor to the NDVH's Executive Director.

[REDACTED], Project Manager at Macro International, Inc., stated:

I have worked with [the petitioner] since February of 1998, serving as her supervisor. . . .

In her position with the National Domestic Violence Hotline, [the petitioner] is responsible for analyzing the data gathered from over 120,000 callers annually. . . .

As a direct result of [the petitioner's] contributions, the Hotline has been able to determine data collection and call-center related problems, that were previously going unnoticed. . . .

In addition, on a quarterly basis, [the petitioner] prepares reports on the data which are mailed to the U.S. Department of Health and Human Services in Washington DC, to the Centers for Disease Control and Prevention in Atlanta, and to family violence service providers and funding sources across the country.

[redacted] letter is fairly representative of the letters from NDVH personnel; other letters are either very general, or else essentially repeat information found in [redacted]'s letter.

The record contains no evidence that the petitioner remains actively, substantively involved with the operations of the NDVH.

The five letters not relating to the petitioner's work at the NDVH are all from individuals who supervised or collaborated with the petitioner at the University of Texas (UT). In a letter dated January 27, 2004, more than two years before the petition's April 3, 2006 filing date, UT [redacted] stated:

I met [the petitioner] during my service [as] Chair of the Department of Educational Psychology of the University of Texas at Austin where she is finishing her doctorate. In the past few years, she has been an extremely productive and a well-rounded and highly recognized international researcher. In 2001, she became my Research Assistant after I met her as my student. . . .

Her latest 2003 research highlights the importance of social interaction in her theoretical model for collaborative learning. Her research contribution is extraordinary and has such an importance for educational research, that soon it will be published and made known to all scholars in the field of educational reform and technology. . . . The implications of her research are vast and have implications for important contributions for the future of psychological research in American society. . . .

Her work is providing information that higher education institutions are using to train teachers in the use of technology, better teaching methods, and in addressing the needs of Hispanic students.

In a letter dated March 4, 2006, [redacted], Associate Vice Chancellor for Academic Affairs and former Dean of Graduate Studies at UT, stated:

I have known [the petitioner] for several years in different capacities. First, she was involved in a research project I directed. Second, she was working for The University of Texas at Austin on an international project with Monterey Tech. Finally, she served as a teacher assistantship [sic] in the Curriculum and Instruction Department.

. . . When [redacted] left the University, [the petitioner] worked with me on different tasks and research projects related to the education process of Hispanic children. She also helped produce "The Sounds of Learning[.]" a documentary created for the Houston-Annenberg, Inc.

We also worked on other research projects such as language program effects on minority students.

[The petitioner] recently completed her dissertation, focused on the assessment of teamwork in higher education. This study validated the Teamwork Assessment Scale, an instrument useful for the assessment of new ways of collaborative learning. Her dissertation produced new information about the characteristics of high performing teams. . . .

Her current postdoctoral work is on the study of systemic change in higher education in Mexico. This is an important study to understand how universities can improve teaching and learning through technology.

Other witnesses offer more general comments, crediting the petitioner with contributing to the success of various projects at UT.

The petitioner submitted copies of documents relating to her graduate student work, including various research papers, both published and unpublished. The petitioner submitted a copy of the Spanish-language book [REDACTED] which the petitioner co-authored with her then-spouse, [REDACTED]. The book dates from 1987, nearly two decades before the filing date; the record does not reflect any more recent involvement in sex education, and the petitioner did not submit any documentary evidence to establish the book's effect on teenage pregnancy or related issues such as sexually transmitted diseases. The petitioner also submitted a VHS cassette of *The Sounds of Learning*, prepared on behalf of the Houston-Annenberg Challenge for Public School Reform.

The director issued a request for evidence on September 21, 2006, instructing the petitioner to submit objective evidence (such as independent citation of published work) showing that the petitioner's work has had a significant impact beyond her own group of mentors and collaborators. In response, the petitioner submitted letters from two UT faculty members and a public school official in Austin, and copies of related documents.

The two UT faculty members, Vice Provost [REDACTED] and Prof. [REDACTED], offer very similar letters. For example, [REDACTED]'s letter contains this passage:

It is clear that higher education preparation of students is of the utmost importance and urgency.

Because of this urgency, the work of [the petitioner] contributes significantly to the national interest. US schools have not changed in decades and are failing to adequately prepare young people for college. Nor has higher education met the demands of the workplace, a fast-changing, technology-based world where new knowledge increases exponentially. The workplace requires new skills beyond those typically addressed by current higher education systems.

[REDACTED] letter contains an essentially identical passage:

It is clear that higher education preparation of students for the 21st century and beyond is of the utmost importance and urgency. Because of this urgency, the work of [the petitioner] contributes significantly to the national interest.

US schools have not changed in decades and are failing to adequately prepare young people for college. Nor has higher education met the demands of the work place, based on a fast-changing technology that is escalating with exponentially increasing new knowledge. The work place requires skills different from those promoted by current higher education systems.

