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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: OCT 04 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. After receiving correspondence from the petitioner, the AAO moved to reopen the proceeding, and issued a new decision affirming the denial of the petition. The matter is now before the AAO on a motion to reconsider. The AAO will grant the motion and affirm the denial of the petition.

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 an attorney. The petitioner did not submit an approved labor certification with the petition. The director found that the petitioner did not qualify for classification as a member of the professions holding an advanced degree, and came to no conclusion regarding an alternative finding that the petitioner qualified an alien of exceptional ability. The director found that the petitioner had not shown 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 AAO first found that the petitioner had failed to establish sufficient work experience, and then found that the petitioner's intended work as an attorney lacks national scope.

On motion, the petitioner maintains that the director and the AAO have mischaracterized his petition.

While the procedural history of this matter has not always been straightforward, in the final analysis the petitioner has not presented a coherent, legally sufficient claim for the benefit sought. The AAO seeks to explain this conclusion with the following discussion.

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.

IMMIGRANT CLASSIFICATION

The petitioner filed the Form I-140 petition on March 14, 2006. Throughout this proceeding, there has been some confusion as to whether the petitioner seeks classification as a member of the professions holding an advanced degree, or as an alien of exceptional ability in the sciences, the arts, or business. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(2) includes the following relevant definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
>
> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The director, in the June 22, 2007 denial notice, stated: "Since the beneficiary does not possess an advanced degree or its equivalent, it is your claim that he/she qualifies for classification under Section 203(b)(2) of the Immigration and Nationality Act based on his/her exceptional ability." The director included this language in error, because the record clearly establishes that the petitioner qualifies as a member of the professions holding an advanced degree. The record shows that the petitioner holds a J.D. degree from St. John's University, New York, New York, and is a qualified attorney belonging to the New York State Bar Association. Section 101(a)(32) of the Act includes "lawyers" in a list of professions.

NATIONAL INTEREST WAIVER

The AAO now turns to the issue of the job offer requirement, and exemption from that requirement in the national interest of the United States. The USCIS regulation at 8 C.F.R. § 204.5(m)(4) states:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

> (ii) *Exemption from job offer.* The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if 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, as well as evidence to support the claim that such exemption would be in the national interest.

Part 2 of the Form I-140 features a nine-item checklist of petition types. The petitioner checked item d, "A member of the professions holding an advanced degree or an alien of exceptional ability (who is **NOT** seeking a National Interest Waiver)" (emphasis in original). The petitioner did not check item i, "An alien applying for a National Interest Waiver (who **IS** a member of the professions holding an advanced degree or an alien of exceptional ability)" (emphasis in original).

The petitioner's initial submission contained no mention of the national interest waiver. Instead, the petitioner stated: "The requirement of labor certification is not applicable here because the petition is based on self-employment." No provision in the statute, regulations, or case law automatically exempts an alien from the job offer requirement merely by virtue of self-employment.

On July 3, 2006, the director issued a request for evidence (RFE), instructing the petitioner to submit an approved labor certification. The petitioner, in response, cited case law from the Board of Alien Labor Certification Appeals showing that a self-employed alien cannot obtain a labor certification for himself, but this does not imply that a self-employed alien may simply disregard the job offer requirement at section 203(b)(2)(A) of the Act. The petitioner has argued: "There is no legislative intent for self-employment business [to] undergo the requirement of a labor certification." Nevertheless, there is also no legislation that declares self-employment to be full and sufficient grounds for classification as an employment-based immigrant.

At that point, the director could have denied the petition on one or both of two grounds. An alien may not self-petition as member of the professions holding an advanced degree or an alien of exceptional ability unless that alien also seeks a national interest waiver. *See* 8 C.F.R. § 204.5(k)(1). Because the self-petitioning alien in this proceeding indicated that he "is **NOT** seeking a National Interest Waiver," the director would have been justified in denying the petition for that reason.

Furthermore, DHS Delegation Number 0150.1 (effective March 1, 2003) established the AAO's jurisdiction to adjudicate appeals. Under that authority, the AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). Subsection (B) of that regulation, in turn, permitted appeals of denials of employment-based petitions filed under 8 C.F.R. § 204.5, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor." Here, the petitioner filed the petition without a labor certification and denied that he sought a waiver. Had the director chosen to deny the petition for that reason, the petitioner would not have been entitled to appeal the decision.

For whatever reason, whether out of courtesy or error, the director chose neither of the above options. Instead, the director assumed that the petitioner sought a national interest waiver and proceeded accordingly.

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 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 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show 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.

