U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FEB 13 2001

File: EAC 99 197 53255 Office: Vermont Service Center Date:

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

identification data deleted to prevent clearly unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER, EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition remanded for further action and consideration.

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 seeks to employ the beneficiary as a research scientist. The petitioner did not submit an approved labor certification with the petition. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had 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 that:

(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. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement 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 regulation at 8 C.F.R. 204.5(k)(4)(i) states, in pertinent part:

> Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, [or] by an application for Schedule A designation (if applicable). . . . . To apply for Schedule A designation . . . a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. . . .

The regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part:

> The director may exempt the requirement of a job offer, and thus of a labor certification . . . if such exemption would be in the national interest. To apply for the exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate.

The petitioner, in this instance, has submitted the entire Form ETA-750 rather than just Form ETA-750B. Furthermore, on the Form ETA-750, the petitioner has written the phrase "Schedule A National Interest Waiver." Although this statement is ambiguous, the petitioner's reference to "Schedule A" and submission of Form ETA-750 in its entirety are consistent with an application for precertification under group II of Schedule A.

In denying the petition, however, the director has addressed only the issue of the national interest waiver. On appeal, counsel states "[t]here was never any request for a waiver of the job offer requirement, ONLY for a waiver of the labor certification process." While not entirely clear, this statement can be interpreted as a request for consideration under Schedule A, group II, which requires a job offer but not an individual labor certification.

The evidence is ambiguous, and suggests that the petitioner and counsel are somewhat confused as to the available options. Still, the petitioner's actions are consistent with an application for Schedule A, group II precertification, and the director has not addressed this request.

The petitioner does not specifically contest the director's finding regarding the petitioner's eligibility for a national interest waiver under section 203(b)(2)(B) of the Act. Therefore, the director's new decision need not address the national interest waiver.

Accordingly, we remand this matter for the purpose of a new decision, limited to consideration of the petitioner's application for Schedule A, group II precertification. The director will review all evidence of record prior to entering a new decision. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn in part. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner, Examinations, for review.