

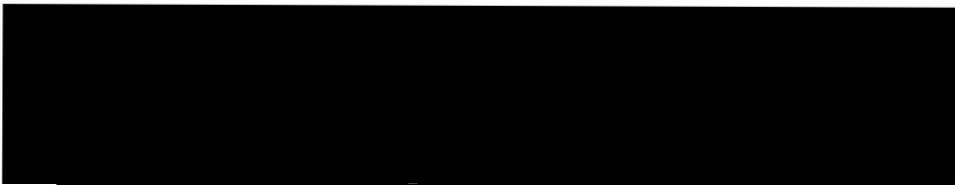
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: FEB 25 2009
SRC 07 800 14795

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:



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, 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 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, a foreign language school operated by the United States Department of Defense (DOD), seeks to employ the beneficiary as an assistant professor. 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:

(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 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, 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.

Counsel stated that the beneficiary has “already made a significant contribution to the U.S. national interest, distinguished from a standard college language teacher, in that [the beneficiary] has already trained dozens of members of the military to be accomplished linguists in the Chinese language.” This may distinguish the beneficiary from “[a] normal language instructor in a college or university,” but as counsel acknowledged, the petitioner is not a standard college or university; it is a dedicated military training facility. General statements about how members of the petitioner’s faculty are different from typical college professors apply not only to the beneficiary, but to every member of the petitioner’s faculty. The statute and regulations establish no blanket waiver for simply serving on the petitioner’s faculty. We note that section 203(b)(2)(B)(ii) of the Act provides

for a blanket waiver for certain physicians. The AAO cannot create, or presume to exist, other blanket waivers for which Congress made no comparable provision.

Arguments relating to the overall importance of the type of work an alien performs are germane to the intrinsic merit and national scope of the alien's occupation, but they cannot establish a given alien merits a waiver simply by virtue of working in that occupation. Therefore, it cannot suffice for the petitioner to establish that it is in the national interest for the petitioner to employ instructors. The petitioner must establish specifically that the beneficiary will benefit the United States more than would a qualified United States worker in that same occupation.

The record shows that the petitioner filed a previous petition on the beneficiary's behalf, with receipt number SRC 07 125 53532, on March 15, 2007, seeking to classify the beneficiary as a member of the professions under section 203(b)(3)(A)(ii) of the Act. While that petition was still pending on May 21, 2007, when the petitioner filed the petition now on appeal, the director approved the earlier petition on September 11, 2007. Significantly, the approved petition includes a labor certification which the Department of Labor (DOL) approved within weeks of its February 5, 2007 filing date. The petitioner therefore seeks to waive a requirement that has already been met.

Counsel makes various claims as to how the labor certification process is incompatible with the petitioner's teacher retention policy. Because the petitioner obtained an approved labor certification for the beneficiary, well before counsel made these arguments, it would serve no useful purpose to entertain those arguments here. More generally, we hold that no employer, whether private or governmental, can unilaterally exempt itself from the labor certification process by setting personnel policies at odds with that process. Congress, which created the labor certification requirement, is capable of exempting employers such as the petitioner from that requirement, but to date Congress has not yet done so, and the AAO lacks jurisdiction to declare the petitioner (or any other employer) to be exempt from labor certification for this classification.

In a letter dated both May 15 and May 18, 2007, [REDACTED], the petitioner's deputy chief of staff for personnel and logistics, stated:

Our school is a part of the United States Army. Our 3500 students are men and women who are members of all branches of the military. We train members of the military in an intensive year plus long, full time, immersive foreign language curriculum. . . .

Our military and intelligence personnel cannot protect our nation from foreign threats without acquiring the highest level of language ability needed to perceive such threats from among available data, or to communicate with persons who they may need to help with their duties. . . . We therefore provide the highest possible level of language instruction, and require not just average teachers, but the best we can get. . . . Our mission requires that our teachers must focus nearly all of their energy on instruction,

unlike typical college professors who can engage in extensive academic writing and publication. . . .

[The beneficiary] brings a high level of expertise in language teaching and technology to her work. . . . Her academic degrees and research have focused on language teaching, and she has focused on integrating technology into language teaching. She has excelled in all areas of teaching at our institution. . . .

