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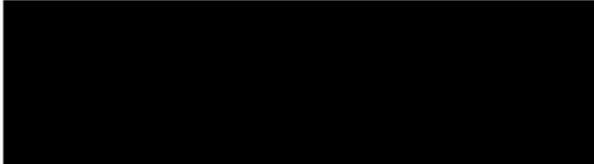
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: LIN 07 230 52778 Office: NEBRASKA SERVICE CENTER Date: OCT 08 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:

SELF-REPRESENTED

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).

W Deadrick
Perry Rhew
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 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. The petitioner seeks employment as a Chartered Marketer. 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 the classification sought, 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, the petitioner claims that the director based the denial on errors and omissions of fact.

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 for the underlying classification sought. 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.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or equivalent sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

The petitioner filed the petition on September 7, 2007. The petitioner’s initial submission consisted of a copy of his master’s diploma from the University of Stirling and evidence that he is a chartered

marketer and a Fellow of the Chartered Institute of Marketing (FCIM). The petitioner did not explain the significance of his membership in a United Kingdom trade association.

On November 20, 2008, the director issued a request for evidence. The director instructed the petitioner to show that his intended work is national in scope, and that that his past record of achievement “justifies projections of future benefit to the national interest.” In response, the petitioner stated:

My planned employment in the US is as a Chartered Marketer. In pursuit of this I have been nominated by members of The Chartered Institute of Marketing to their International Board of Trustees (see attached confirmation). If my petition to USCIS is approved it is my intention of representing the interests of The Chartered Institute of Marketing in the US and US interests on the International Board of Trustees. I am uniquely placed to take up this planned employment as it is only available to Board members. . . .

Beyond FCIM status I have also qualified as a Chartered Marketer in recognition of outstanding practical experience and expertise. . . . I believe these achievements and the documentary evidence provided . . . demonstrate that my proposed position is national in scope, demonstrates a past record of prior achievement that justified projections of future benefit, and establishes my ability to serve the national interest to a substantially greater extent than the majority of my colleagues, and demonstrate to some degree my influence on my field of employment as a whole.

The electronic mail printout informing the petitioner of his election to the CIM Board of Trustees is undated, but the message indicates that the petitioner’s “appointment will commence . . . on Monday 8 December 2008.” There is no evidence, and no reason to presume, that this election took place more than a year earlier, before the September 2007 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Aside from the late date of his election, the petitioner did not show how his position on the CIM Board of Trustees would serve the national interest. He simply stated that this was the case. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

The petitioner submitted CIM documentation showing that, to qualify for the rank of Fellow, “[t]he applicant must be a person of integrity who has a proven record of expertise, experience and success in Marketing Management, Marketing Education or Marketing Consultancy.” In this regard, we note that 8 C.F.R. § 204.5(k)(3)(ii) indicates that a petitioner can establish an alien’s exceptional ability in business by meeting three of six listed standards. 8 C.F.R. § 204.5(k)(3)(ii)(E) refers to membership in

professional associations. The petitioner's CIM fellowship may meet the membership standard, but the petitioner would still need to meet two other standards just to qualify as an alien of exceptional ability in business. Because exceptional ability is not, by itself, sufficient grounds for the waiver, and the petitioner's FCIM title is only partial evidence of exceptional ability, we must conclude that the title is not, on its face, evidence of eligibility for the waiver.

The same logic applies to the petitioner's Chartered Marketer title, "awarded . . . in recognition of outstanding practical experience and expertise," which appears to correspond to certification for a particular profession or occupation under 8 C.F.R. § 204.5(k)(3)(ii)(C).

The director denied the petition on March 9, 2009, stating: "The petitioner has not submitted any convincing evidence that his position would be in the national scope" (*sic*). The director also found that the petitioner's FCIM and Chartered Marketer titles "fail[] to establish that the petitioner has exhibited a substantial degree [of] influence on his field of endeavor."

On appeal, the petitioner states:

The "Decision" . . . incorrectly states that the petitioner failed to establish a substantial degree of influence on his field of endeavour, the reason being "The petitioner submitted evidence of his approved application to become a fellow of The Chartered Institute of Marketing." This is a material error of fact.

In actual fact the documentation submitted included certification of having already achieved Fellowship of The Chartered Institute of Marketing (FCIM). This clearly shows that the reason given by USCIS is factually incorrect.

The petitioner has not shown that this alleged "material error of fact" affected the outcome of the decision. Furthermore, the director referred to an "approved application," meaning that the director clearly did not mistakenly believe the application to be pending or denied. The director evidently referred to a June 9, 2006 letter from [REDACTED] at CIM, informing the petitioner "that your application to become a Fellow of The Chartered Institute of Marketing has been approved." The director's description of this letter appears to be entirely accurate.

The petitioner faults the director for failing to consider the petitioner's seat on CIM's Board of Trustees, but, as we have explained, there is no evidence that the petitioner held this title at the time he filed the petition. He did not mention it at that time, and he did not join the Board until almost a year and a half later. Therefore, even if the petitioner had persuasively demonstrated that "being on the Board of CIM is the greatest degree of influence the petitioner could possibly have in his professional field of endeavour," which we do not concede here, this would not show that the petition was already approvable at the time of filing in mid-2007.

The petitioner discusses "the Governance rules of CIM" and notes that he had previously provided a "web-link to the actual rules" at CIM's web site (<http://www.cim.co.uk>). The petitioner, on whom the

burden of proof rests, is responsible for providing the evidence necessary to support his petition. It cannot suffice for the petitioner simply to refer to outside evidence and tell the director where to find it.

The petitioner asserts that his “mandate as a CIM Board Member is to help US citizens become more employable, improve their education, wages, and longer term career prospects, by educating and certifying them in the field of Marketing, ultimately as Chartered Marketers.” The petitioner has not even established that CIM, a British entity, is active in the United States, or that a comparable United States entity exists that grants the title “Chartered Marketer.”

We note, here, that the petitioner seeks an employment-based immigrant classification, and therefore the waiver should relate to the petitioner’s employment activities. The petitioner has not shown or even claimed that any of his CIM titles are paid positions in and of themselves. If CIM does not employ the petitioner (and will not employ him in the United States), then we cannot grant him an employment-based immigrant classification based entirely on his activities within CIM.

We reject the petitioner’s underlying claim that his high rank in CIM is, itself, sufficient proof of his eligibility for the national interest waiver. The petitioner has submitted minimal evidence in support of his claim, and no evidence at all that CIM or its officials have any impact or influence on marketing in the United States. Therefore, we agree with the director’s finding that the petitioner has not established eligibility for the national interest waiver.

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 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.