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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: EAC 98 235 52074 Office: Vermont Service Center Date: JAN 03 2002

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision 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 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, reopened on the petitioner's motion, and again denied by the center director. The matter is now before the Associate Commissioner for Examinations 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, an early childhood education program, seeks to employ the beneficiary as its education director. 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 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 director did not dispute that the beneficiary 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 Service 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 Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service 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, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 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.

The beneficiary is the education director of the petitioning entity, which operates under the federal Head Start program. Counsel asserts that the beneficiary's "work as the Education Director has a direct impact on the education of low income children," and that as a result of her skills, the beneficiary is "exceptionally qualified" for the position.

Counsel provides general background information about the Head Start program, which establishes the program's intrinsic merit. The program's work with individual children, however, is administered locally; a local Head Start administrator does not

inherently have a national impact. Counsel describes the beneficiary's duties:

> [The beneficiary] has overall responsibility for every aspect of the education component. . . . As an administrator she recruits and screens prospective Teachers and Assistant Teachers. She supervises and evaluates the Teachers and Assistant Teachers. She conducts workshops for the parents. As an educator, [the beneficiary] creates and maintains quality standards of early childhood education designed to meet the emotional, intellectual and social needs of early childhood groups. She develops and plans the educational program . . . and supervises the implementation of planned activities in accordance with Head Start's performance standards.

Counsel asserts:

> [The beneficiary[has worked so effectively to directly involve parents more in the education process of their children, that the [petitioning program] was chosen as a pilot program to begin implementing a family literacy project. This program ran from January 1997 to February 1998. . . . The program was a huge success. The teachers saw a huge improvement in the children. . . . With the increased parental participation the children became more eager to learn.

The record contains no evidence to show that the petitioner's literacy project served as a model for other programs outside of New York City.

Counsel contends that the beneficiary "directly improves the education of children in the United States." The initial documentation, however, indicates that the beneficiary's influence has been almost entirely limited to the petitioning facility; this documentation does not show that the beneficiary has had an influence on the Head Start program at a national level. The fact that Head Start is a national program does not establish or imply that individual Head Start participants or administrators exert national influence over the program.

The initial documentation in general limits the beneficiary's impact to New York City. The petitioner made a presentation at a citywide conference, and an official of the City of New York Administration for Children's Services states that the beneficiary "has been a great support not only to Head Start but to all of New York City's children and families." The petitioner has submitted a copy of a certificate from the Head Start Bureau of the U.S. Department of Health and Human Services, but this certificate does not establish that the beneficiary has been singled out for special attention. The record shows that there are 72 "delegate agencies . . . to provide Head Start services in New York City."

The beneficiary's name has been handwritten onto a pre-printed (and therefore presumably mass-produced) certificate which reads "[i]n appreciation for the years of dedicated service given to the children and families of the Head Start Program." There is nothing on the certificate to indicate that it recognizes anything other than length of service.

In addition to documentation pertaining to the beneficiary's field, the petitioner submits several witness letters. Veronica B. Klujsza, director of the petitioning program, describes the beneficiary's duties and states that the beneficiary has impressed students, parents, and fellow staff members with her skill and innovation. Ms. Klujsza states that the beneficiary "plays a critical role in the on-going success of" the petitioning program, but she does not describe what impact, if any, the beneficiary's work has had outside of "this Flatbush, Brooklyn community."

Professor Luisa Garro of Bank Street College of Education is the petitioner's former advisor and instructor. Prof. Garro states "[b]ilingual children are vastly underserved" in the area of preschool education, and that the beneficiary "is able to help the children acquire pre-reading skills in a comfortable environment." Prof. Garro asserts that the beneficiary "is able to influence the lives of hundreds of children."

Denise M. Ferrera, education director at A.C.E. Integration Head Start in Brooklyn, states that the beneficiary "truly cares about the children" and "always manages to find the positive" even though "[w]orking . . . in drug-ridden, gang oriented communities is stressful and taxing."

Other witnesses, including parents, teachers, and local officials, state that the beneficiary is a valued asset to the petitioner's educational program. Other witnesses attest to the beneficiary's prior teaching activities in Brazil.

The remainder of the initial submission consists essentially of background documentation regarding the petitioner and the overall importance of Head Start and other preschool programs.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted new letters, and arguments from counsel to the effect that the petitioner's initial submission addresses the director's concerns.

Counsel contends that the beneficiary "has had a direct impact on early childhood education throughout the US on both Head Start and other programs, thus evidencing broad based direct impact in her field on a national level." Veronica Klujsza, identified above, asserts that the beneficiary's work has had a national impact, for

example by providing advice to programs in Washington, D.C. and in South Dakota. Other letters show that Ms. Klujsza refers to instances in which the beneficiary's counterparts from centers in Washington and Sioux Falls talked with the beneficiary at professional conferences (which the beneficiary had attended as a trainee) and came away with recommendations for their local programs.

Maria Benejan of Bank Street College of Education states:

> [The petitioning program] is a delegate of the Administration for Children's Services, the largest Head Start grantee nationally. The Administration for Children's Services Head Start delegates are nationally recognized, not only for the large number of children they serve but for the exemplary services they provide. Due to this national recognition, the Administration for Children's Services staff are asked to participate in focus groups, policy revisions meetings and proposal reviews at the national level. . . . [The beneficiary] is frequently asked to participate in these activities for input and recommendations.

The beneficiary's participation at these gatherings appears to result not from her own reputation, but rather from her employer's delegate status. Nevertheless, the beneficiary's involvement at this level would provide a forum for her ideas to be heard at a national level in a formal setting, rather than in chance casual conversations with others in her field.

