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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
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Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: **MAY 18 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:

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, Nebraska 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 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 an alien of exceptional ability in the sciences and a member of the professions holding an advanced degree. The petitioner, an energy services company, seeks to employ the beneficiary as an environmental and safety program manager. 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 job offer requirement would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of previous submissions.

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. A separate finding of exceptional ability would serve no constructive purpose in this proceeding. 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.

In a letter accompanying the initial filing, the petitioner’s Senior Human Resources Generalist, stated:

[The petitioner] is a corporation engaged in providing non-regulated and regulated energy services including gas, water, and electrical utilities to over one million residential and commercial customers in Iowa, Illinois, Minnesota and Wisconsin. . . .

The Environmental and Safety Program Manager position requires that the beneficiary *plan and implement cost-effective environmental and safety/industrial hygiene management plans to ensure compliance with laws and regulations.* The position is responsible for the development, implementation and maintenance of Environmental Management Information System (“EMIS”) for environmental compliance assurance and performance tracking for the company. In addition to these functions, the position must perform Environmental Health and Safety (“EHS”) assessments and audits to assess performance of existing EHS programs.

The intrinsic merit of the beneficiary’s occupation is not in dispute. To establish the national scope of the beneficiary’s work, ██████████ stated:

An effective EMIS system is essential for utility generation companies such as [the petitioner] to comply with its environmental reporting obligations. . . . [The beneficiary’s] approach promises to provide large enterprise companies with a compliance system that can deliver tremendous efficiencies, time-saving and process improvement.

██████████ noted the petitioner’s submission of letters of support from witnesses in New Jersey, Ohio and California as evidence of the national scope of the beneficiary’s work. ██████████ also asserted that the beneficiary’s “work in modifying existing EMIS systems is unlike anything currently being done by other EHS professionals and will have (and has had already) a lasting and substantial effect outside of [the beneficiary’s] immediate community.”

Along with documentation of the beneficiary’s previous employment and his presentations and other work, the initial submission included several witness letters. Apart from one letter from a professor at the University of Toronto, Canada, who mostly discussed the petitioner’s master’s thesis, all of the witnesses are either officials of the petitioning company; officials of Enviance, Inc.; or members of Envision, which is a group composed of users of Envision technology. Given that all of these witnesses have worked with the beneficiary, either for the same company or at Envision, it is not clear how these witnesses show the impact of the beneficiary’s work “outside of [his] immediate community.”

The letters from officials of the petitioning company are generally similar, sometimes using exactly the same language. Two letters both contain this sentence: “[The beneficiary’s] work has demonstrated and continues to demonstrate the value of using an EMIS for enterprise wide environmental compliance and management at larger-sized companies.” Three letters contain the following sentence, or minor variations thereof: “It would be a set back for the company EHS resources especially for Enviance EMIS development and maintenance if [the beneficiary] has to leave the company.”

President and Chief Executive Officer of Enviance, Inc., Carlsbad, California, stated:

[The beneficiary] has made significant contributions to the development of [the petitioner’s] environmental management system, which has been deployed on the

Enviance platform. These contributions have benefited [the petitioner], as well as other power companies that regard his work as powerful and exemplary.

. . . Enviance was the first to develop an Internet-based “on demand” compliance management system, and we are widely regarded as the market leader in this sector. . . . Companies like [the petitioner] have used the Enviance System as a platform on which to implement comprehensive environmental, health and safety management systems. . . . Today the Enviance System is being deployed at over 1,700 facilities in 37 countries.

I had the opportunity to attend [the beneficiary’s] presentation to our 2005 Users’ Conference, which was attended by 46 companies and 70 users. He presented the case study of his company’s pilot-scale implementation of Enviance at three large coal fired generation plants. From the conceptual design to actual system configuration, [the beneficiary] did an excellent job of using Enviance platform in a very comprehensive way. He provided the conference with a superb example of how the Enviance Platform can deliver to large enterprise companies the tremendous efficiencies, time-saving and process improvement that comes with comprehensive compliance automation. . . .

[The beneficiary] has used the modeling capabilities of the system to configure innovative “Basic Emission Blocks.” These blocks make a complex multimedia implementation much easier. . . . [The beneficiary’s] work stands as an important example of how innovative employees can implement the Enviance System to meet the diverse needs of complex facilities operating in the oil & gas, petrochemical, chemical process, pharmaceutical, and mechanical manufacturing industries. . . .

