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20 Massachusetts Ave., N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

B5

FILE:

SRC 07 192 54188

Office: TEXAS SERVICE CENTER Date: JAN 29 2009

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.

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
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 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 senior analytical chemist at [REDACTED] Louisville, Kentucky. 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.

On appeal, counsel argues that the evidence submitted previously supported approval of the petition.

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.

We note that Part 4, line 6 of the Form I-140 petition (which the petitioner signed under penalty of perjury) asks the question: “Has any immigrant visa petition ever been filed by or on behalf of this person?” The petitioner answered “no,” but this answer is false. On March 1, 2004, the petitioner filed a petition, with receipt number LIN 04 104 50669, seeking to classify himself as an alien of extraordinary ability under section 203(b)(1)(A) of the Act. The director, Nebraska Service Center, denied that petition on June 1, 2005. The petitioner appealed that decision, and the AAO dismissed the appeal on April 11, 2006. The petitioner filed his second petition (under review here) on June 11, 2007, only 14 months after the AAO dismissed his prior appeal.

In a personal statement submitted with the petition, the petitioner stated:

I am a Senior Research Associate (P-3 Chemist) in the Kentucky division of [REDACTED] . . . This is a permanent position for research and environmental sampling and testing open to further promotion. In this position, I supervise and conduct research, conduct environmental on-site soil, water and oil sampling and testing for organic hazardous wastes. . . .

During my more than ten years science and technology research and application practice I have made many important contributions on the hazardous waste management, remediation, recycling and disposal. Although I cannot publish all my work due to the business and national security reason[s], I have received a highest China national award for my exceptional contributions to both national science and technology progress and society benefit in 1998. . . . One of my selected works was published on international high levels in [an] international high level science and technology journal and cited by some international highly public accessed science and technology search sources. My research work on-site at USEPA Cincinnati will be published in the near future. Eventually these results will be [a] guide or fundamental for the remediation of US hazardous organic waste contaminated sites. . . .

[REDACTED] . . . operates one of the world's most diversified commercial testing and analytical laboratory groups. .

The Kentucky Division's primary capabilities include: storm water, groundwater, and wastewater testing and sampling; environmental remediation; environmental soil testing and sampling; RCRA regulatory analysis; and food microbiology testing. . . .

I have been working in the field of hazardous waste management and disposal since 1990. . . . In [REDACTED] and [REDACTED] division, I exp[an]ded my working field to organic hazardous waste management and disposal research (remediation) and onsite services (sampling, testing and consulting).

(Emphasis in original.) The petitioner submitted several witness letters discussing his work with hazardous waste remediation. The single largest source of those letters is the China Institute of Atomic Energy (CIAE), where the beneficiary worked from 1990 to 1998. An illustrative example is from [REDACTED], director of the National Research Center of Isotope Engineering and Technology at CIAE. Prof. [REDACTED] stated:

[The petitioner] joined a research group in CIAE conducting a China National Eighth Five-year Plan's Significant Sci. & Tech. Project titled as [REDACTED] in 1990. . . . His

talent, astute insight, as well as hard work had established the solid foundations for the following superb research work.

[The petitioner] had developed several crucial and critical technologies after he joined the group. With [the petitioner's] technologies and discoveries the group overcame some scientific and technological difficulties and was able to move further.

. . . To get high purity medical use molybdenum and properly manage and dispose [the] hazardous radioactive waste (gas, liquid and solid) is the most difficult part of the technologies. And at the same time the group faced another challenge, the uranium in precipitate high radioactive waste must be recycled since it is the precious national control nuclear fuel.

Facing these challenges, [the petitioner] developed several innovative technologies at some of the critical steps for the project. . . . By using his methods the whole molybdenum recovery increased from 70% to 85%. . . .

The un-reacted uranium was co-precipitated with all other solid hazardous radioactive wastes. These wastes cannot be disposed as high radioactive solid waste before the uranium is recycled. . . . [Using the petitioner's method, t]he recovery of uranium is more than 99%. . . . This study was published in one of the top international nuclear science journal[s], Journal of Radioanalytical and Nuclear Chemistry.

[REDACTED], a senior engineer at CIAE, states that the petitioner's innovations "have been serving the company for many years." [REDACTED] stated that the petitioner's "contributions . . . cannot be overstated."

[REDACTED], technical directive manager at the National Risk Management Resource Laboratory, U.S. Environmental Protection Agency (EPA), described work that the petitioner performed for the EPA while he was a student at the University of Cincinnati:

Remediation of polychlorinated biphenyls (PCBs) has been a major problem in the United States. . . . After [he] joined the group [the petitioner] played a key role as a team leader. It is the first work in the world to investigate the PCBs bimetallic system degradation reaction kinetics systematically. . . . [The petitioner] discovered that bimetallic system degradation does not produce any intermediate products even in [a] very short time. This discovery made it easy for the environmental risk assessment after the remediation. . . . During his on-site research period at USEPA, [the petitioner] made many significant contributions on the PCB in aqueous and sediment slurry matrix remediation. With his excellent research works our research group [remains a] pioneer in the field.

