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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUN 04 2008

EAC 06 018 53404

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, Nebraska 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 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, an engineering firm (since acquired by Siemens Power Generation), seeks to employ the beneficiary as an environmental engineer. 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 beneficiary 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.

The “Nontechnical Description of Job” found on the Form I-140 petition reads: “Development and design of low NOx [nitrogen oxide] burners, overfire systems and other equipment to reduce emissions from coal-fired power plants in US and Asia.” The director acknowledged the intrinsic merit and national scope of such work. The present decision will, therefore, focus on the merits of the individual alien rather than on the larger issue of cleaner coal-burning technology.

In an introductory statement, [REDACTED], President of the petitioning entity, asserted:

[The beneficiary] is in a unique position and offers significant benefit which considerably outweighs the inherent national interest in protecting U.S. workers through the labor certification process. . . . His educational achievements, research and development of products to serve the Chinese power industry have provided significant benefit, not only to [the petitioner], but to the entire relationship between the U.S. and China.

According to the Environmental Protection Agency, reductions in emissions from 2003-2004 can be attributed to improvements to coal-fired boiler plants. The work of [the petitioner] and [the beneficiary] played no small part in those results. [The beneficiary] has established himself as an original thinker and has contributed, in no uncertain terms, to the power industry’s reduction in emissions as mandated by President Bush. . . .

There is an increasing demand for environmental engineers and a short supply, if any, of environmental engineers with [the beneficiary’s] qualifications. [The beneficiary] has made,

and will continue to make, unique contributions to the power industry. His ability to work in the U.S. permanently will provide a significant benefit to the national interest in working to put the U.S. at the forefront of environmental technology to limit the amount of harmful gases emitted by coal-fired power plants. His knowledge and experience with the Chinese power industry, along with his ability to communicate fluently in both English and Chinese, considerably outweighs the inherent national interest in protecting U.S. workers through the labor certification process. . . .

Given the uncertainty of the period of time necessary to process a labor certification, the increasing demand for environmental engineers, and the impetus placed upon this industry by the President of the United States and by the Chinese government, it is respectfully submitted that [the beneficiary's] unique qualifications make him a perfect candidate for a national interest waiver.

(Evidentiary citation omitted.) In *Matter of New York State Dept. of Transportation*, the AAO found that the national interest waiver was not intended as a means to address worker shortages (*Id.* at 218) or to avoid delay or inconvenience from the labor certification process (*Id.* at 223). The AAO will give full consideration to the merits of the petitioner's claims, but the waiver is not merely a procedural "shortcut"; it exists to benefit the United States, not the petitioner or the beneficiary.

In a separate letter, [redacted] described the beneficiary's duties:

From our office in Pluckemin, NJ, [the beneficiary] will utilize his expertise and skills in the engineering of coal-fired power plants to develop new low emission combustion systems. His primary responsibility will be the creation of new products and prototypes and to explore applications of novel technologies to these problems. He will also be developing relationships with Chinese and other Asian users of low emission coal combustion equipment. The position requires independent work as a single contributor, and participating in a small team environment.

We note that [redacted]'s second letter contains what appear to be contradictory assertions regarding the position's requirements. In the letter's third paragraph, he stated: "the position requires that the incumbent possess a doctorate in Environmental Engineering or Thermal Science." In the very next paragraph, however, [redacted] states that the beneficiary "exceeds our academic requirement given the fact that it only remains for him to defend his Ph.D. dissertation at Lehigh University." [redacted]'s other letter contains the similar assertion that the beneficiary "exceeds the academic requirement for the position offered given the fact that this year he will complete the final requirement (defense of his dissertation) to earn his Ph.D. in Mechanical Engineering." Thus, according to [redacted] "the position requires [someone who] possesses a doctorate," but the beneficiary, who did not yet possess a doctorate, "exceeds our academic requirement." It is difficult to reconcile these two statements.

The petitioner has submitted several witness letters, regarding which [redacted] stated the beneficiary's "work has impressed many of the industry's top scientists and professionals. Attached please find advisory

opinions from prominent experts in the field of environmental engineering attesting to the scope and nature of [the beneficiary's] work, as well as, his unique, original and crucial contribution to the industry." Generally, the witnesses credit the beneficiary with developing new means of reducing nitrogen oxide (NOx) emissions from coal-fired power plants, and with introducing this technology to clients in China.

Many of the letters include common passages of varying lengths. Four letters, signed respectively by [redacted] and [redacted], contain so much shared language that they are virtually identical except for the discussion of each person's credentials and the circumstances under which each met the beneficiary. Several of the remaining letters contain shorter extracts of the same shared language. The true author of the shared passages is not identified. Given this common authorship, the AAO accepts that the witnesses have endorsed the petition, but the AAO gives diminished weight to the exact wording of the letters. One of the recurring passages is the assertion that the beneficiary "has written several articles that have been published in journals of international circulation and his articles are cited by others in his field." The petitioner's initial submission included no documentary evidence of such citation.

On October 31, 2006, the director issued a request for evidence. The director informed the petitioner that a worker shortage is not grounds for granting the waiver, and that it cannot suffice for the petitioner merely to assert that the beneficiary has unique training or qualifications; the petitioner must also show "the beneficiary's ability to serve the national interest to a substantially greater extent than the majority of his colleagues." With respect to citation of the petitioner's work, the director instructed the petitioner to "submit copies of any published articles by other researchers citing or otherwise recognizing the beneficiary's research and/or contributions."