Our official school catalogue notes the great importance to our program that we *retain* the skilled teachers that have experience and success in our school. [The beneficiary] has already received hundreds of hours of special training in [the petitioner's] language teaching techniques.

(Emphasis in original.) The AAO acknowledges that the beneficiary's occupation is not necessarily conducive to producing large quantities of published research. Published research is certainly not the only means by which an alien can establish eligibility for the national interest waiver. Nevertheless, the petitioner must establish that the beneficiary has had a comparable impact by some other means.

noted that the beneficiary "was rated at the highest level of excellence" on her Civilian Evaluation Report for the period from April 17 to September 30, 2006. This report calls the beneficiary "a relatively new teacher." Indeed, the report is supposed to be an annual rating, but it covers only six months because the petitioner did not hire the beneficiary until April 2006. The record does not reveal the distribution of ratings or show how many of the petitioner's instructors achieved the top rating during their first half-year of teaching. The beneficiary's rating demonstrates that lengthy experience at the petitioning institution is not necessary to achieve a high level of performance. When we consider arguments concerning the importance of retaining experienced instructors, we cannot ignore that the petitioner filed this petition only thirteen months after hiring the beneficiary.

The beneficiary's rating was signed by [REDACTED], who provided a letter of support dated April 28, 2007. [REDACTED] stated that the beneficiary "is one of the finest instructors that we have here," and her students assigned her a Teacher Effectiveness Analysis Rating of "3.85, which was the highest one in our department and a very superior score." [REDACTED] added that the beneficiary "is also the Language Technology Specialist of our department. She was assigned to this new position after she worked at [the petitioning institute] for only a few months, thanks to her exceptional job performance."

[REDACTED], president of the Chinese Teachers' Association of California and a department chair at the petitioning institute, asserted that the beneficiary "is regarded as one of the most qualified language instructors in the school. . . . Her work at [the petitioning institute] has been consistently impressive." Letters from other instructors and students echo the above assertions regarding the petitioner's competence and effectiveness as a teacher.

On October 30, 2007, the director issued a request for evidence, instructing the petitioner to explain how the beneficiary serves the national interest to a substantially greater extent than would a minimally qualified United States worker in the same capacity. In response, counsel offered a hypothetical example:

To illustrate, during the Korean War, the U.S. was fighting against soldiers from China, and, if an enemy soldier were captured, it would have a national security need to interrogate that prisoner. If the Dept. of Labor rules were used, a minimally qualified instructor would have to be used, so that the prisoner might be interrogated by a soldier with minimal language skills. However, use of a soldier trained by the best possible language instructor would enhance the possibility of gathering the most accurate information.

Counsel's highly speculative example assumes a direct correlation between the teacher's qualifications and the soldier's subsequent language skills. A student may be more likely to excel under the tutelage of a better teacher, but the record does not establish the extent of this effect. (Anecdotal self-reporting by a handful of students cannot suffice in this regard.) On a related note, the record contains no objective evidence that the petitioner's former students are, in fact, more fluent in Chinese than students who studied under other instructors at the institute.

Counsel stated: "The national security mission of the employer would be compromised . . . in that it would provide lesser training to military and intelligence officers – if it were forced to use *minimally* qualified instructors without experience in its instruction system." Counsel, here, appears to treat the term "minimally qualified" as though it were a synonym for "barely competent." The petitioner and counsel have repeatedly argued that the petitioning institute is not like a civilian college and should not be regarded as such. If the petitioner is, indeed, an institution like no other, then it would seem that the petitioner is able to determine for itself what constitute the minimum qualifications for teaching there. An instructor who is unable to teach sufficient language skills to his or her students is unqualified, not "minimally qualified." The AAO sees no reason to assume that the petitioner has set its own hiring standards so low that to hire such workers would compromise national security, and that the national interest waiver is necessary to prevent the petitioner from hiring such workers.

