U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-R-L-

DATE: SEPT. 15, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a small business owner, seeks classification as an individual of exceptional ability. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is normally attached to this immigrant classification. *See* § 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director, Texas Service Center, denied the petition and two subsequent motions. The Director found that the Petitioner did not qualify for classification as a member of the professions holding an advanced degree, and that he had not established that a waiver of a job offer would be in the national interest.

The matter is now before us on appeal. In his appeal, the Petitioner argues that he qualifies as an individual of exceptional ability and satisfies the national interest waiver requirements.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification normally requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

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) National interest waiver. . . . the Attorney General[1] 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.

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).

Matter of New York State Department of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must demonstrate that he or she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he or she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, a petitioner's assurance that he or she will, in the future, serve the national interest cannot suffice to establish prospective national benefit. *Id.* at 219. Rather, a petitioner must justify projections of future benefit to the national interest by establishing a history of demonstrable achievement with some degree of influence on the field as a whole. *Id.* at 219, n.6.

II. ANALYSIS

Although the Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, seeking classification as an individual of exceptional ability in business, the Director focused on whether the Petitioner qualified as a member of the professions holding an advanced degree. The Director

[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

determined that that the evidence provided was not sufficient to establish that the Petitioner held an advanced degree, as an advisory evaluation of his education credentials was not submitted. The submitted evidence reflects, however, that the Petitioner has met at least three of the six exceptional ability standards under the regulation at 8 C.F.R. § 204.5(k)(3)(ii). For example, the Petitioner provided academic records, letters and employment verifications showing more than ten years of full-time experience, occupational certifications, and membership in professional associations that satisfy the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (C), and (E). In addition, the documentation offered was commensurate with a degree of expertise significantly above that ordinarily encountered among small business contractors. For instance, the Petitioner has accrued 20 years of experience in his field, received a Master's degree in Business Administration, and has earned various noteworthy occupational certifications such as Registered Communications Distribution Designer (RCDD). Accordingly, the Petitioner qualifies for the underlying classification as an individual of exceptional ability in business. 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 according to the three-pronged analysis set forth in *NYSDOT*.

Pursuant to section 203(b)(2)(A) of the Act, individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. *NYSDOT*, 22 I&N Dec. at 218, 222. Therefore, whether a given individual seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that individual cannot qualify for a national interest waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his field of expertise. The national interest waiver is an additional benefit, separate from the classification sought, and therefore eligibility for the underlying classification does not demonstrate eligibility for the additional benefit of the waiver.

The Petitioner proposes to continue his work as chief executive officer (CEO) and owner of [redacted] d.b.a. [redacted] a telecommunications and information technology systems contracting company in the [redacted] region of Texas. [redacted] installs structured cabling, school intercom systems, paging systems, video surveillance, access control systems, and telephone systems. In addition, the company offers networking, outsourcing, and design services. The submitted documentation shows that the Petitioner's work as an entrepreneur and owner of a small business that provides cabling, networking, security, and telecommunications services to its customers is in an area of substantial intrinsic merit. Accordingly, the record supports the Director's determination that the Petitioner meets the first prong of the *NYSDOT* national interest analysis. The two findings at issue in this matter are (1) whether the Petitioner established that the benefits of such work are national in scope as required under the second prong of the *NYSDOT* national interest analysis, and (2) whether the Petitioner demonstrated that his past record of achievement is sufficient to meet the third prong.

The Director determined that the scope of the Petitioner's work, and his impact and influence on the field did not satisfy the second and third prongs of the *NYSDOT* test. Specifically, the Director noted that the Petitioner's business activities did not have a substantial impact beyond the region where he

worked, and that the record lacked specific examples of how the Petitioner's contributions have influenced the field.

With regard to the national scope of his proposed benefit, the Petitioner contends that providing information technology systems and related services is national in scope because "[I]nternet access is considered interstate commerce." The Petitioner submits a 2015 news release from the Federal Communications Commission (FCC) entitled "FCC Adopts Strong, Sustainable Rules to Protect the Open Internet." The news release concerns new rules for fixed and mobile broadband that protect a fast, fair, and open Internet, but it does not focus on contractors such as the Petitioner whose work helps enable his local clients' online connectivity. Furthermore, simply engaging in interstate commerce does not, without more, indicate that a company's benefits are national in scope. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 85 S. Ct. 348, 358, 13 L. Ed. 2d 258 (1964) (holding that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination"). Although the Petitioner's company may provide Internet access to its local clients, the FCC's regulation of the Internet as interstate commerce does not alone establish the national scope of his specific business activities.

