

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B5

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER
WAC 04 178 50862

Date: JUL 01 2009

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:

[REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 in the sciences. The petitioner seeks employment as a disaster management expert. The petitioner is the president, chief operating officer, and sole owner of Emergency and Disaster Management, Inc., Los Angeles, California. 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 has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Throughout the course of the appeal, the petitioner has submitted attorney briefs, letters, and various documents.

The petitioner's initial attorney of record was [REDACTED].¹ When the appeal was filed in January 2006, the petitioner's attorney of record was [REDACTED]. The term "counsel" shall refer only to the petitioner's present attorney of record, [REDACTED].

Although space does not permit a detailed discussion of every exhibit in the record, the AAO has reviewed the full record in adjudicating the appeal.

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.

¹ On October 4, 2007, [REDACTED] pled guilty to one count of conspiracy, in violation of 18 U.S.C. § 371, and two counts of visa fraud, in violation of 18 U.S.C. §§ 1546(a) and (b)(2). As a result, on October 25, 2007, the Board of Immigration Appeals (BIA) suspended [REDACTED] from practice in matters before the Department of Homeland Security (DHS). On December 6, 2007, the BIA expelled [REDACTED] from practice before the BIA, immigration courts, and the DHS. Source: [http://www.usdoj.gov/eoir/profcond/FinalOrders/\[REDACTED\]FinalOrder.pdf](http://www.usdoj.gov/eoir/profcond/FinalOrders/[REDACTED]FinalOrder.pdf) (visited June 23, 2009; copy added to record.)

(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 directly rule on the petitioner's claim of eligibility as an alien of exceptional ability in the sciences. The AAO will not make an initial finding on that issue, as it would not affect the outcome of the appeal. 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 U.S. Citizenship and Immigration Services (USCIS)] 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, an 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 petitioner filed the petition on June 4, 2004. In a statement accompanying the petitioner’s initial submission, [REDACTED] described the petitioner’s work:

Due to the increased role of counter-terrorism and national defense in the Post 9-11 world, it is critical that we as a nation utilize the much needed services of international experts in the fields of both emergency preparedness and disaster management.

The beneficiary in this case is one of the few experts in these fields and has over 20 years of experience. Over the years, [the petitioner] has published reports in international trade magazines on topics such as Aviation and Train Disasters, SARS, E Coli O 157, and even on the dangers of using Aircraft as a weapon in 2000. . . .

[The petitioner] has ties with the Department of Homeland Security, and he has been certified by The U.S. Department of Justice as a trainer for Emergency Response to Terrorism. Since 2000 he has trained and educated hundreds of emergency service and security professionals from local, state, and federal agencies. . . .

[The petitioner] has been featured on national and international media, including radio (i.e., Radio Nederland in the Netherlands on March 11th, 2002) and television (i.e., BR Bavarian TV in Germany, Channels [sic] News Asia on January 23rd, 2002, ORF- in Austria in 2002, KCAL Los Angeles in May of 2004).

It is expected that a few officials from the Department of Homeland Security and/or Government Officials will contact the adjudicating officer in this case to ensure that this petition is handled in an expeditious manner. [The petitioner] has gained national and international recognition in the field of disaster management and counter-terrorism. He is regarded as an expert in the field by many of the industry’s leading organizations. . . .

[The petitioner] has given over 60 presentations in Disaster Management at International Symposiums in recent years and has been elected to serve on Executive Boards of several leading associations in his field.

The goals of Emergency and Disaster Management, Inc. are to provide consultation and recommendations to private, industrial and public organizations on the handling of a

wide variety of manmade and natural disasters. Through identifying hazards and vulnerabilities, [the petitioner] and his staff evaluate the effectiveness of existing fire and rescue agencies, and then develop real working emergency guidelines, train the staff and consult on comprehensive emergency management programs.

did not describe the petitioner's claimed "ties with the Department of Homeland Security," and the record contains no documentation of such ties. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Also, there is no indication that any DHS official has intervened on the petitioner's behalf at any stage of this proceeding.