On February 1, 2007, the director issued a second RFE, instructing the petitioner to submit evidence to meet the three-pronged national interest test published in *Matter of New York State Dept. of Transportation*. In response, the petitioner stated:

> [T]he following concepts and nomenclature 1) national interest waiver, 2) labor certificate exemption and 3) the ineligibility for a labor certification should not be entangled or commingled in the process to scrutinize this petition.
>
> . . . Logically and consequently, the issue of national interest waiver is not applicable since it is a secondary issue that can only be raised after the self employment/petitioner passed the threshold of eligibility to file a labor certification application.
>
> Since the self employment/petitioner has failed to pass the threshold of eligibility, there should be no further proceeding to examine the petition in light of a national interest

> waiver or a labor certificate exemption because said waiver or exemption is inapplicable in the first place.

By the above language, the petitioner essentially refused to pursue a national interest waiver, claiming that it should only apply to aliens for whom labor certification is a realistic option in the first place. The director, nevertheless, continued to treat the petition as though it included an application for a national interest waiver.

Binding precedent directly addresses the issue of self-employers' inability to obtain labor certification:

> The Service acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

Matter of New York State Dept. of Transportation, 22 I&N Dec. at 218 n.5. The same decision indicates that "Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process." *Id.* at 223. There is simply no basis for the petitioner to declare that, as a self-employed alien, the job offer requirement does not apply to him and he can therefore claim eligibility with no further requirements.

The petitioner noted that two different law firms applied for labor certifications on his behalf, and stated that "very few employers . . . have the patience to wait at least three or more years to get a labor certificate." The petitioner did not disclose whether or not the Department of Labor approved those applications, but his filing of a new petition on his own behalf implies that he no longer intends to work for either of those former employers. The passage is, nevertheless, instructive because it shows the petitioner's awareness that a law firm may seek labor certification on behalf of an attorney.

The petitioner then continued with several observations that are not relevant to the matter at hand, such as his daughter's recitation of the Pledge of Allegiance at school; the assertion that his family recently converted to Christianity and fears persecution (but will not apply for asylum because of the "incredibly high" denial rate); and general assertions about human rights and the value of small businesses. These claims (which the petitioner has repeated in numerous successive submissions) may explain the petitioner's motives in seeking immigration benefits, but they do not set the petitioner apart from other attorneys to show his eligibility for the national interest waiver.

The petitioner submitted copies of newspaper articles about the economic benefits of immigrant-owned businesses. There exists no blanket waiver for alien business owners, and these materials do not show that the petitioner has had a greater impact than others in that category. Another article indicated that

many intending immigrants require legal assistance but cannot afford it. The petitioner had previously expressed his intention to provide "legal services such as consultation, representation for immigrants and non-immigrants . . . esp. for those who are low-income minorities."

The director denied the petition on June 22, 2007, stating that the petitioner had not shown that low-cost legal services would be unavailable to aliens in the New York metropolitan area in the petitioner's absence, or that the petitioner's legal work has had significant impact or influence in the practice of law. The director acknowledged the petitioner's assertion that a self-employed alien should not have to provide a labor certification, but the director stated that the petitioner's opinions do not affect the law or how USCIS enforces it.

The petitioner appealed that decision on July 23, 2007, repeating the assertion that, because he is ineligible for labor certification, "there should be no further proceeding to examine the petition in light of national interest waiver or labor certificate exemption" (emphasis in original). The petitioner still did not explain how self-employment excuses him from the statutory job offer requirement.

The petitioner asserted: "It can be taken as judicial notice that there is shortage of affordable lawyers who [are] providing affordable legal services to new and low income immigrants in this region and this country. . . . In 2006, in New York City, the pro bono legal service work provided can only meet 20% of the needs" (emphasis in original). *Matter of New York State Dept. of Transportation* contains the observation that *pro bono* legal work by an individual attorney lacks national scope. *Id.* at 217 n.3.

Repeating the assertion that former employers have sought labor certifications on his behalf, the petitioner stated that he "could be eligible for adjustment according to section 245(i) of the INA even if you may deny this self-employed petition on other ground[s]."

Section 245(i) of the Act, 8 U.S.C. § 1255(i), states, in pertinent part:

Adjustment of Status for Aliens Physically Present in the United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –

(A) who –

(i) entered the United States without inspection ; or
(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary . . . of –

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001

* * *

> (C) who, in the case of a beneficiary of a petition for classification . . . that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000 [enacted December 21, 2000];

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application . . . .

Section 245(i) of the Act permitted certain aliens who were physically present in the United States on December 21, 2000, and who were otherwise ineligible to adjust their status, such as aliens who entered the United States without inspection or failed to maintain lawful nonimmigrant status, to pay a penalty and have their status adjusted without having to leave the United States. Section 245(i) of the Act expired as of April 30, 2001, except for those aliens who are "grandfathered." The regulatory definition of a "grandfathered alien" at 8 C.F.R. § 245.10(a)(1)(i) included "an alien who is the beneficiary . . . of . . . [a]n application for labor certification under section 212(a)(5)(A) of the Act that was properly filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001, and which was approvable when filed."

