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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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ULLB, 3rd Floor
Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: [redacted] Office: Vermont Service Center Date: JAN 18 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, Ver nont Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal and the petitioner filed a motion to reopen. After granting the motion to reopen, the Associate Commissioner, Examinations, affirmed the denial of the petition. The matter is now before the Associate Commissioner on a subsequent motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

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 municipal bond consultant. 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 had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The Administrative Appeals Office, ("AAO"), acting on behalf of the Associate Commissioner, concurred with the director's finding and dismissed the petitioner's appeal on July 14, 1999. The petitioner filed a motion to reopen the AAO's decision on September 9, 1999. On October 3, 2000, after granting the motion to reopen, the AAO affirmed the denial of the petition.

The pertinent statutory and regulatory language appears in the prior AAO decision and need not be repeated here.

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 employment-based immigrant visa petition was filed with the Vermont Service Center on January 14, 1998. In its previous decision affirming denial of the petition on the first motion to reopen, the AAO noted that the "new information" submitted by the petitioner in support of the motion "concerns developments which took place in December 1998 and thereafter." The AAO stated: "The petitioner filed this petition on January 14, 1998, over a year before most of this new evidence came into existence." The AAO cited Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971), in which the Service held that beneficiary's seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. The AAO properly concluded: "Barring certain changes in the law, developments after the filing date cannot retroactively establish the petitioner was eligible as of the filing date."

The AAO, noting a December 1998 letter from Imaamul Haque of the World Bank, raised an additional issue. The AAO stated: "Even if the date of this letter were not an issue, there is no indication that adoption of the petitioner's program is imminent or even probable."

Counsel's second motion to reopen, filed on November 2, 2000, states: "This motion to reopen is being filed to submit new materials, demonstrating that the grounds of the Associate Commissioner's October 3 decision have been overcome by subsequent developments." Counsel contends that Matter of Katigbak is not applicable to the petitioner's case. Counsel states: "There has been no change in [the petitioner's] qualifications since the filing of the January 1998 petition." Qualifications related to the petitioner's eligibility as a member of the professions holding an advanced degree are not an issue here. The sole issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Counsel repeats the same argument addressed in the previous motion regarding an "Indian nuclear proliferation researcher, whose case was approved by the Vermont Service Center, despite the fact that he had not demonstrated that he was responsible for any breakthroughs in his field of professional activity." In the matter cited, the alien was an expert not in municipal bond issues but in nuclear arms proliferation. Because this other matter was approved at the Service Center level, the AAO has never examined its record of proceeding and has no means by which to compare that record to the record in the matter at hand. Certainly, this other unpublished decision does not establish a binding precedent which mandates the approval of every petition for aliens who claim expertise in Indian policy matters.

On the other hand, Matter of Katigbak is a binding precedent which is applicable in the present matter. Counsel's assertion that the alien's "January 1998 petition included a 'record of potential' that is similarly provided by researchers who are approved under the national interest category" merely furthers the argument that future contributions of the petitioner were entirely speculative at the time of filing. The record of proceeding at that time had no demonstrable evidence of the petitioner's significant contributions and achievements in the municipal bond industry.

Counsel seems to have disregarded the AAO's determination regarding the applicability of Matter of Katigbak and once again submits "new information" as additional evidence. The instant motion includes five e-mail messages, a fax, and a letter. This correspondence, dated from January 2000 through September 2000, reflects the further interest of various individuals involved in the petitioner's proposal to the Pakistani government. However, as noted in the AAO's previous decision, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, supra. Therefore, 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). Pursuant to these precedent decisions, the petitioner cannot simply continue to add more and more documentation to an already-adjudicated petition, in hopes of eventually rendering the petition approvable.

Counsel asserts that "recent developments have only confirmed the value of the petitioner's contributions." It appears from this statement that counsel is acknowledging that up until submission of the "new evidence" in support of the instant motion, the petitioner has had "no demonstrable prior achievements" of value to the municipal bond industry. Eligibility for the national interest waiver is demonstrated by establishing the petitioner's individual achievements and significant contributions to her industry. We note that the entire record of proceeding reflects little formal recognition of the petitioner's work, arising from various groups taking the initiative to recognize the petitioner's contributions, as opposed to letters and e-mails in which the petitioner took the initiative of selecting individuals expressly for the purpose of viewing her proposals. The "recent developments" confirming the "value of the petitioner's contributions" to which counsel refers include five e-mail messages, a fax, and a letter that are all related to the petitioner's pending proposal before the Pakistani government. Even if these items were to be considered, they are insufficient to demonstrate the "value of the petitioner's contributions" to the municipal bond industry. While relevant to her pending proposal, they do not constitute evidence of the petitioner's proven achievement and contributions of notable significance to the municipal bond industry. On a motion to reopen filed almost three years after the initial petition, there remains no evidence of the actual implementation of the petitioner's proposal in Pakistan.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. Without evidence that the petitioner has been responsible for significant achievements in the municipal bond industry, we must find that the petitioner's assertion of prospective national benefit remains speculative at best. 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.

ORDER: The Associate Commissioner's decision of October 3, 2000 is affirmed. The petition is denied.

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