Both letters addressed educational issues in general terms. With respect specifically to the petitioner's work, [REDACTED] stated that the petitioner "has created and validated tools and instruments that impact teams in their development toward high performance. The tools have been used by The University of Texas at Austin, Texas A&M, ITESM System in Mexico, and in January, will be used by the University of Western Arizona." [REDACTED] assessment differed by two words ("assist" in place of "impact," and "by" instead of "at"). The petitioner did not provide evidence of use of these "tools and instruments" in the United States outside of the Southwest, nor did the petitioner indicate that her intended future work in the United States will involve the continued creation of such "tools and instruments."

For the petitioner's most recent work, we turn to [REDACTED] Associate Superintendent for Human Resources Development and Information Systems at AISD, who stated:

[The petitioner's] work supports administrators and teachers of the district in making data-based and data-informed decisions that improve education for all students. . . .

One of the most important strategies to improve student learning is to use data to inform instruction, to assure quality and accountability. [The petitioner's] role as Coordinator of Campus and District Accountability for AISD is supporting the people, tools and practices needed for [the] AISD public school system to excel as a performance-driven organization. She manages and analyzes data and produces graphic representations that assist administrators and teachers in their understanding and use of data for improvement. . . .

[The petitioner's] work with the district's school staffs ensures that the school personnel have the data they need to target their instructional practices to maximum benefit of all learners, with particular relevance to high-need populations such as English Language Learners, poor and ethnically diverse students.

Of all the experience claimed by the petitioner when she first filed the petition, the work that seems to relate most closely to her position at AISD is her work at the NDVH, because that position, like the one at AISD, involves maintenance of large quantities of data. This most recent work, however, appears to be distinctly local rather than national in scope, relating as it does to statistical information pertaining to a single urban school district.

The director denied the petition on January 9, 2007, stating that the petitioner had failed to distinguish herself from others in her field. The director noted that the petitioner relied primarily on statements from supervisors and others who have worked closely with the petitioner, rather than on objective evidence that would tend to set the petitioner apart from her peers. The director found that the petitioner had failed to provide an “explanation of how her work separates her from others in the field, nor how her contributions affected the educational process nationally as requested in the RFE.”

On appeal, counsel asserts that the petitioner “has persuasively demonstrated her contributions by providing proof of national and international conference presentations, the development of educational software technology, [and] national and international inclusion in books.” The director did not find that the petitioner’s lengthy career has been unproductive or otherwise devoid of professional accomplishments. At issue, rather, is the extent of the influence of the petitioner’s work. The petitioner has published her work, participated in conferences, and so on, but she has not shown that these achievements are, in and of themselves, marks of unusual influence in the field.

Furthermore, the petitioner has not established a particularly linear career trajectory. She appears, rather, to have worked in several different occupations that are only somewhat related to one another. The evidence of record relating to the petitioner’s work in the field of sex education, for instance, is about twenty years old; there is no evidence of her continued involvement or influence in that field, and no basis by which to conclude that the petitioner will *prospectively* benefit the United States in this regard. Even then, the petitioner has submitted no concrete evidence to support her self-serving claim to have been “a pioneer in sex education in Mexico” – such as statistical evidence that her work has appreciably reduced teenage pregnancy rates in that country. Counsel repeats the petitioner’s claim that the petitioner’s book on sex education has sold 10,000 copies. The record contains no evidence regarding the publication figures for other Mexican books on sex education. Without such information, the publication figure for the petitioner’s book is simply a number, devoid of context.

The petitioner has engaged in some educational research in recent years, but this was entirely in the context of doctoral studies, which presumably required her to engage in such research. The beneficiary’s most recent work has not addressed national educational issues, but rather has involved the collation of data for one particular local school district. Whatever the benefit to that district, the petitioner has not shown how this work is of direct benefit outside of Austin.

Counsel argues that the director erred in finding that the petitioner’s “praise was localized or merely by those who had worked with her.” Counsel then supports this argument by listing the individuals who wrote letters on the petitioner’s behalf. These witnesses, without exception, are the petitioner’s current and former employers, mentors, and collaborators.

The petitioner has clearly had a long and varied career in various aspects of education, and her database work at the NDVH appears to have been good preparation for her current position at AISD. The petitioner has not, however, demonstrated that her past work has had an appreciable effect, at a national level, on sex education, improving educational opportunities for Hispanic Americans, or other aspects on which she has focused at

different times. Also, her current work for a local school district appears, from the available information, to lack national scope.

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.

Review of the record reveals another ground for denial. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

We note that 8 C.F.R. § 204.5(k)(4)(ii) states that, to apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. On this ground alone, the petition cannot be approved. The director, however, did not note this omission in the denial notice or in the prior request for evidence. We have, therefore, reviewed the matter on the merits.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.