Much of the petitioner's initial submission consists of materials prepared by the petitioner's company such as pamphlets and electronic slide presentations. The petitioner also submitted certificates establishing his attendance at seminars and his participation in training classes (both as a student and as an instructor). These materials demonstrate the nature of the petitioner's work, but do not establish that the petitioner's work stands out from that of others in the field. The fundamental nature of the petitioner's work speaks to the intrinsic merit and national scope prongs of the national interest test, but not to the petitioner's individual qualifications for the waiver. The importance of a given field of endeavor does not establish a blanket waiver for workers in that field. *See Matter of New York State Dept. of Transportation* at 217.

The petitioner submitted several witness letters attesting to the petitioner's accomplishments. [REDACTED] Executive Director of the International Association of Emergency Managers (IAEM), stated:

[The petitioner] became involved in IAEM in 1999 when he was chosen to be part of a delegation of subject matter experts to visit Italy. . . . [The petitioner] represented our organization well with his expertise and knowledge.

[The petitioner] has served as IAEM's International Committee Chair and is presently a member of the Board of Directors as President of Region 9 (AZ, CA, HI, NV, and the Pacific Trust Territories). He also regularly conducts special advanced emergency management training at IAEM's Annual Conference, and provides editorial contributions to the monthly newspaper on current disaster topics such as aviation disasters and train crashes. He provides leadership to emergency managers in his region and throughout the United States.

Former IAEM President [REDACTED] stated:

[The petitioner] was, and still is, a leader and major contributor within this Association. . . . He provides a wide spectrum of emergency management training within IAEM for public safety personnel representing many disciplines. He also was instrumental in the

development of IAEM's International Committee and Task Force which facilitated international public safety partnerships under [the petitioner's] leadership.

I have attended [the petitioner's] workshops which are considered to be among the best of their kind by participants who I have talked with, which only further confirms that which I already know – [the petitioner] provides first rate training and support services that go a long way in improving public safety capability to deal with unanticipated disasters including the now persistent threat of terrorism.

██████████ President of the National Air Disaster Alliance and Foundation (NADA/F), stated that the petitioner's "professional expertise has helped *NADA/F* and others develop disaster management policies, implement effective plans, and respond to the every-changing [*sic*] world of emergency disaster response and management."

██████████, Past President of the American Association of Professional Emergency Planners and currently Executive Director of the Office of Disaster Management for Area G (described as "the South Bay portion of Los Angeles County"), described the petitioner as "an internationally respected expert in the field of transportation disasters, and particularly in aviation disasters." Other state and local authorities, as well as officials of various organizations, offered similar endorsements to those quoted above.

The petitioner also submitted copies of articles that the petitioner wrote for various trade publications between 1999 and 2003. The articles concern such diverse topics as *E. coli* contamination, railroad accidents, and the terrorist attacks of September 11, 2001. Other articles from various newspapers and magazines include interviews with the petitioner, typically on the occasion of his participation at local gatherings.

On March 23, 2005, the director issued a request for evidence (RFE), instructing the petitioner to submit "[c]urrent letters or affidavits from recognized governmental or private organizations/agencies confirming the benefit the beneficiary's skills and prospective employment, to a greater extent than U.S. workers having the same minimum qualifications, will provide to the United [S]tates." A cover sheet accompanying the notice advised the petitioner: "The information requested below must be received by this office no later than eighty-four (84) days from the date of this notice. If you do not provide the required documentation within the time allotted, your application will be considered abandoned."

On June 14, 2005, ██████████ requested an extension until "the end of July 2005" to obtain materials to respond to the RFE. ██████████ claimed "special circumstances" including "the leadership change from Tom Ridge to Michael Chertoff" as Secretary of Homeland Security and the ongoing preparation of "comprehensive, research based letters" from officials of IAEM. Mr. ██████████ did not explain why the transition from Secretary Ridge to Secretary Chertoff affected the petitioner's ability to obtain evidence during the allotted 12-week response period. The regulation at 8 C.F.R. § 103.2(b)(8), as in effect at the time of the RFE in 2005, required that "[a]dditional time may not be granted" to respond to an RFE. The regulation made no allowance for "special circumstances."

As for [REDACTED] justification for the requested extension (the first in a series of such requests), we have already observed that the assertions of counsel do not constitute evidence, even when an attorney's credibility is not subsequently tarred with a fraud conviction as is the case here.

