

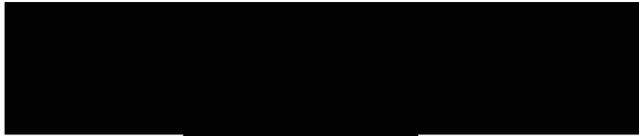
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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAR 05 2008**
SRC 06 263 51584

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:

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.

A handwritten signature in cursive script that reads "Mari Plussa".

2 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. The petitioner is a senior professor at the Orlando, Florida campus of DeVry University. 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.

On appeal, the petitioner submits arguments, a letter, a newspaper clipping, and medical documentation. The petitioner quotes a memorandum from [REDACTED], Acting Deputy Director, *Legal and Discretionary Analysis for Adjudication* (May 3, 2006):

If the applicant is legally ineligible for the benefit being sought, particularly because of an inadmissibility ground, the law may afford the applicant the opportunity to seek a waiver. Many waivers require establishment not only of essential facts, but also of extreme hardship or exceptional hardship to another person (i.e., 212(h), 212(i), 212(a)(9)(B), 212(e)) or to the applicant (i.e., battered spouse or child).

The petitioner argues that his mother-in-law and two of his children are “totally disabled US citizens” who rely on the petitioner’s care, and that the director “could have used his/her discretion to approve my I 140 petition based on the exceptional hardship we as [a] family are facing.” The “waiver” mentioned in the quoted passage is a waiver of inadmissibility, not a national interest waiver of the job offer requirement.

There is no statutory provision for a waiver of the job offer requirement based on hardship or other humanitarian grounds. The AAO is not indifferent to the challenges the petitioner's family faces, but there is simply no legal justification for allowing those hardships to influence the outcome of the decision.

The petitioner also, on appeal, offers arguments on the merits of his petition. The AAO will consider those arguments elsewhere in this decision.

The petitioner's initial submission established his professional credentials (such as a 1993 doctorate in engineering science from the University of Toledo, Ohio) and included examples of his conference presentations and other materials. The initial submission did not, however, address the core issues involved in an application for a national interest waiver.

The conference papers relating directly to engineering science date from 1996 or earlier. The only presentation after 1996 was a 2001 paper entitled "Team-Building Approach in a Multi-Campus Institution," the title of which suggests a focus on educational methodology rather than on engineering as such. A 2000 letter from textbook publisher Prentice Hall acknowledged the petitioner's "writing plans" and requested "an outline, prospectus, and 2-3 sample chapters," but the record contains no evidence that this project ultimately resulted in publication.

The petitioner submitted letters from several of his students, praising the manner in which the petitioner has taught various courses at DeVry. The petitioner also submitted positive evaluation questionnaires from students. These materials establish that the petitioner is a capable and popular instructor, but they do not explain why it would be in the national interest to waive the job offer/labor certification requirement that typically applies to the immigrant classification that the petitioner has chosen to seek.

On December 11, 2006, the director issued a notice of intent to deny, listing guidelines from *Matter of New York State Dept. of Transportation* and stating that the petitioner had not established that his work has national scope or that his past accomplishments justify the expectation that the petitioner's future work will benefit the United States to an extent that would warrant a waiver. The director requested evidence including evidence of citation of the petitioner's published work, letters from independent witnesses, and other materials that would objectively establish "that his contributions to the field are of such unusual significance that he merits the special benefit of a national interest waiver."

In response, the petitioner stated: "Under Schedule A, Group 3, College University professors are eligible." The petitioner quoted from <http://www.foreignlaborcert.doleta.gov/perm.cfm>, a web page operated by the Department of Labor (DOL):

Schedule A Occupations

Schedule A is a list of occupations, set forth at 20 CFR 656.15, for which the Department has determined there are not sufficient U.S. workers who are able, willing, qualified and available. In addition, Schedule A establishes that the employment of aliens in such

occupations will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The occupations listed under Schedule A include:

[. . .] Sciences or arts (except performing arts) - Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts including **college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States.** For purposes of this group, the term “science or art” means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university in order to qualify for the Group II occupation.

(The petitioner’s emphasis.) The petitioner relied on a misreading of the regulations. The DOL has no jurisdiction over national interest waiver applications, and therefore DOL regulations cannot, in any event, establish the petitioner’s eligibility for the waiver. There exists no “Schedule A, Group 3”; the quoted passage refers to Schedule A, Group II (as shown at the end of the quoted passage). More significantly, the cited passage does not establish a blanket waiver for university professors. Indeed, Schedule A, Group II classification is, essentially, an alternative form of labor certification (as opposed to individual labor certification), and as such requires a job offer; it is not a waiver of the job offer requirement. Schedule A, Group II classification and the national interest waiver are mutually exclusive, and cannot both be sought in the same proceeding under a single petition. Furthermore, only the intending employer can file a petition seeking Schedule A, Group II classification. An alien cannot self-petition for Schedule A, Group II classification. See 8 C.F.R. §§ 204.5(k)(1) and (4)(i).

