



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Public Copy

AUG 1 2001

File: WAC 98 162 52218 Office: California Service Center Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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, Acting Director
Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in business. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service regulation at 8 C.F.R. 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

The petitioner seeks classification as an alien with extraordinary ability as the sales manager at Fiesta Furniture, a furniture store which he co-founded. Counsel implies that Fiesta Furniture, with 31 employees, is "a large multinational company," but counsel

offers no evidence that Fiesta Furniture is in fact "multinational" rather than a local furniture store.

The regulation at 8 C.F.R. 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence which, counsel claims, meets six of the criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Counsel does not specify what prizes the petitioner has received. The only prize-related documents in the record consist of awards for being top salesperson of the week, and of the month, at Plaza Furniture (a former employer). There is no evidence at all that these awards are recognized nationally, internationally, or to any discernible extent outside of Plaza Furniture. Countless businesses reward employee performance with "employee of the week" or "employee of the month" awards and there is no evidence that the awards from Plaza Furniture command national or international attention or recognition.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

Counsel states that the petitioner fulfills this criterion by way of his "certificate of active member status from the Greater Riverside Chamber of Commerce, where [the petitioner] has made substantial contributions in an effort to enhance the community and the local labor market."

The petitioner has submitted nothing to show that the members of the Greater Riverside Chamber of Commerce are chosen by recognized national or international experts. Counsel's assertion that the petitioner has made outstanding contributions while a member of the Chamber of Commerce does not establish that such contributions are necessary for admission into the organization. Furthermore, the petitioner has not shown that these contributions are national or international in scope, or have otherwise resulted in sustained national or international acclaim.

Furthermore, the petitioner is not a member of the Chamber of Commerce. The membership application in the record shows that Fiesta Furniture, as a distinct entity, is a member; the petitioner is simply named as one of two contacts at the store.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

Counsel cites "the great amount of profitable advertising that has been done by" the petitioner. The purpose of this criterion is to show that an alien's widespread acclaim is reflected in major media coverage. An alien cannot create his own evidence under this criterion by purchasing advertising space, because one need not be extraordinary or highly acclaimed in order to advertise one's own business.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

The petitioner submits five letters from friends and colleagues. These letters indicate that the petitioner is knowledgeable about the furniture business, and has thus enjoyed a measure of success, but there is nothing to indicate that the petitioner has made original contributions of major significance to the entire field, at a national or international level. Simply running a profitable business is not an original contribution of major significance. His mutually fruitful relationships with other area businesses may contribute to his store's success, but they do not elevate him above almost all other furniture dealers.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

Counsel states that the petitioner's advertisements, noted above, also satisfy this criterion because "the perfect presentation and display of his furniture is one of the reasons for his renown success." A retail display in the petitioner's own store is not an artistic exhibition or showcase, and unless he personally made the furniture it is arguably not a display of his work in any sense. This criterion is intended for visual artists who, owing to their renown, are honored with museum exhibitions and the like. Creating a visually pleasing arrangement of furniture which one hopes to sell does not fulfill this criterion; many furniture dealers put great care into the arrangement of their display pieces.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

Counsel states that the petitioner's income tax returns and bank accounts "reflect the incredible profit received through the business." The record offers no comparative evidence to show how the petitioner's compensation ranks "in relation to others in the field" as the regulation requires.

A joint income tax return shows that the petitioner and his spouse earned, before taxes, \$26,185 in 1996. The record does not reflect how much of this amount was earned by the petitioner's spouse, but the filing of a joint return suggests that the petitioner himself did not earn the entire \$26,185. Even if the petitioner had earned the entire amount himself, it is not at all apparent that the vast majority of furniture store managers earn less than that amount.

Fiesta Furniture's corporate tax return has no bearing on the petitioner's personal remuneration. Still, we note that this tax return reports gross receipts or sales in the amount of \$609,597 for 1996. Counsel has stated "the gross annual revenue of the plant was over \$55 million." The petitioner, however, does not operate the plant which manufactures the furniture; he works in a retail store which sells already-finished products. The fact that the petitioner's company is one of "the plant's" many clients is without significance.

Bank statements in the record indicates that Fiesta Furniture conducts monthly transactions in the range of \$130,000. The highest monthly balance in the company's account is less than \$7,000; the account has at times been overdrawn by several hundred dollars.

Beyond the above evidence, counsel cites various documents such as invoices and insurance papers which demonstrate that the petitioner "has completed all the transactions necessary to make a business succeed." This documentation may show that the petitioner has been thorough and diligent in organizing his business, but it is not a sign of extraordinary ability unless one presumes that the vast majority of furniture store managers irresponsibly fail to maintain such documents. Success in business does not necessarily establish extraordinary ability or national acclaim, and completing "all the transactions necessary to make a business succeed" is a business manager's fundamental responsibility rather than a mark of distinction.

