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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]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 1 4 2003

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]

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

Elizabeth Heyrand

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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 initially indicated that she seeks employment as an educator at the Regional AIDS Interfaith Network of Central Missouri ("RAIN"). 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 has 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.
> >
> > > (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. 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, 22 I&N Dec. 215 (Comm. 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.

Counsel quotes RAIN's mission statement:

> To provide nonmedical, compassionate care to families and individuals in Central Missouri who are affected with or affected by HIV/AIDS.
>
> To provide prevention education in order to eliminate the spread of HIV/AIDS in Central Missouri.

RAIN's own letterhead describes the organization as "a regional response to a world problem."

Counsel describes the petitioner's work:

> In her position, [the petitioner] would be responsible to develop and implement peer education programs to reduce the spread of HIV/AIDS in the Central Missouri schools and communities. [The petitioner] would also be responsible for giving presentations on HIV/AIDS to local shelters, clubs, organizations, substance abuse centers and other appropriate facilities. She will also develop future educational projects and community interventions for RAIN.

Teresa Goslin, executive director of RAIN, states:

 [redacted]

> [The petitioner] has already successfully initiated one program called Basic Education and Awareness for Teens ("Project Beat") for our organization. This program was funded in 1998 by a grant from the Centers for Disease Control and Prevention. [The petitioner's] extensive background and experience is invaluable and needed in our efforts to control the spread of HIV/AIDS in our most vulnerable communities. . . .
>
> It is very difficult, especially in the rural community of Central Missouri and as a non-profit agency, to find an individual with both [the] qualifications and a level of commitment that [the petitioner] has demonstrated."

The employer's inability to find a qualified worker in the local geographic area is, however, the exact situation for which labor certification exists.

Counsel asserts that Project BEAT "has served as a model for future projects" but does not elaborate on crucial details such as who has adopted the project as a model, and how widely it has been or will be implemented.

Documentation in the record shows that the petitioner presented a paper, "The Potential Impact of Successful Intervention: School-based HIV/AIDS Education Programs to Empower Children in Zimbabwe," at the Second International Conference on Women in Africa and the African Diaspora: Health and Human Rights, October 1998. Conference presentation of research work can give the petitioner's work national or international impact, through its dissemination to other researchers. This paper, however, was prepared in the context of the petitioner's ongoing studies as a Ph.D. candidate at the University of Missouri-Columbia. The petitioner did not yet work for the petitioner at the time of the conference. There is no evidence that, as an educator for RAIN, the petitioner will conduct original research, or distribute her findings to a national audience via conferences or publications. That the petitioner, like many doctoral candidates, has conducted research and prepared scholarly papers does not show that her work with RAIN has had or will have an impact that is national in scope.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response, counsel argues "[i]t is without question that the effort to stem the spread of HIV/AIDS is national in scope." At issue is not the larger issue of HIV/AIDS prevention, but whether the petitioner's occupation will have a national impact on that problem. *See id.* at 217, n. 3 for a discussion of occupations that address national concerns, but the impact of which is "so attenuated at the national level as to be negligible." The materials in the record repeatedly indicate that the efforts of RAIN (the "R" in the acronym stands for "Regional") are focused on central Missouri. Certainly the national effort to fight HIV/AIDS must operate through smaller organizations at the local level, but it is also true that an individual working in a national capacity is better poised to have a national impact than a worker at a local organization. The petitioner has not persuasively shown that her work with RAIN has had, or is reasonably certain to have, a national impact.

Counsel asserts that the petitioner's background gives her a fuller understanding and better tools to deal with her work than RAIN would likely find in a U.S. worker, but this assertion is tangential to the issue of how much impact the petitioner's work has had, or is likely to have, outside of central Missouri.

Counsel claims that the "labor certification requirement will further delay the delivery of the much needed services in central Missouri." Counsel does not explain how labor certification would automatically cause such delay. The regulation at 8 C.F.R. § 214.2(h)(16)(i) states, in pertinent part:

> An alien may legitimately come to the United States for a temporary period as an H-1 nonimmigrant and, at the same time, lawfully seek to become a permanent resident of the United States provided he or she intends to depart voluntarily at the end of his or her authorized stay. The filing of an application for or approval of a permanent labor certification, an immigrant visa preference petition, or the filing of an application for adjustment of status for an H-1 nonimmigrant shall not be a basis for denying:
>
> (A) An H-1 petition,
>
> (B) A request to extend an H-1 petition,
>
> (C) The H-1 alien's application (and that of their dependent family members) for admission. . . .