The DOL web page quoted by the petitioner includes a link which leads, via intermediate links, to http://a257.g.akamaitech.net/7/257/2422/01apr20051500/edocket.access.gpo.gov/cfr_2005/aprqtr/20cfr656.15.htm, which describes the procedure for filing a Schedule A application. Because the petitioner has not applied for Schedule A, Group II designation, and cannot so apply on his own behalf, the AAO will not discuss in detail the petitioner’s claim to qualify for that designation. The AAO will note only that the cited regulation defines “exceptional ability,” using requirements considerably more stringent than the petitioner’s assertion that his title of “Senior Professor . . . [is] a reflection of my exceptional ability in the sciences and engineering education.”

The petitioner submitted a printout from <http://scholar.google.com>, showing that two of his scholarly works, dating respectively from 1993 and 1996, have each been cited once. This minimal citation rate does not establish that the petitioner’s scholarly work has been especially influential among other engineers. Furthermore, the dates of the listed works (both cited and uncited) tend to indicate that the petitioner’s output of research work diminished, if not stopped completely, after the early- to mid-1990s. A handful of subsequent published or presented works relate to the teaching of engineering, rather than engineering itself.

The printout includes a circled reference to a third citation, but this does not appear to pertain to the petitioner. The search was performed based on the petitioner's first initial and surname, and appears to have included research results from others who share that partial name. The third citation pertains to a 2003 article called "Ergot-associated dyspnea outbreak in a dairy herd," from a Belgian veterinary journal. The record contains no evidence that the petitioner has any training in veterinary medicine, and therefore the AAO concludes that the Belgian article was written not by the petitioner, but by a different researcher with a similar name.

The petitioner submitted copies of electronic mail messages inviting him to attend various professional conferences and symposia. It is not clear how many of these are "bulk" messages, sent *en masse* to large numbers of professionals based on their specialties rather than on their specific achievements. Other messages invited the petitioner to participate in peer review of scholarly articles. Again, it is not clear whether the petitioner was singled out for these invitations, rather than simply being expected, as a member of the academic community, to participate in peer review.

Without exception, all of the above invitations are dated after the petition's September 6, 2006 filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Thus, even if these messages established eligibility, which they do not, they cannot establish that the petitioner was already eligible when he filed the petition.

Similarly, the petitioner's elevation to Senior Member grade in the Institute of Electrical and Electronics Engineers (IEEE), which "requires experience reflecting professional maturity and significant professional achievements," took place after the filing date. The letter indicates that "[o]nly 7.6% of our approximately 376,000 members hold this grade," meaning there are roughly 28,600 IEEE Senior Members. The letter informing the petitioner of his elevation is a "form" letter, with his name added in a distinctly different typeface than that used for the body of the letter.

Furthermore, the petitioner's membership in the IEEE and other professional associations may contribute toward a finding of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(E), but a plain reading of the statute shows that exceptional ability is not, by itself, grounds for a national interest waiver; aliens of exceptional ability in the sciences are presumed to be subject to the job offer requirement absent a separate showing of eligibility for the waiver.

One document dating from before the filing date is what the petitioner described as "a letter from the Dean of engineering of the [U]niversity of Toledo that highlights my expertise in the area of Adaptive Control and requests my help to secure grants for his department." The AAO can find no letter in the record that matches that description. There is a March 18, 1996 letter from [REDACTED] Vice President for Graduate Studies, Research and Economic Development at the University of Toledo, which describes "a new internal, competitive research grant program" and states: "You are identified by the Investigator as an expert in the field who would provide a critical and helpful evaluation of his/her proposal to the University's Research Council addressing overall quality and appropriateness." The document is a "form" letter, addressed to "Dear Colleague" and containing no specific reference to the petitioner's area of expertise. The letter's standardized

format suggests common usage of such letters at the university. The available evidence does not persuade the AAO that grant proposal review is a privilege rather than a fairly routine duty expected of faculty members.

The petitioner stated that he is proudest of “helping with the education and training of US **minority students**” (the petitioner’s emphasis). Such work is a worthy endeavor of substantial intrinsic merit, but intrinsic merit alone cannot establish eligibility for the waiver. The waiver is not available to every educator who works with minority students.

The petitioner asserted that his work has national scope because he has authority over a curriculum in use not only in Orlando, but also at DeVry campuses throughout the United States. The petitioner’s submission contained no documentary evidence to establish the extent to which the petitioner has exerted control over curricula at the national level.