In my opinion, [the beneficiary’s] innovative work inside the Enviance System has established his company . . . as a leader in the deployment of “on demand” technology to meet enterprise-wide compliance management requirements.

[REDACTED], Vice President of Marketing and Sales Operations for Enviance, stated:

[The beneficiary] is currently leading the Enviance Air Compliance ABC (Activity Based Council) which has more than 75 participants from over 30 US-based, Fortune 1000 companies. . . . [The beneficiary] assumed leadership of the Air Compliance ABC because of his unique knowledge and experience with Enviance and within [the petitioning company]. . . .

It is through [the beneficiary’s] efforts that other companies can, in a rather short period of time, take their environmental compliance activities to the next level.

[REDACTED], Senior Manager of the EHS Department at Pfizer, Morris Plains, New Jersey, stated that the beneficiary’s “work is resulting in a significantly less resource-intensive, more accurate and more

rigorous approach to calculating, reporting and analyzing airborne power plant emissions regulated by the Clean Air Act.” ██████████ concluded by stating:

The extent he developed the Enviance system for EHS data and compliance assurance management for his company is a leading example for other companies to follow. It would be a loss of a leading expert in EMIS field if [the beneficiary] has to leave the country. I strongly recommend CIS to grant [the beneficiary] a National Interest Waiver so that he can continue his work in the U.S. on a permanent basis.

Senior Engineer with American Electric Power (AEP), Columbus, Ohio, stated:

AEIP is an energy utility company . . . [with] more than 5 million customers in 11 states. . . . Like [the beneficiary], I also manage an EMIS project for AEP.

. . . He made an effective use of the Enviance platform to configure [the] system for complex emission calculations and reporting needs for extensive . . . regulations. His emission block-based structural approach . . . is a pioneer work which can be adopted by other utilities to compliance assurance and reporting.

██████████ letter concluded with exactly the same passage found at the end of ██████████ letter, quoted above. The same passage, with grammatical corrections (for instance, changing “the extent he developed” to “the extent to which he developed”), appears in a letter from ██████████ of Sempra Energy, San Diego, California.

The witness letters appear to indicate that the beneficiary’s contribution lies not so much in any innovation on his own part, but rather on imaginative use of the existing Enviance platform. The letters do not provide specific data or details to show how the beneficiary’s work has significantly improved safety or environmental compliance at the petitioning company, or the extent to which other companies have implemented the beneficiary’s work.

On March 4, 2008, the director issued a request for evidence, instructing the petitioner to “submit any available additional documentary evidence that, as of the petition priority date, the beneficiary had a degree of influence on his field that distinguishes him from others in your field with comparable qualifications.” The director asked the petitioner to explain “how [the beneficiary’s] utilization of an existing program sets his past and projected achievements at a higher level than others in his program.”

In response, the petitioner submits further documentation regarding the beneficiary’s presentations at conferences and professional gatherings. While such presentations present the opportunity for wider influence, they are not self-evident proof of such influence.

Regarding the beneficiary’s use of existing Enviance software, counsel argued that the beneficiary’s “development and use of Enviance is a stat[e]-of-the-art approach.” Counsel, however, also asserted that “Enviance is a software platform that is configured and designed by its users to adapt to the users’

particular needs,” which seems to indicate that the beneficiary’s modifications of the platform are specific to his employer, and that all users must make custom modifications to suit their particular needs. The observation that other users can adopt the beneficiary’s work is not evidence that other users have actually done so.

Counsel asserted: “EHS professionals from all over the country travel to hear [the beneficiary] speak on the topic of EHS compliance, and specifically, his work in implementing EHS compliance at” the petitioning company. While the beneficiary has spoken at national gatherings, this does not mean that the other attendees traveled to the meetings specifically to hear the beneficiary’s presentations.

Along with copies of some previously submitted letters, the petitioner submitted two new witness letters. [REDACTED] President of the Air and Waste Management Association, Pittsburgh, Pennsylvania, stated that the petitioner “has made significant contributions in EHS field,” but did not identify or discuss these contributions.

an environmental engineer with DTE Energy Services, Ann Arbor, Michigan, provided more details about the beneficiary’s work:

I know [the beneficiary] from interacting with him on the Enviance Activity Based Council (ABCs). . . . [The beneficiary] helped me when I was in the process of setting up Enviance for my company. . . .