Pursuant to the above regulation, the alien could permissibly work as an H-1B nonimmigrant while an application for labor certification was pending. While a variety of factors may have a bearing on each individual case, an application for labor certification would not automatically prohibit the petitioner's continued employment or delay the execution of her duties.

The petitioner submits various materials of uncertain significance. A brochure from a 2001 conference held in Tuskegee, Alabama does not identify the petitioner as a presenter at this conference. Traveling to Alabama simply to attend the conference does not cause the petitioner to slow or halt the spread of HIV/AIDS outside of central Missouri.

The record contains materials about Rae Lewis-Thornton, who suffers from AIDS and travels the country to provide education and inspiration. While RAIN arranged for [redacted] to travel to Missouri from Chicago to appear at an event, this by no means shows that [redacted] national impact is attributable to RAIN. Rather, it appears that RAIN arranged for her appearance based on her already prominent standing. If anything, the materials about Ms. Lewis-Thornton demonstrate the means by which an AIDS educator can have an impact beyond the strictly local level.

The petitioner submits a report, *2000 Epidemiological Profiles of HIV Disease and STDs in Missouri*, issued by the Missouri Department of Health. We do not dispute that HIV/AIDS is a significant problem in Missouri, as it is in many other locales, but unless this report documents a significant drop in infection rates in central Missouri, attributable to the petitioner's work, then the report serves only as background documentation.[1] AIDS educators do not, as a class, qualify for a blanket waiver of the job offer/labor certification requirement.

The petitioner also submits letters indicating that, in early 2001, she inquired about possible employment with the Missouri Department of Health. Even if the petitioner were to secure a job with that office, and demonstrate that her job with a state agency had national rather than statewide impact, that change of circumstances would not render the existing petition approvable. 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 Izummi*, 22 I&N Dec. 169 (Comm. 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. The petitioner's waiver application was predicated on the claim that she would serve the national interest by working as the education coordinator for RAIN.

The director denied the petition, finding that the petitioner's own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director asserted that the petitioner's work "may be characterized as national in scope" but offered no elaboration upon this finding. The petitioner had, in the past, published and presented work pertaining to HIV and AIDS, but the record does not show that the petitioner has continued to produce work for mass dissemination in this way.

On appeal, counsel protests the director's "undue rigidity" in denying the waiver application. Counsel does not elaborate on this point. The denial of a given waiver request does not, by itself, demonstrate "rigidity," and counsel has not identified any pattern beyond this one petition that would indicate such rigidity.

Counsel states "[t]he standard set by the Service to deny petitioner's petition is not derived from case law or the regulations." Counsel also states "[t]he petitioner provided substantial information concerning the HIV/AIDS epidemic in Missouri obviating the need for a labor certification." Counsel, however, fails to identify any "case law or . . . regulations" that indicate that "information concerning the HIV/AIDS epidemic in Missouri obviat[es] the need for a labor certification." As we have already cited above, case law, in the form of *Matter of New York State Dept. of Transportation*, a binding precedent decision, states that purely local impact on a national problem does not qualify an alien for a waiver.

Counsel appears to contest *Matter of New York State Dept. of Transportation* itself, stating that it is inconsistent with the intent of Congress. By law, the director does not have the discretion to

[1] A graph on page 14 of the report shows no change in the number of newly reported HIV infections in Missouri from 1999 to 2000.

reject published precedent. See 8 C.F.R. § 103.3(c), which indicates that precedent decisions are binding on all Service officers. To date, neither Congress[2] nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error. Counsel repeatedly criticizes the director's standards, but offers no clear or defensible alternative standards to replace those upon which the director relied in rendering the decision. It remains that, by law, an alien seeking admission as a member of the professions holding an advanced degree must generally obtain a labor certification, and the burden is on the petitioner to establish that it is in the national interest to waive that requirement. We note that the statute as originally enacted did not make the waiver available to advanced degree professionals; the waiver was, at first, limited to aliens of exceptional ability. Only a later technical amendment[3] widened the availability of the waiver. Given this legislative history, there is no support for counsel's argument that Congress originally intended to apply the waiver to aliens such as the petitioner, seeking admission as an advanced degree professional.

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.

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[2] Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *Matter of New York State Dept. of Transportation*. The narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision. Congress' creation of a blanket waiver of this kind also reinforces the Service's position that the original wording of the statute does not imply such blanket waivers; otherwise the new law pertaining to physicians would have been redundant.

[3] Section 302(b)(2) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (P.L. 102 - 232, Dec. 12, 1991, 105 Stat. 1743)