It is not clear what those minimum qualifications are (a brochure in the record indicates that dozens of faculty members do not hold bachelor's degrees), but the petitioner has not shown that the labor certification process would require it to hire teachers who are barely able to impart sufficient language skills to their students. There is no evidence that DOL establishes the minimum qualifications for a given position, and then imposes those requirements on employers. Instead, DOL ascertains the minimum requirements as established by the employers, and ensures that U.S. workers willing, able, and available to meet those requirements have meaningful access to job opportunities. The DOL also ensures that the employment of alien labor will not adversely affect similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). In this particular instance, the petitioner's efforts to employ the beneficiary have already survived

DOL review. The approved labor certification shows that counsel's arguments are not merely hypothetical; they rely upon assumptions contradicted by the record.

Furthermore, an alien's replacement by a minimally qualified United States worker would only happen if the labor certification process yielded an application from such a worker (but not from any United States worker with qualifications above the minimum). In this instance, the beneficiary's approved labor certification proves that such a situation did not occur. We cannot be swayed by a hypothetical situation that contradicts the known facts of the proceeding.

With regard to the asserted importance of "experience in [the petitioner's] instruction system," the beneficiary was clearly successful within months of her hiring, despite having had no previous experience in that instruction system. The record contains no evidence that the petitioner's other instructors struggle to master that system. The AAO is not persuaded by the argument that an instructor with barely a year of experience should receive a waiver to avoid being replaced by someone with less experience.

When considering the scope of the beneficiary's impact, we cannot ignore the small class sizes emphasized in the record. While small class sizes can contribute to a more effective and personalized learning environment for the students involved, they also limit the number of persons directly affected by the beneficiary's work. The initial filing included the assertion that the beneficiary "has already trained dozens of members of the military." Whatever the scope of the overall mission of the petitioning institute as a whole, the beneficiary's individual impact has been considerably narrower. Case law specifically cites classroom teaching as an example of an occupation that lacks national scope. *Matter of New York State Dept. of Transportation* at 217, n.3.

The director denied the petition on November 29, 2007, stating that the petitioner had not shown that the beneficiary's contributions are such that it would serve the national interest to exempt her from the job offer/labor certification requirement. The director also held that the beneficiary does not qualify for the waiver simply by virtue of being well qualified for her position.

On appeal, the petitioner and counsel observe that the director's decision erroneously referred to the beneficiary as a self-petitioning "computer analyst." If the director had been consistently in error in this regard, then the petitioner would have a strong case for arguing that the director failed to review the petition. The director, however, also correctly identified the beneficiary's occupation, educational background, and employer elsewhere in the decision. It appears that the paragraph referring to the beneficiary as a self-petitioning computer analyst was copied from another decision, and not edited to bring it into conformity with the facts of the petition. The AAO does not ignore this error, but the error is editorial rather than adjudicative. (Counsel concedes as much, stating that the errors do not "mean that the decision was wrong.") The decision, taken as a whole, contains correct information, and the AAO will not vacate or invalidate the decision based on isolated errors.¹

¹ By way of analogy, Form ETA-750B, Statement of Qualifications of Alien (signed both by the beneficiary and by counsel), indicates that the beneficiary began working for the petitioner in April 2004, whereas the rest of the record – including the beneficiary's own résumé – amply demonstrates that the petitioner hired the beneficiary in April 2006.

Counsel also protests the director's characterization of the witness letters as having been written by the beneficiary's "current and former co-workers." Some witnesses were the beneficiary's students rather than co-workers, but this distinction would not have altered the outcome of the decision. Counsel states: "Another non-co-worker supporting letter was from [REDACTED] of the Chinese Language Teachers Association of California." Counsel fails to explain how [REDACTED] who stated "I work as the chair of Chinese Department E, Asian School I of [the petitioning institute]," is a "non-co-worker."