The director denied the petition, concluding that the petitioner has not satisfied any of the regulatory criteria to establish sustained acclaim. On appeal, counsel asserts that "the entire supporting documentation was ignored."

In a subsequent brief, counsel cites various procedural issues. For instance, counsel asserts that the petitioner had submitted a supplement to a previously-submitted petition, but the director erroneously considered this supplement to be a new petition and assigned it a priority date of May 1998 rather than January 1998.

Counsel claims that the petitioner submitted a skeletal petition on January 14, 1998 (the cutoff date for benefits under section 245(i) of the Act), and the petitioner's May 1998 submission "was clearly submitted as a supplement to the skeletal petition filed on January 14, 1998."

The record contains only one Form I-140 petition, which was received on May 21, 1998. The date next to the alien's signature, and next to counsel's signature, is "5-15-98." On part 4 of the form, in response to the question "[h]as an immigrant visa petition ever been filed by or on behalf of this person," the petitioner responded "no," thus implying that the May 1998 form was the first petition ever filed on his behalf. The cover letter accompanying this new petition form, and the supporting evidence, does not cite the receipt number of the January 1998 filing, nor does it make any other mention at all of any earlier filing. Thus, the petitioner's submission of May 1998 did not give the director any affirmative indication that the May 1998 submission was intended to supplement an earlier petition. By submitting a new petition form, in fact, counsel and the petition very strongly implied otherwise.

Whatever confusion may have arisen from the submission of a supplement to a prior petition, the petitioner and counsel certainly added to this confusion by submitting a new petition form in May 1998, when the submission of a second petition form is not required to supplement an existing petition. Given the actions of the petitioner and counsel, and the sheer volume of petitions filed with the California Service Center, we find no clear error in the director's assigning a May 1998 priority date to a petition form which was signed and submitted in May 1998, with a cover letter that made absolutely no reference to any previous petition.

The petitioner submits evidence to show that an earlier petition was in fact filed in January 1998. The petitioner, however, essentially instituted a new proceeding by filing a second form as detailed above, and the petitioner, by filing two separate petitions under the same classification, does not automatically secure for himself the earlier of the two priority dates.

The earlier petition was denied in November 1998 despite counsel's efforts to consolidate the two petitions. There is no evidence that the petitioner filed a timely appeal to the November 1998 denial. The appeal at hand was filed in March 1999, in relation to a February 1999 denial. The November 1998 denial is a separate administrative matter and, even if it were rife with error, the

petitioner cannot contest both that denial and the February 1999 denial with a single appeal.

In any event, the issue of the priority date (which was not a factor in the director's February 1999 decision) is irrelevant because the petitioner has not established eligibility for the visa classification he seeks. An immigrant visa petition secures a usable priority date only if that petition is approved. See 8 C.F.R. 204.5(e), which states "[no] priority date [will] be established as a result of a denied petition."

Counsel devotes the majority of the appeal brief to the issue of the director's failure to consolidate the two records of proceeding arising from the two petitions discussed above. As we have noted, this issue did not figure at all in the director's decision of February 4, 1999, which is the sole decision covered by the instant appeal. Counsel does devote some space in the appeal brief to the issue of the petitioner's eligibility for the classification sought.

Counsel states that the director's decision "fails to provide a reasonable explanation of how the more than 100 pages of documents fail to satisfy the criteria for the benefit sought." We note that the burden of proof is on the petitioner, who has failed to demonstrate that any of his evidence does, in fact, fulfill the stated criteria. Counsel has simply declared that the evidence is sufficient. Counsel's repeated references to the sheer quantity of evidence submitted are without effect. The petitioner's ability to produce "more than one hundred pages of documents" pertaining to his business does not demonstrate that the petitioner is nationally or internationally known in his field.

Counsel argues "[g]iven that 90% of businesses fail in their first year, the fact that [the petitioner] has been able to engineer a profit for Fiesta Furniture in EVERY YEAR of its existence show[s] an extraordinary ability that 90% of the active businessmen in this country does not possess." Counsel offers no support for this statistic, but even if he had done so, the profitability of the petitioner's business is not *prima facie* evidence of eligibility.

Section 203(b)(1)(A)(i) of the Act demands "extensive documentation" of "sustained national or international acclaim," and the regulation at 8 C.F.R. 204.5(h)(3) reflects this requirement. The mere fact that the petitioner's business has not failed does not in any way suggest or imply that the petitioner enjoys national or international acclaim as one of the top business figures in his field. The record contains no evidence at all that the petitioner enjoys any recognition whatsoever outside of the immediate vicinity of his furniture store. The top figures in the U.S. furniture industry include the owners and executives of

national retail chains, and it is against individuals at this level that we must compare the petitioner.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim, is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States.

While the petitioner is a somewhat successful local businessman, the record is devoid of evidence that the petitioner has earned sustained national or international acclaim as one of the few figures at the very top of the field. The evidence of record does not show that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.