In response, the petitioner submitted copies of the beneficiary's published work. The petitioner did not, however, submit any evidence of citation of that work. Instead, counsel cited an unpublished AAO decision in which the AAO found "the lack of frequent citation is not a bar to eligibility where other objective evidence of the petitioner's eligibility exists." While 8 C.F.R. § 103.3(c) provides that AAO precedents are binding on all CIS employees in the administration of the Act, the cited appellate decision is not a binding, published precedent. Nevertheless, it is certainly permissible for a petitioner to rely on other evidence in the absence of heavy citation of the beneficiary's work, and it is often the case that an individual influences his or her field in a manner that does not produce citations in scholarly journals. That being said, however, once a petitioner claims that the beneficiary's work has been cited, the burden is on the petitioner to show that the claim is true.

In the present proceeding, the petitioner voluntarily chose to submit numerous witness letters all alleging, in identical language, that the beneficiary's "articles are cited by others in his field." When the director, in a request for evidence, called upon the petitioner to produce documentation of the claimed citations, the petitioner abandoned this claim rather than substantiate it, and relied instead on the argument that citations are not crucial to a finding of eligibility. This tactic not only calls the petitioner's credibility into question, it also casts doubt on the witness letters, many of which referred to the citations. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner has submitted letters of dubious origin, which contain assertions of purported fact that the petitioner has refused to confirm when called upon to do so. At the same time as the petitioner cast doubt on its previously submitted letters in this way, the petitioner submitted new letters. One of these new letters, from [REDACTED] of Fuel Tech, Inc., includes this passage: “Given the uncertainty of the period of time necessary to process a labor certification . . . it is respectfully submitted that [the beneficiary’s] unique qualifications make him a perfect candidate for a national interest waiver.” These exact words had previously appeared in an introductory letter attributed to [REDACTED]. The continuing use of common language does not lead the AAO to conclude that the second round of letters is any more persuasive than the first group (which contained the now-abandoned claim regarding citation of the beneficiary’s work).

On appeal, counsel states:

Simply because the letters are similar in form and the opinions expressed are comparable, does not mean the persons signing the letters do not support the content. Even if the letters may have been drafted by one person, or the signatories may have used a sample letter as a reference for form, the supporters reviewed, revised and were at liberty to supplement their respective support letter[s]. The fact is, the similarities between these letters do not undermine the value of the underlying opinion.

(Counsel’s emphasis.) The AAO acknowledges that the similarities between the letters do not automatically invalidate the letters. In this instance, however, the template or “sample letter” contained not only statements of subjective opinion, but also a factual claim (regarding citations) that the petitioner has been either unwilling or unable to support. The “one person” who wrote the template or sample letter either had personal knowledge of citations, but has refused to provide evidence thereof, or had no such knowledge and simply offered a claim that he or she was in no position to make. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). An unsubstantiated claim made under such circumstances is not credible, regardless of how many people affixed their signatures to the same doubtful claim.

The appeal includes one 2005 article from the *Chinese Journal of Power Engineering* that contains a citation to one of the beneficiary’s conference presentations. Counsel asserts that the petitioner has thus documented “[o]ne instance where [the beneficiary] was cited.” This one citation does not support the prior assertion that the beneficiary’s “articles [plural] are cited by others in his field.”

Counsel, on appeal, cites a 2003 appellate decision in which the AAO acknowledged the importance of witness letters. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Even then, in the cited decision, the AAO stated “advisory opinions from [prominent] sources do not automatically mandate the approval of a given petition.” The cited decision does not hint at the credibility issues overshadowing the present proceeding.

The record contains evidence that the beneficiary's work has been implemented at several coal-burning plants, but the record contains no reliable, objective evidence showing that the beneficiary's work has been more widely implemented than that of other engineers employed by corporations with an international clientele. Counsel's arguments in this vein are not persuasive. For instance, counsel notes that the beneficiary made a presentation at a conference "presented by the U.S. Department of Energy" and asks, "What better evidence to show that [the beneficiary's] accomplishments greatly exceed the exceptional ability standard than these invitations of participation from the United States government?" Counsel's rhetorical question hinges on the *a priori* assumption that one must be a highly influential researcher even to be invited to participate in such a conference. The record contains nothing from the Department of Energy to support or justify this assumption.

The record establishes beyond dispute that the beneficiary has been active in an area of substantial intrinsic merit and national scope. Technical documentation, by itself, affords no comparison between the beneficiary and others in his field in a manner comprehensible to laypersons outside the coal-burning technology industry. The petitioner's witness letters are problematic for reasons already enumerated in this decision, including multiple iterations of an apparently false claim and the petitioner's contradictory assertions that the beneficiary is either overqualified or underqualified for his position with the petitioning company.

Section 204(b) of the Act, 8 U.S.C. § 1154(b), provides for the approval of immigrant petitions only upon a determination that "the facts stated in the petition are true." False, contradictory, or unverifiable claims inherently prevent a finding that the petitioner's claims are true. See *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988).

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.