The regulation at 8 C.F.R. § 245.10(a)(3) states:

> *Approvable when filed* means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act . . . , the qualifying petition . . . was properly filed, meritorious in fact, and non-frivolous ("frivolous" being defined herein as patently without substance). This determination will be made based on the circumstances that existed at the time the qualifying petition or application was filed.

However, section 245(i) relief applies to adjudication of a Form I-485 adjustment application, not to adjudication of the underlying immigrant petition. Specifically, section 245(i)(2)(A) of the Act mandates that an alien seeking section 245(i) relief be "eligible to receive an immigrant visa." *See INS v. Bagamasbad*, 429 U.S. 24, 25 n. (1976) (per curiam); *Lee v. U.S. Citizenship & Immigration Servs.*, 592 F.3d 612, 614 (4th Cir. 2010) (describing the legislative history of 8 U.S.C. § 1255(i)).

The law does not require the approval of every grandfathered immigrant petition, nor does it exempt grandfathered aliens from the petition process and allow them to proceed directly to the adjustment phase. In order to seek relief under section 245(i) of the Act based on classification under section 204 of the Act, the alien in this case must first have an approved immigrant petition and an approvable when filed immigrant petition or labor certification filed on or before April 30, 2001. The petitioner's claim to be a grandfathered alien under section 245(i) of the Act has no effect on the adjudication of any petition filed on his behalf; status as a grandfathered alien is relevant only at the adjustment stage, which the petitioner has not yet reached.

The AAO dismissed the petitioner's appeal on December 8, 2009. The AAO did not discuss any of the above issues. Instead, the AAO stated:

> The director determined that the petitioner failed to demonstrate that he possessed the requisite experience for the position beginning on the priority date.
>
> On appeal, the petitioner merely stated that he had the requisite experience for the position.

The discussion in the December 8, 2009 dismissal order mischaracterized both the ground for denial, and the petitioner's response on appeal. The AAO, in that notice, failed to provide an accurate summary or discussion of the issues in dispute.

On December 14, 2009, the petitioner stated: "a glaring error has been made concerning the basic facts. . . . Therefore, I treat your decision dated December 8, 2009 as an RFE." The petitioner complained that the AAO did not issue an RFE while the appeal was pending. While the AAO reserves the right to request additional evidence when circumstances warrant, there is no requirement that the AAO must routinely issue such notices. Rather, the presumption is that the record ought to be complete when the AAO receives the appeal (hence the information included on the Form I-290B Notice of Appeal, advising the petitioner of a final opportunity to supplement the record with a brief and/or evidence).

The petitioner submitted copies of numerous documents, showing that he is a qualified attorney who has participated in several cases. The petitioner did not, at that time, claim eligibility for the national interest waiver. Instead, he intended his submission to establish his experience as an attorney, because the AAO raised the issue of experience in its December 8, 2009 decision.

On February 12, 2010, the AAO reopened the petition on its own motion and again dismissed the petitioner's appeal. In the decision, the AAO stated: "The AAO finds that the beneficiary does provide affordable legal services to low income immigrants, but that a waiver of the labor certification [requirement] would not benefit the country to a scope of national proportions."

On February 24, 2010, the petitioner filed a motion to reconsider the AAO's decision. The petitioner argues that he qualifies for classification under section 203(b)(2) of the Act. At this time, the AAO acknowledges that the petitioner is clearly a member of the professions holding an advanced degree. Nevertheless, the plain language of the statute indicates that such aliens are subject to the job offer requirement (including labor certification) unless it is in the national interest to waive that requirement.

The petitioner once again raises "the peculiar fact that . . . in this case the petitioner/employer and the beneficiary/employee is the same person" (emphasis in original). The petitioner argues at length that it would serve "little practical purpose" to hold him to the labor certification requirement. Once again, the petitioner cites no statute, regulation, or case law to show that a self-employed alien is exempt from the statutory job offer requirement. USCIS and its employees must act within the confines of the law, and

USCIS has no authority simply to disregard the job offer requirement merely because the petitioner is self-employed. The law applies to the petitioner, notwithstanding his repeated, emphatic disagreement with that law. Congress has passed no statute, and USCIS has published no regulation, that automatically entitles a self-employed alien to an immigrant visa. There the discussion ends.

An alien cannot self-petition under section 203(b)(2) of the Act unless the alien seeks a national interest waiver. Throughout this proceeding, the petitioner has occasionally listed the benefits of his work, but has repeatedly and consistently denied that he seeks the waiver. Therefore, there is no viable basis for the petition. The AAO, in this latest decision, has endeavored to clear up some of the confusion resulting from prior adjudicative errors. In the final analysis, a self-petitioning alien seeks classification as a member of the professions holding an advanced degree, without either a labor certification or a national interest waiver. The benefit that the petitioner seeks simply does not exist under current law. The AAO must, therefore, affirm the denial of the petition.

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.

ORDER: The appeal is dismissed.