The Petitioner offers a letter from of a stating that his company hired "to provide networking and telecommunications services in Texas" and that the services allowed his company "to communicate and interact with suppliers, clients and corporate offices in the states of Illinois and North Carolina." The Petitioner's appellate submission includes additional letters from companies located in Texas such as the and The letters' authors all indicate that provided cabling, networking, and telecommunication services that "allowed [their companies] to access a broad scope of information, but more importantly, communicate and interact" with suppliers, clients, corporate offices, donors, or consultants from across the country. None of the authors claimed their companies' online communications and interactions were nonexistent or limited prior to contracting services. While the Petitioner has improved his customers' communications systems, there is no indication that his work will have any national implications beyond the companies with which he conducts business.

In addition, a July 2013 letter from mentioned that provided "networking, security, communications, and sound" contract work for the Networking Operating Center in Texas. Furthermore, a July 2013 letter Project Manager, identified as a vendor "in the that performed work for the and school districts. noted that installed systems that "have helped the schools and their students to be more secure (Surveillance System), better communicated (Intercom System) and more efficient in their classroom teaching (Lightspeed

System)." The Petitioner argues that his company's projects for the aforementioned school systems "impart national-level benefits."

The Petitioner provides 16 purchase orders and invoices from his suppliers and clients reflecting that conducts or generates business in multiple states scattered across the United States. For example, the Petitioner submitted invoices billed to from in Arizona reflecting total charges of $171.80 and from in Wisconsin reflecting charges of $1,578.19. The Petitioner contends that such invoices are evidence that he and his company "have a national impact on the U.S. economy." With respect to organizations outside of Texas with which conducts business, the economic impact of sales and purchases affecting individual organizations does not become "national in scope" based solely on their diverse locations. The Petitioner has not shown that his company's level of economic activity has a national effect.

The Petitioner indicated that his work as an entrepreneur and owner of offers a national benefit through the creation of job opportunities for U.S. workers. Specifically, the Petitioner claimed that he "built the company up from a 3 man operation into a successful business that brings in over $1 million dollars in annual revenue with 30 employees and contractors." An unsigned copy of Form 1120, U.S. Corporation Income Tax Return, for 2012 reflected "gross receipts or sales" of $870,540 and "salaries and wages" of $63,427. On April 19, 2016, we issued a request for evidence (RFE) asking the Petitioner to "provide objective documentary evidence to support [his] statements regarding sustained record of growth and job creation." The Petitioner was requested to submit "official records from the Internal Revenue Service (IRS) and the Social Security Administration (SSA) reflecting the number of employees and contractors compensated by . . . and the amount of such compensation." Instead, the Petitioner provided uncertified tax documentation prepared by his company for submission to the IRS. The documentation offered reflects payments by to its workers over a nine year period:

	IRS Forms W-2, Wage and Tax Statement for Employees	IRS Forms 1099-MISC Miscellaneous Income for Contractors	Total Yearly Remuneration
2007	3 totaling $10,343.24	2 totaling $46,726.94	$57,070.18
2008	3 totaling $23,693.70	2 totaling $14,310.00	$38,003.70
2009	4 totaling $12,955.46	2 totaling $33,189.25	$46,144.71
2010	7 totaling $33,065.24	7 totaling $49,411.01	$82,476.25
2011	7 totaling $77,613.85	15 totaling $101,120.22	$178,734.07
2012	10 totaling $92,563.49	22 totaling $129,791.49	$222,354.98
2013	16 totaling $150,732.26	27 totaling $234,933.21	$385,665.47
2014	18 totaling $163,552.89	21 totaling $134,729.92	$298,282.81
2015	13 totaling $197,276.03	17 totaling $135,671.18	$332,947.21

The Petitioner argues that the national scope of his "business is evident because the company has created U.S. jobs in the which is one of the poorest regions in the United States."