[REDACTED] claimed that "a shortage of highly qualified emergency managers" qualified the petitioner for the national interest waiver. Binding case law specifically rules out worker shortages as a basis for the waiver. See *Matter of New York State Dept. of Transportation* at 218.²

On December 28, 2005, the director denied the petition. The director acknowledged the petitioner's request for an extension, but found that "the petitioner has yet to submit the requested evidence." The director determined "[t]he petitioner has not complied with the USCIS' request for evidence" and denied the petition accordingly. The director did not deny the petition for abandonment, which, pursuant to 8 C.F.R. § 103.2(b)(15), would have precluded appeal of the denial. Instead, the director denied based on failure to submit sufficient evidence, and allowed the petitioner to appeal the decision.

On appeal, [REDACTED] stated:

[T]he Service, in their notice of decision, state that they requested more specific evidence to show that granting of the Petitioner's waiver request would be in the national interest. Petitioner is at a loss to understand what further evidence would satisfy the Service in light of the fact that voluminous documentation was submitted to substantiate this fact. The evidence that was submitted to the Service establishes beyond a doubt that Beneficiary is an expert in the field of Emergency and Disaster Management and that his skills and knowledge in this area would be a tremendous asset to the United States in protecting their citizens.

[REDACTED] acknowledged [REDACTED] prior request for an extension, but did not mention, let alone explain, the petitioner's failure to submit any further evidence before the period of the requested extension had elapsed.

The petitioner submitted two letters on appeal. The director had requested such letters in the RFE, and the petitioner failed to submit them at that time. Because the petitioner forfeited a prior opportunity to submit evidence specifically requested by the director, the AAO will not consider this evidence on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena* at 537.

Because the AAO will not consider the newly submitted letters, and the appeal included no other new evidence, the appeal rested on [REDACTED] contention that the petitioner's initial submission was sufficient to establish the petitioner's eligibility.

² Section 203(b)(2)(B)(ii) of the Act, enacted after the promulgation of *Matter of New York State Dept. of Transportation*, made the waiver available to certain physicians in designated shortage areas. Congress created no comparable provision relating to shortages in any other occupation.

repeated earlier claim that the petitioner “has ties with the Department of Homeland Security” but, like the prior attorney, did not specify the nature of these “ties” or identify any evidence in the record that would shed light on the issue.

During the review of the appeal, it came to the attention of the AAO that the State of California has suspended the corporate status of Emergency and Disaster Management, Inc.³ The AAO visited the company’s web site, <http://www.emergency-management.net>, and found that it contained no indication of any activity by the petitioner or his company later than 2007. On March 24, 2009, the AAO advised the petitioner: “The evidence from your own web site does not indicate that you remain consistently active or a national presence in your field.” The AAO also stated: “Because your national interest waiver claim relies heavily on the activities of your company, we cannot ignore the company’s suspension when considering your ability to continue performing the activities that, you claim, serve the national interest.”

It is important to note, here, that the AAO did not indicate that the petition was on the edge of approval, or that evidence of recent activity would suffice to establish eligibility for the waiver. The AAO sought evidence of recent activity in order to provide context to the information discussed above. The AAO did not state that it would treat its March 2009 notice as a new opportunity for the petitioner to respond to the Marc 2005 RFE. The petitioner forfeited the opportunity to respond to that earlier notice. Concerning the waiver, the AAO will consider the petitioner’s latest submission only insofar as it addresses the issues of the petitioner’s recent activities, and the suspension of his company’s status.

On April 30, 2009, the AAO received a response from the petitioner’s present attorney. Counsel asserted that the petitioner’s uncertain immigration status has limited his ability to work in the United States, but “[o]nce this petition is approved, [the petitioner] will be able to accept contracts with the government, universities, and travel throughout the United States and Internationally.” The petitioner, at that time, did not submit any documentary evidence to show that any public or private entity had attempted to enter into contracts with the petitioner, only to be turned away because of the petitioner’s immigration issues.

With respect to the petitioner’s recent activities, counsel stated: “If you www.google.com his name . . . you will be able to view numerous information [*sic*] about his recent activities (approx. 7000).” The petitioner submitted printouts from the Google search engine showing “about 7,000” search results. The “about 7,000” figure, however, is not limited to the petitioner’s “recent activities.” Rather, the figure relates to every web page that includes both the petitioner’s first name and his last name, whether together or separate.