[REDACTED], a laboratory director at [REDACTED], described the petitioner's current work:

In my laboratory, [the petitioner] keeps playing an important role on the organic hazardous waste sampling, analyzing, management, remediation and disposal. Except routine environmental services, [the petitioner] and the laboratory also [have] the responsibility for the emergency environmental needs for Kentucky and the neighbor states. In the middle of January, the greater Louisville Area was stunned to learn that a train had derailed off Highway 1020 in the nearby city of [B]rook. To put the magnitude of the disaster in focus, the derailment fire, which ignited 90,000 gallons of Butadiene, lasted six days. Our laboratory acted at the first time to collect and analyze the samples. We provided the first hand data promptly for the environmental remediation. [The petitioner] played a key role in this project to develop analytical method and analyze all the contaminated water and soil samples. Although he just started his work in my laboratory, [the petitioner] already made great contributions on our organic hazardous waste sampling, analyzing, remediation, management and disposal.

The petitioner and several witnesses discussed awards that the petitioner has received, such as the National Science and Technology Progress Award. (According to the record, the petitioner was one of 3,461 people who received the award in 1998.) Pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(F), government awards for significant contributions to the field can form part of a claim of exceptional ability, but cannot alone justify a finding of exceptional ability. The plain wording of the statute at section 203(b)(1)(A) of the Act shows that aliens of exceptional ability are, typically, subject to the job offer requirement. Therefore, partial evidence of exceptional ability has limited value as evidence of eligibility for the national interest waiver.

On December 11, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit additional information and documentation about the impact and recognition of the petitioner's work. The director specifically requested documentation regarding citation of the petitioner's published work and evidence that awareness of the petitioner's work is not limited to institutions where he has worked or studied.

In response, the petitioner submitted additional witness letters and various documents. One of the new letters, from [REDACTED], a forensic toxicologist at Virginia Commonwealth University, Richmond, Virginia, reads, in part:

I have not worked at length with [the petitioner]. I only know him through an interview when [REDACTED] Inc. created a new position for a senior analytical chemist who would be responsible for maintaining the instrumentation used for high volume of drug of abuse testing and R&D projects I suggested [REDACTED] recruit [the petitioner] for the critical position from all the nation wide candidates. I met him again at Kroll while I was working as government regulatory auditor.

letter indicates that the petitioner has left his environmental remediation work at Microbac in order to work for KLS, which is a drug testing company. The petitioner submitted background information about drug addition and drug testing, but he submitted no evidence to show that he, as an individual, had any impact at all on the drug problem prior to filing the petition in June 2007. The petitioner must qualify for the benefit sought as of the petition's filing date; subsequent developments cannot retroactively make him eligible. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The remainder of the letters submitted in response to the RFE discuss the petitioner's background in hazardous waste processing, a field that the petitioner has now abandoned. The petitioner also submitted various documents concerning nuclear waste processing, but he did not present any evidence that he has been or will be involved in nuclear waste processing in the United States.

Regarding citation of his work, the petitioner stated that his publications have been "cited by some public access science and technology research information [sic] systems." The petitioner apparently refers to the inclusion of his work in various databases that catalog scholarly articles. These are not the citations to which the director referred. The record does not show that other researchers, in their own articles, have relied on the petitioner's past work and included bibliographic references to the petitioner's articles.

The director denied the petition on March 27, 2008. In the denial notice, the director acknowledged the witness letters and other evidence, but concluded: "The evidence on record does not sufficiently set the alien apart from his peers to such a degree that the impact made, or any future impact to be made, could affect the welfare of the entire nation."

On appeal, counsel submits additional letters and asserts: "Numerous letters have testified to the impact the petitioner/beneficiary has had on the field." Counsel adds that the petitioner has documented international use of the nuclear waste reprocessing technology that he helped to develop in China, and that this evidence shows "a substantial impact on the field." It is not clear what counsel means by "the field," because the record does not indicate that any entity in the United States has employed or sought to employ the petitioner in the field of nuclear waste reprocessing or recycling. Even if we consider the petitioner's "field" to be, broadly, the handling of hazardous waste, the record indicates that the breadth and significance of the petitioner's impact has been diminishing rather than expanding. The record does not indicate that the petitioner has produced any published work since he finished his master's degree in 2003, and there is no objective evidence that the petitioner has more recently been an especially significant figure in the field of environmental remediation, compared to others of similar rank in that field.

The national interest waiver is not a reward for an alien's past achievements, but rather a means by which the United States seeks to secure the services of aliens who will prospectively benefit the United States. The petitioner initially based his waiver application on the importance of environmental remediation, which he indicated he would perform at [REDACTED]. Nevertheless, the

petitioner left Microbac in Kentucky shortly after he filed that petition, to work at KLS in Virginia in a capacity that has nothing to do with environmental remediation. (The petitioner filed the petition in June 2007; correspondence from the petitioner indicates that he “moved to Richmond VA by the end of August” that same year.) Both positions involve chemistry, but there is otherwise little connection between the petitioner’s prior work at Microbac and elsewhere and his later work at KLS. This change in the petitioner’s employment indicates either that the petitioner no longer intends to work in environmental remediation, or else he has been unable to secure employment in that field. Neither of these situations would lead the AAO to conclude that the petitioner merits a national interest waiver on the basis of his environmental remediation work.

Also, we briefly note here that the record shows that KLS operates several regional laboratories to test individual samples. The petitioner has not shown, or even directly claimed, that the work of one chemist at one KLS facility possesses the national scope required by *Matter of New York State Dept. of Transportation*. This observation conforms to the AAO’s broader conclusion that the petitioner’s work and influence are contracting rather than expanding.

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.