For example, a December 2013 letter from owner of indicated that his company "subcontracted to install the structured cabling at the and that the project generated "12 full time jobs during the contract duration." A May 2016 letter from explains that he "assigned six full time electricians to perform . . . tasks to support the scope of work for [the Petitioner's] company," which also utilized six workers on the project. The Petitioner submits a graph utilizing data compiled by the Federal Reserve in showing that the unemployment rate in Texas from July 2011 – May 2016 was about three percentage points higher than the unemployment rate in the state of Texas. In addition, the Petitioner provides information from reflecting that the average hourly rate for a cable installer/repairer in Texas is $10.64. The Petitioner offers a pay rate chart for "technicians" and "helpers" indicating that they receive hourly compensation that is about 20 percent higher than that of other cable installers/repairs and Texas minimum wage recipients.

We note that Congress has established the EB-5 program to bring new investment capital into the country and to create new jobs for U.S. workers. *See* section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5). This classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.

The Petitioner argues that "the is underserved with respect to information technology systems providers" and that there are no RCDD-certified individuals in his region. The record includes a certificate showing that the Petitioner received his RCDD designation in October 2011. Information provided about the certification indicates that RCDDs have "demonstrated knowledge in the design, integration and implementation of information technology systems (ITS) and related infrastructure." The appellate submission includes a September 2014 email from U.S. South-Central Region Director, stating that there are "no other RCDDs in the or areas, but that "there could be some who've opted to be excluded from a directory." In addition, the Petitioner provides information reflecting that participates in the which provides training and certification for business partners that install and deploy products. The Petitioner also submits online search results from a "Find a Partner" search on website identifying as the company's only partner in Texas. Lastly, the record includes "company search results" from the website reflecting that is among only ten companies in licensed to provide security services. Although the preceding documents demonstrate the substantial intrinsic merit of his work, they do not establish its national scope or influence on the field as a whole.

With regard to his qualifications and past record of achievement, the Petitioner provided his training certifications from and the In addition, the Petitioner submitted recognition certificates from his former employers and a certificate

identifying [redacted] as an "Authorized Network Installer" for [redacted] and an award from [redacted] recognizing [redacted] as a '[redacted] for 2013." While particularly significant awards may serve as evidence of the Petitioner's impact on the field, the Petitioner has not demonstrated that his recognition certificates have more than institutional significance and are indicative of influence on the field as a whole.

On appeal, the Petitioner points to his 20 years of work experience, recognition in the field, and 20 professional certifications. For instance, the Petitioner notes that his RCDD certification "is only held by 8,000 worldwide" and represents "one of the highest design credentials in the [information technology] systems industry." A May 2012 news release from [redacted] stated: "The RCDD exam requires between 100-200 hours of study from [redacted] recommends studying the manual in conjunction with a [redacted] exam preparation course." Occupational experience, professional certifications, and recognition for achievements are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(B), (C), and (F) respectively. However, in this matter, the Petitioner must also demonstrate eligibility for the additional benefit of the national interest waiver. As previously mentioned, eligibility for the underlying classification does not demonstrate eligibility for the additional benefit of the waiver. Without evidence demonstrating that the Petitioner's work has affected the field as a whole, employment in a beneficial occupation such as an ITS contractor does not by itself qualify him for the national interest waiver.

The Petitioner indicates that the process of obtaining a labor certification would be "impossible, as [he] is the owner and founder of the petitioning company and a labor certification cannot be self-petitioned." The Petitioner further argues that with respect to entrepreneurs, USCIS is attempting "to apply outdated and inapplicable standards (created largely for employees)." The inapplicability or unavailability of a labor certification, however, cannot be viewed as sufficient cause for a national interest waiver; a petitioner still must demonstrate that he will serve the national interest to a substantially greater degree than do others in his field. *See NYSDOT*, 22 I&N Dec. at 218, n.5.

In addition, the Petitioner explains that he meets the requirements of a "Qualified Entrepreneur" as defined in section 4802 of Senate Bill 744, the "Border Security, Economic Opportunity, and Immigration Modernization Act." That proposed legislation, however, did not become law.