Because counsel has chosen to incorporate Google searches into the record of proceeding, it is appropriate to examine the search parameters used. A May 12, 2009 Google search for the petitioner’s first and last name together, as a phrase, produced only 230 results. On the same day, a similar search

³ Source: <http://kepler.ss.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C1979900> (accessed on January 14 and March 24, 2009; copy added to record).

including the petitioner's often-used middle initial produced 463 results. (The AAO has added printouts to the record.) Given these figures, it appears that the majority of the 7,000 claimed search results involve coincidental uses of the petitioner's first and last name and do not refer to the petitioner at all.

Furthermore, while Google permits searches restricted by date, counsel's search had no such restrictions. One of the listings shown on the petitioner's printouts concerns a workshop in 2003, clearly not among the petitioner's "recent activities." When the search is limited to pages modified during the past year (the broadest available date-related parameter), the petitioner's first and last name (as adjacent words) produce 16 results, while his name with the middle initial shows 49 results. (Searches conducted June 30, 2009; printouts added to record). Seen in context, the reference to "about 7,000" results showing the petitioner's "recent activities" is grossly exaggerated.

Counsel requested additional time to supplement the petitioner's response to the AAO's notice. In the final submission, received in May 2009, counsel stated that the petitioner "has not been able to travel or accept opportunities with local, state and the federal government as well as universities. Therefore, for the past 3 years his ability to remain active in his field of expertise has been limited." Counsel asserts, nevertheless, that the petitioner "has been doing pro bono work for during [*sic*] the past 4 years or more," and "has been a speaker at countless conferences over the past 3 years."

The petitioner himself states: "I remain most certainly consistently active and a national presence in the field of emergency management, despite the fact that EDM's web site does not indicate that." He claims: "I was a few times asked to apply for openings in local, state, and federal government as well as universities. Due to my -undecided- status I had to decline." The petitioner did not identify, much less document, these claimed "openings in local, state, and federal government."

As evidence of his recent activities, the petitioner submits documentation establishing that he continues to serve as Region 9 President of IAEM-USA; that he is one of 51 members of the Editorial Board of the *Journal of Emergency Management*; and that he is a Board Member of the California Emergency Services Association, Southern Chapter. He also presented the keynote address at the 2009 International Disaster Management Conference in Orlando, Florida.

The latest submission establishes that the petitioner remains active in his field to the extent that his current status (or lack thereof) allows. The petitioner, however, is considerably less responsive concerning the suspension of the corporate status of Emergency and Disaster Management, Inc. The petitioner does not mention the suspension at all in his own statement. Previous submissions have included vague references to the "staff" of Emergency and Disaster Management, Inc.; the new submission does not show that the company has any employees at all. Counsel states only that the petitioner "has maintained his business office as evidenced by the rent payments," although the AAO had not expressed concern about the petitioner's rent payments. Counsel does not address the suspension, even though the AAO had specifically noted that suspension as a point of serious concern. Therefore, despite several requests for extensions (notwithstanding the petitioner's earlier efforts to expedite the adjudication of the appeal), the petitioner has responded only in part to the AAO's notice.

Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition. 8 C.F.R. § 103.2(b)(14).

The record contains evidence that the petitioner is, and has been, prominent in his field, but prominence is not automatic evidence of eligibility. The petitioner seeks an employment-based immigrant classification, but his positions with various regional and national organizations appear to be unpaid. Clearly, these functions are incidental rather than central to his occupation.

The petitioner has referred to himself as an aviation consultant, but the record contains little information from the aviation industry to establish his direct contributions to that industry. The petitioner has prepared reports about air crashes and other disasters, but it is not clear whether these reports were commissioned or, rather, he prepared them on his own initiative. The record also does not indicate that the industry has adopted any recommendations he may have set forth in those reports.

The petitioner's initial submission suggested avenues by which he could qualify for the waiver, but questions remained, and the petitioner declined to provide further evidence when given the opportunity to do so. He remains active in an unpaid capacity, but when confronted with the question of the suspension of his business, he once again failed to address the issue directly. Given these unresolved issues, we find that the petitioner has not met his burden of proof to establish eligibility for the national interest waiver.

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 decision 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.