Counsel, noting that most civilian jobs within the federal government are restricted to United States citizens, states: "The determination of the U.S. Department of Defense to employ (and sponsor the immigration of) an alien worker in this particular job has thus, already been a determination that the beneficial value of her work outweighs that 'overriding national interest'" inherent in employing United States citizens. **This is not an argument specific to the beneficiary, however.** The petitioner's own *General Catalog 2006-2007* states, on page 6: "There are more than 1,100 civilian teachers employed at [the petitioning institute], most of them native speakers of the language they teach." Thus, it can be inferred that the petitioner relies heavily on immigrants as teachers. There is no indication that the petitioner routinely limits hiring of foreign-born staff to naturalized citizens and made a special exception for the beneficiary owing to her unique talents. Rather, USCIS records identify at least 80 immigrant and nonimmigrant petitions filed by the petitioner. Furthermore, many of the immigrant petitions filed by the petitioner were filed with approved labor certifications.² The AAO rejects the argument that the petitioner's willingness to hire non-citizens is presumptive evidence that its teachers qualify for the national interest waiver.

Counsel contends that the transformation of the Immigration and Naturalization Service, a Department of Justice agency, into USCIS, a Department of Homeland Security agency, "is an historically clear signal from the elected branches of government – national security is not an issue to be disregarded in immigration matters." Those same "elected branches of government" chose to create the labor certification requirement, and refrained from exempting DOD employees when they could have done so. The placement of USCIS within the Department of Homeland Security is not a presumptive argument for granting the waiver specifically in this proceeding, or generally to members of the petitioner's teaching staff.

Counsel asserts: "The considered, expressed and explained opinion of [REDACTED] as the representative of a Department of Defense agency, as to the national security based needs of this agency, should [be] appropriately taken into consideration by the CIS in evaluating whether the immigration of [the beneficiary] is in the national interest." The AAO has taken [REDACTED] arguments into consideration, and while the AAO is not deaf to concerns relating to national

The AAO does not consider this isolated typographical error to be evidence of deliberate misrepresentation, or of the beneficiary's unfamiliarity with her own credentials and work history.

² In 2008 alone, the petitioner filed at least ten I-140 petitions with approved labor certifications, with the following receipt numbers: LIN 08 220 52048; LIN 08 219 52712; LIN 08 211 50543; LIN 08 211 50525; LIN 08 201 50826; LIN 08 192 50478; LIN 08 192 50443; LIN 08 192 50438; LIN 08 192 50410; and LIN 08 187 50378.

security, the primary mission of the AAO is to enforce immigration laws, not to accommodate agencies whose own priorities or practices may conflict with those laws. The AAO has considered above, the principal arguments advanced by both counsel and the petitioner (including

Counsel argues that the petitioner has established that the beneficiary has a history of “specific prior achievements” that demonstrate her eligibility for the waiver. All of the specified achievements are personnel evaluations and awards presented by the petitioning entity itself. 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. To establish exceptional ability, a given alien must satisfy at least three of six specified criteria at 8 C.F.R. § 204.5(k)(3)(ii). The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) calls for evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. Therefore, the petitioner’s recognition of the beneficiary would constitute part, but not all, of a claim that the beneficiary is an alien of exceptional ability. By statute, exceptional ability is not grounds for a national interest waiver; aliens of exceptional ability are, generally, subject to the job offer requirement. Therefore, the certificates and other evidence that amount to a partial claim of exceptional ability cannot suffice to qualify the beneficiary for the national interest waiver. We do not dispute the claim that the beneficiary’s performance has been superior to that of many of her co-workers, but this does not compel a finding of eligibility.

On December 15, 2008, the AAO received a supplemental submission from counsel. A December 5, 2008 DOD press release and accompanying fact sheet described a pilot program allowing the recruitment of certain nonimmigrant aliens, including “Enlisted Individuals with Special Language and Culture Backgrounds.” The DOD has no jurisdiction over eligibility for immigrant classifications. Even if it were otherwise, the pilot program does not encompass the beneficiary. The pilot program specifically refers to “enlistment into military service.” The beneficiary is not an enlisted member of the armed forces. She is, rather, a civilian DOD employee. The DOD press release is not relevant to the proceeding at hand, notwithstanding the use of the phrase “national interest” in the newly submitted fact sheet.

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 decision is without prejudice to the beneficiary’s adjustment application or any further proceedings arising from the approval of the earlier petition filed by the petitioner on the beneficiary’s behalf.

ORDER: The appeal is dismissed.