The petitioner stated:

Because of my outstanding job in designing and improving Math and Science curriculums, I was invited to present and lead different technical sessions on teaching innovations for some of the ATE (Advanced Technological Education). The ATE is a program that began in 1992 with an Act of Congress.

Included is a special thank you letter from the National Center for [A]dvanced Technological Education (NJCATE). Also included are emails requesting my participation [in] the ATE conferences.

The letter mentioned above is dated November 30, 2006, several months after the petition’s filing date. The letter, from [REDACTED], Executive Director of NJCATE, does not identify NJCATE as “the National Center for [A]dvanced Technological Education” as the petitioner stated. Rather, the letterhead of that letter identifies NJCATE as “a National Center for Advanced Technological Education” (emphasis added). The printed logo uses bold type to distinguish “CATE” from “NJ,” viz.: “**NJCATE**.” Considering these factors, and NJCATE’s location in New Jersey, it appears that the initials “NJCATE” stand for “New Jersey Center for Advanced Technological Education.” There is no indication that NJCATE is, itself, a national organization rather than a state arm of such an organization, or that the petitioner has played an especially significant role within the organization. While a presentation at a national-level ATE conference could give the petitioner’s work national scope, the conference documented in the record occurred in November 2006, after the filing date. There is no evidence of the petitioner’s prior involvement with ATE at the local, state or national level.

The director denied the petition on February 5, 2007, stating that the petitioner had established the intrinsic merit, but not the national scope, of his present work. The director also found that the petitioner had not distinguished himself from other college professors to a degree that would warrant the special, additional benefit of a national interest waiver.

On appeal, the petitioner argues that the director “has overlooked my cumulative contributions, skills, and efforts.” The burden is on the petitioner to establish that his cumulative record merits a national interest waiver; it cannot suffice for him simply to list his achievements. The petitioner has certainly accumulated many years of teaching experience at DeVry, during which time he has received positive and enthusiastic evaluations from students, but many universities have experienced and well-regarded faculty members. The petitioner cannot earn a waiver simply by being a seasoned and well-liked professor.

The petitioner states that the director “ignored the Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313). . . . This act without any doubt shows the intent of congress that applicants like me are directly benefiting the United States through their work on behalf of higher Education Universities.” The petitioner does not quote from the statute, but the petitioner does identify a memorandum from Michael Aytes, Associate Director for Domestic Operations, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* (June 6, 2006). The cited memorandum concerns the allotment of H-1B nonimmigrant visas. It does not mention the national interest waiver or any other permanent immigration benefit, and does not state or imply that university professors of math or science should preferentially qualify for the waiver.

Any argument concerning Congressional intent must also take into account that Congress could have established blanket waivers for college professors, or eliminated the job offer/labor certification requirement entirely. Instead, they established a law with the job offer/labor certification requirement as the default position, to be overruled only when the individual circumstances merit the granting of an exemption.

The petitioner states: “unlike other professions that usually take jobs from US workers, my job is to prepare US students to get better jobs.” This argument rests on the basic nature of the petitioner’s occupation rather than on his individual merits. As we have already noted, there exists no blanket waiver for college professors.

The petitioner lists his various individual accomplishments, many of which have already been discussed above. The petitioner claims “[m]ajor contributions in the area of helping student retentions and graduation rates (recognitions by the Advanced Technological Centers and the praise of [P]resident Bush for those contributions).” The petitioner submits an article, “Bush praises local mans [*sic*] contributions,” from the February 2007 edition of *Conway News*, a local publication distributed in the Orlando, Florida, area. The article begins with a discussion of the petitioner’s credentials, and then shifts to a discussion of the ATE program and an ATE conference. No author is credited.

The headline of the article is misleading, in that there is no evidence that President Bush has ever singled out the petitioner for recognition of any kind. Rather, the President sent a general letter of greeting to a professional conference at which the petitioner was among the speakers. Furthermore, as we have already explained, the ATE gathering did not take place until some time after the filing date, and therefore cannot be considered.

The only other substantive exhibit submitted on appeal is a letter from [REDACTED] President of DeVry University, Central Florida. That official praises the petitioner’s knowledge and skills as an engineer and as a

teacher, and asserts that “the university has called upon him to both chair our campus sequence committee and serve on DeVry’s national ECET committee – the latter, given responsibility for the design and enhancement of all coursework for our two bachelor’s programs in EET and CET.” The petitioner repeats the assertion that, given his influence over DeVry’s curriculum throughout the DeVry system, his work is national in scope.

We do not find the petitioner’s argument persuasive. National scope involves more than simply geographic dispersal. The petitioner has not shown to what extent, if any, his work has directly affected engineering instruction for that vast majority of university students who study at institutions other than DeVry University.

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.