

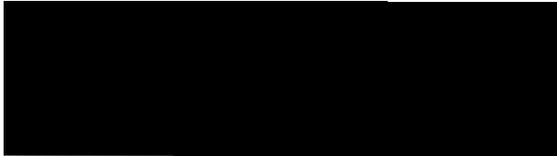
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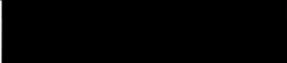
U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **SEP 17 2008**

SRC 08 142 51259

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.

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. At the time he filed the petition, the petitioner was a doctoral student in the Automated Nanoscale Design Group at Rice 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 failed to submit Form ETA-750B and therefore did not properly apply for the waiver.

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, who holds an M.S. in Electrical and Computer Engineering from Rice University, 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.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(k)(4)(ii) state that, to apply for the national interest waiver, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The petitioner's initial submission, filed on March 28, 2008, did not include this required document. In a letter accompanying the initial filing, counsel listed the various enclosed exhibits and stated: "This petition is being filed in a relatively skeletal form, due to time sensitive and unforeseen circumstances. Supplementation will be timely made of additional, relevant documentation in support of the above petition." Counsel did not specifically mention Form ETA-750B nor explain why the form was omitted from the "skeletal" filing, which included third-party materials such as witness letters and a university transcript.

The director denied the petition on May 6, 2008, based on the petitioner's failure to submit the required Form ETA-750B. On appeal, counsel states: "[The director] did not properly consider weight of available evidence in adjudicating petition. Petitioner notified Service of emergency basis for filing and to-be-submitted supplementation. Decision prematurely received."

With respect to the "to-be-submitted supplementation," counsel indicates that the materials will be forthcoming within 30 days. To date, three months after the filing of the appeal, the record contains no further substantive submission from the petitioner. On August 28, 2008, the AAO sent a message to counsel by facsimile, allowing the petitioner five business days to produce the promised supplement to the record. The permitted time has elapsed, and the AAO has received no response from counsel. We therefore consider the record to be complete as it now stands.

There is no evidence to show that the petitioner made any effort to supplement the record during the more than five weeks between the filing date and the denial date. Similarly, the record reflects no further action by the petitioner in the three months following the denial date. Counsel, on appeal, did not explain why the appeal itself did not include any further documentation in support of the petition. We note that the Form ETA-750B calls for information about the alien's education and employment experience, all of which would be information known to the alien. Counsel has never explained the nature of the ongoing "emergency" that has evidently prevented the petitioner from submitting this required form for over five months.

Because the petitioner has made no discernible effort to complete his petition, even on appeal, the AAO affirms the director's decision to deny the petition. In the interest of thoroughness, the AAO will briefly address the merits of the minimal evidence that the petitioner has provided so far.

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 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.

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.

The evidence submitted by the petitioner does not set him apart from other engineers in his field. Much of the evidence attests simply to his basic qualifications in the field and his acceptance into graduate study programs at various universities. An undated letter from ██████████ of Niroo Research Institute was evidently written as a recommendation letter in support of the petitioner's graduate school applications. The record is silent with regard to the petitioner's achievements as an engineer (as opposed to an engineering student).

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 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.