The director denied the petition, stating "the beneficiary's direct impact is localized and centers on the New York City area." The director acknowledged the beneficiary's attendance at professional gatherings, but found that the only specific, documented "sharing of new ideas" took place during informal conversations between the beneficiary and individual counterparts. The record does not reflect formal adoption of the beneficiary's recommendations on a national level, or that the beneficiary's suggestions to individual programs reach a level that could reasonably be considered national.

The petitioner filed a motion to reopen, citing "new evidence showing that [the beneficiary's] work is in the national interest." Counsel states:

> Specifically, she has been selected as a peer reviewer for the preeminent *NHSA Dialog*, the journal of record in the early childhood intervention area. In addition, she has also been selected as one of three individuals to spearhead a national pilot program in peer play therapy.

Much of the evidence submitted on motion is general documentation regarding highly publicized school shooting incidents in Arkansas and Colorado. Some news articles published at the time suggested that early childhood may be a critical time to prevent psychological trauma that, some believe, can ultimately result in murderous acts such as those that erupted in Jonesboro and Littleton. The beneficiary's play therapy pilot project is designed to "provide emotionally needy children extra attention."

The record appears to indicate that the beneficiary herself did not devise the pilot project; rather, she is one of several educators chosen to test the program which was developed at Columbia University and elsewhere.

Regarding the beneficiary's role as a peer reviewer for NHSA Dialog, a letter from that journal's editor shows that the petitioner was chosen at least in part because she, like the editor who selected her, works in New York City.

On August 30, 1999, the staff of NHSA Dialog invited the beneficiary to submit an answer for a segment entitled "Ask NHSA Dialog." The requesting official stated "do not feel that you must give a definitive answer to the question. Remember, this is your opinion, and in some ways these are rhetorical questions."

Further discussion of the beneficiary's pilot project and work for NHSA Dialog would serve no useful purpose in this proceeding, because the beneficiary was not involved in these activities when the petition was filed. Even if the beneficiary's later involvement in these projects established that her work serves the national interest, that involvement cannot retroactively show that she was already eligible for the waiver when the petition was filed months earlier. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Counsel states that educators in various cities "have called upon [the beneficiary] for advice." The record illustrates that these individuals did not specifically seek out the beneficiary; rather, they met the beneficiary at professional gatherings and, in the course of their conversations, they received useful suggestions from the beneficiary.

The motion includes letters from individuals who have worked directly with the beneficiary, as well as one of her counterparts who has remained in contact with the beneficiary since meeting her

at a July 1998 professional gathering. These letters discuss the above-mentioned projects, as well as information exchanges which appear to be routine at professional gatherings.

The director reopened the petition and again denied it, stating that the petitioner's appointment as a peer reviewer for NHSA Dialog and her work with the pilot project appear to be in very early stages, with no documented results in the record.

On appeal, the petitioner submits a copy of NHSA Dialog (volume 3, number 1, 1999), containing the beneficiary's one-page answer in the "Ask NHSA Dialog" section. Counsel, on appeal, asserts that the beneficiary "has published in the preeminent journal of record which is read by professionals nationwide. Her work is sought after in states throughout the U.S. and abroad." Counsel refers to NHSA Dialog as "the preeminent journal of record," but the journal began publication in late 1998 and the beneficiary's comments were printed in what appears to be the seventh issue of the journal. The petition appears to have been filed before the first issue was published.

Counsel argues that the beneficiary "is one of the top experts in bilingual early childhood education in the U.S. . . . she has had a significant impact in her field." The record contains no objective documentation (such as professional publications or documentation of the beneficiary's appearance as a featured speaker at a major conference) to show that the beneficiary was widely regarded in those terms at the time the petition was filed. If the beneficiary truly is one of the most highly-regarded figures in her field, as counsel claims, then it is not unreasonable to expect evidence to that effect other than letters that the petitioner has solicited especially for this visa petition.

Counsel asserts that the beneficiary "is regularly invited to speak and participate at professional conferences throughout the U.S." Speaking and participating are two very different activities. While the initial record shows the beneficiary played an active role at local New York conferences, her documented involvement at larger national gatherings has been shown to be as a trainee.

Counsel, on appeal, again emphasizes the petitioner's 1999 contribution to a journal, and her participation in a pilot project that began in September 1999, but does not explain how these activities qualify her retroactively for an August 1998 priority date. Activities which the beneficiary had not even begun until well after the petition's filing date can properly be considered only in the context of a newly filed petition. To allow otherwise would effectively condone the premature filing of petitions on behalf of unqualified aliens, on the expectation that the alien will eventually qualify by the time the petition (or, failing that, the appeal) is adjudicated. The petitioner does appear to be

gradually gaining recognition in her field, as well as opportunities to exert national rather than merely local influence. The record, however, does not show that the beneficiary had achieved such stature as of the time of filing.[1]

In sum, while we do not dispute the overall importance of the beneficiary's field of early childhood education, the beneficiary's work appears only very recently to have begun taking on national scope as her duties expand. Even then, national scope does not address the issue of why the standard labor certification process is not suitable in this instance, which would cause the petitioner to seek a waiver. A number of knowledgeable witnesses have stated that the United States needs more educators in her specialty, and a worker shortage is generally a favorable consideration in an application for labor certification.

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, 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.

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[1]These findings should not be construed to imply that a newly-filed petition is guaranteed to be approved, only to defer to well-established case law that requires eligibility to be established as of, rather than long after, the filing date.