The US EPA Toxic Release Inventory . . . (TRI) is an annual report which is compiled and submitted to the EPA if applicable facilities exceed the threshold for the toxic compounds released to the environment. . . .

[The petitioner] configured the TRI system for his company in a way that facility TRI emission Form R reports get prepared automatically in the system by simply loading of fuel and raw material consumption data for the facilities into the system. This comprehensive emission block based approach calculates the emissions released into air, water and waste based on fuel and materials consumptions during a year and loads the data into the US EPA electronic TRI forms within the system. This not only reduces significant amount of time and resources for data manipulation but also brings consistency, accuracy and transparency. Additionally, accumulative emission data reports for the whole company are available centrally for management review and developing emission reduction strategies.

[REDACTED] letter concludes with this passage:

The extent he developed the Enviance system for greenhouse gas (GHG) emission data management for his company is a leading example for other companies to follow. It would be a loss of a leading expert in EHS field if [the beneficiary] has to leave the country.

A nearly identical passage ends [REDACTED] letter:

The extent [the beneficiary] developed the Enviance system for EHS data and compliance assurance management for his company is a leading example for other companies to follow. It would be a loss of a leading expert in EMIS field if [the beneficiary] has to leave the country.

The repeated appearance of similar language throughout this proceeding raises questions about the source of the letters; clearly the witnesses did not write the letters independently.

The director denied the petition on September 30, 2008. The director acknowledged the substantial intrinsic merit of the beneficiary's occupation, but found that the beneficiary's work lacks national scope because "the petitioning entity is clearly regional," with a range covering parts of only four states. The director also asserted that the beneficiary's expertise with the Enviance platform, which he did not create, essentially amounts to advanced training that could be listed on an application for labor certification. The director found that the petitioner had not shown that a waiver of the job offer requirement would be in the national interest.

On appeal, counsel asserts:

[The beneficiary] build a complex compliance tool on simple building blocks, allowing a facility like [the petitioner] (as well as a multitude of other facilities in the oil and gas, petrochemical, chemical process, pharmaceutical, and mechanical manufacturing businesses) to implement a comprehensive system across multiple facilities and plants. Simply put, [the beneficiary's] work was and continues to be critical in order for [the petitioner] to meet compliance obligations and perform emission control planning. . . .

The evidence submitted demonstrates that for the entirety of [the beneficiary's] career, he has developed, from the ground-up, innovative EHS programs. [The beneficiary] leads the Enviance Air Compliance Activity Based Council.

Most notably for purposes of this Petition, though, is [the beneficiary's] influence on the EHS field as a whole. The record is clear that representatives of leading and nationally-known companies unrelated to [the petitioner] are not only using [the beneficiary's] work as a guidepost for their own EHS compliance activities, but are also quick to recognize his pioneering work in the field.

(Citations omitted.) The petitioner submits no new evidence on appeal. Counsel's arguments rest, for the most part, on previously submitted witness letters. Those letters indicate that Enviance has developed a basic software platform, which individual users then adapt to their particular needs. The beneficiary has done this for his employer, and shared some of his ideas with other Enviance users. The

beneficiary's work in this area and his presentations at professional meetings extend his scope beyond the petitioner's limited geographic range. We can therefore find that his work is national in scope.

We cannot, however, find that the beneficiary stands out in his field to an extent that would justify a national interest waiver. We acknowledge that the beneficiary has developed EHS programs, but this appears to be a basic requirement of his job, rather than a singular achievement.

With respect to the beneficiary's expertise with the Enviance platform, exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221.

Although many letters have included passages describing the beneficiary's work as "a leading example for other companies to follow," this is not evidence that other companies have, in fact, followed the beneficiary's example. Also, while it is certainly advantageous for individual Enviance platform users to save time when preparing TRI forms, the petitioner has not persuasively shown that the importance of the beneficiary's work in this area merits a national interest waiver. Simply identifying a benefit arising from the beneficiary's work does not show his eligibility for the waiver. The record indicates that this benefit is mostly restricted to other Enviance clients.

As we explained earlier in this decision, exceptional ability in one's field is not sufficient to qualify an alien for the waiver. Therefore, assertions that the beneficiary has obtained superior results are not automatic evidence of eligibility for the waiver. The petitioner has shown that the beneficiary has made contributions within his field, but the record does not persuasively establish that he is the influential leader that some claim he is.

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.