The Petitioner mentions a USCIS directive to clarify the standard by which a national interest waiver may be granted to foreign inventors, researchers, and founders of start-up enterprises. On November 20, 2014, Jeh Johnson, Secretary of the U.S. Department of Homeland Security, issued a memorandum to León Rodríguez, Director of USCIS, entitled "Policies Supporting U.S. High-Skilled Businesses and Workers."[2] With respect to the national interest waiver, the memorandum states: "This waiver is underutilized and there is limited guidance with respect to its invocation. I hereby direct USCIS to issue

[2] Memorandum from Jeh Charles Johnson, Secretary, DHS, *Policies Supporting U.S. High-Skilled Businesses and Workers* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf.

guidance or regulations to clarify the standard by which a national interest waiver can be granted, with the aim of promoting its greater use for the benefit of the U.S. economy."

The Petitioner requests approval of his petition in light of this directive to USCIS to improve its guidance and "to enhance opportunities for foreign inventors, researchers, and founders of start-up enterprises wishing to conduct research and development and create jobs in the United States." USCIS, however, has not yet issued any new guidance or regulations clarifying the national interest waiver eligibility standards in response to the Secretary's memorandum, and the memorandum does not itself set forth any specific guidance. A concern about underutilization of the national interest waiver benefit in general is not indicative that any particular decision USCIS has previously issued constituted an error of law or policy. The existing *NYSDOT* guidelines require the Petitioner to establish that the benefits of his work are national in scope and that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications, and he has not done so in this matter. *See NYSDOT*, 22 I&N Dec. at 217-18. With regard to following the guidelines set forth in *NYSDOT*, USCIS, by law, does not have the discretion to ignore binding precedent. *See* 8 C.F.R. § 103.3(c).

A. National in Scope

The Petitioner has not shown that the benefits of his proposed work as a CEO and company owner are national in scope. The Petitioner demonstrated that Supernova has performed cabling, networking, security, and telecommunications services for its various customers located in the [redacted] but there is no indication that his company's projects offer benefits at a national level. In *NYSDOT*, we found a civil engineer's employment to be national in scope even though it was limited to a particular region, but that finding hinged on the geographic connections between New York's bridges and roads and the national transportation system. While information technology systems allow users to reach into the national marketplace, the Petitioner has not shown that a small business that installs telecommunications infrastructure and services a limited pool of clients produces benefits at a level that is national in scope. Affecting individual clients' connectivity does not become "national in scope" based on their utilization of the Internet to conduct interstate commerce. Although [redacted] information technology services have value to the company's client base, this relates to the substantial intrinsic merit of the proposed work, which is not in question. In addition, the Petitioner has not demonstrated that his company's level of job creation and wage growth will offer sufficient positive economic effects in the [redacted] or other regions of the United States as to have a national effect. Accordingly, we agree with the Director's determination that the Petitioner does not meet the second prong of the *NYSDOT* national interest analysis.

B. Serving the National Interest

The Petitioner has not demonstrated that he has had sufficient influence on his field to satisfy the third prong of the *NYSDOT* analysis. As stated above, that prong requires a petitioner to demonstrate that he or she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. To do this, a petitioner must

establish "a past history of demonstrable achievement with some degree of influence on the field as a whole." *Id.* at 219, n. 6. In this instance, the Petitioner has not claimed or established that he has influenced his field of endeavor.

The Petitioner contends that his past record in starting a successful ITS business, holding RCDD certification, creating local jobs, and generating over $1 million in revenue justifies projections of future benefit to the national interest. There is no indication, however, that his business activities or ITS designs have been widely emulated by other companies in the industry, have increased economic activity in areas outside of Texas at a level affecting national markets, or have otherwise influenced the field as a whole. The letters of support from the Petitioner's customers and clients describe the contract work that performed on various projects, but do not offer specific examples of how the Petitioner's work has affected the industry or ITS field as a whole.

In addition, the Petitioner states that it is unlikely that an available U.S. worker would have more than 20 years of ITS experience, over 20 professional certifications, and the necessary qualifications to "develop and run [a] company that directly employs over 12 people." While such accomplishments help qualify the Petitioner for the underlying classification as an individual of exceptional ability, they do not show that he will serve the national interest to a substantially greater degree than do others in his field.

III. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner in this case has not established by a preponderance of the evidence that the benefits of his proposed work are national in scope or that he has a past record of demonstrable achievement with some degree of influence on the field as a whole. Therefore, the Petitioner has not demonstrated that a waiver of the job offer requirement will be in the national interest of the United States. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of A-R-L-*, ID# 77263 (AAO Sept. 15, 2016)