



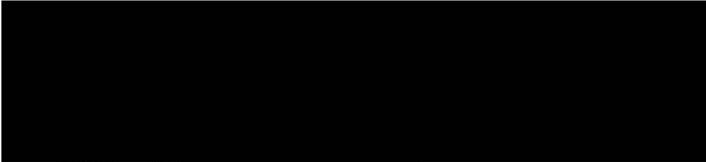
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Office: TEXAS SERVICE CENTER

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Petitioner:

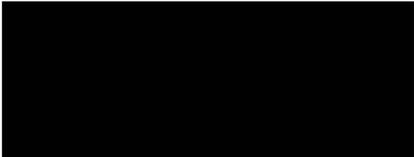
Beneficiary:



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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary 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 to employ the beneficiary as an operations manager whose main duties would involve real estate appraisal. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the beneficiary is an alien of exceptional ability based on his degrees in an area the director conceded has intrinsic merit. For the reasons discussed below, the petitioner has not overcome the director's valid concerns. Specifically, the petitioner has not provided any evidence corroborating many of counsel's assertions. Ultimately, as will be explained in more detail below, the significance of a field the beneficiary supports and his possession of an advanced degree alone are insufficient to warrant a waiver of the alien employment certification process. Moreover, we find that the beneficiary does not qualify for the classification sought as either an advanced degree *professional* or an alien of exceptional ability.

While the director did not raise the issue of the beneficiary's eligibility for the classification sought, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 requirement 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 beneficiary holds a Master of Business Administration (MBA) degree from Webster University. It remains, then to determine whether the beneficiary's occupation falls within the pertinent regulatory definition of a profession.

As defined at Section 101(a)(32) of the Act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as follows:

[O]ne 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 position listed on the Form I-140 is "operations manager." This position is not listed at section 101(a)(32) of the Act. Initially, counsel asserted that the position "demands someone with at least a Master's Degree in Business Administration and a certificate or degree in real estate." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence from a reputable source, such as the Occupational Outlook Handbook prepared by the Department of Labor, indicating that a baccalaureate degree is required for entry-level operations manager positions. In fact, a search for "operations manager" in the index of the Occupational Outlook Handbook 700 (2006-2007 ed.) refers readers to the "Top executives" and "Office and administrative support" occupational titles. The record does not reflect that the petitioner is seeking to hire the beneficiary as a top executive. Regardless, while "many" top executives have baccalaureate or higher degrees, the handbook does not reflect that such a degree is required for an entry-level executive or office and administrative support position. *Id.* at 68, 480. In addition, a baccalaureate is not required for an entry-level position as a real estate appraiser. *Id.* at 75.

As the petitioner has not established that the beneficiary is an advanced degree professional, we will consider whether the beneficiary is an alien of exceptional ability, as claimed on appeal. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the

criteria below; qualifications possessed by every member of a given field cannot demonstrate “a degree of expertise significantly above that ordinarily encountered.” The petitioner claims the beneficiary meets the following criteria.

*An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

As stated above, the beneficiary has an MBA. We are persuaded that an MBA is consistent with a degree of expertise significantly above that ordinarily encountered among operations managers and, thus, we are satisfied that the beneficiary meets this criterion. Section 203(b)(2)(C) of the Act, however, provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, the beneficiary’s MBA is not sufficient in and of itself to establish eligibility as an alien of exceptional ability. Consistent with this statement, the regulation requires that an alien meet at least two additional criteria.

*Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought*

The record contains no letters from former employees and the beneficiary has not worked for his current employer for ten years. As such, the petitioner has not established that the beneficiary meets this criterion.

*A license to practice the profession or certification for a particular profession or occupation*

Initially, counsel asserted that the beneficiary was certified as a real estate appraiser but that the petitioner was unable to produce the certificate at that time. In response to the director’s request for additional evidence, the petitioner submitted Form ETA 750B completed by the beneficiary where he indicated that he had an appraiser’s license but failed to submit the license. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not met his burden of submitting the required initial evidence relating to this criterion as the record is absent a copy of the license. See 8 C.F.R. § 103.2(b)(2).

Regardless, section 203(b)(2)(C) of the Act provides that the possession of a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, assuming the beneficiary does have an appraiser’s license, we must determine whether the license is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered. The petitioner has not established whether Florida requires real estate appraisers to be licensed. If so, a license is not indicative of a degree of expertise

above that ordinarily encountered. Thus, the petitioner has not established that the license is consistent with a degree of expertise significantly above that ordinarily encountered among real estate appraisers.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

*Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability*

Initially, counsel asserted that the proffered position would pay \$30,000 to \$50,000 and would be based on commissions. The petitioner does not confirm this information and the record lacks evidence that the beneficiary had earned these wages prior to the filing date of the petition. John Morales, the petitioner's vice president, indicates that he hired the beneficiary in August 2003. The petitioner's 2003 Internal Revenue Service (IRS) Form 1120, U.S. Income Tax Return for an S Corporation, reflects that it paid total wages of \$16,475 to employees other than officers with no additional cost of labor. The record lacks evidence as to how much of these wages the beneficiary received as the petitioner claims 12 employees on the Form I-140 petition. Moreover, without evidence of comparable wages for the occupation, we cannot determine whether the beneficiary's wages are consistent with a degree of expertise significantly above that ordinarily encountered in the field.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

*Evidence of membership in professional associations*

The petitioner submitted no evidence relating to this criterion.

*Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations*

The petitioner submitted no evidence that the beneficiary has enjoyed any formal recognition in the field.

As the petitioner has not demonstrated that the beneficiary is an advanced degree *professional* or an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue, as it was the sole basis of the director's decision.

Neither the statute nor 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 the 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 Dep't. of Transp.*, 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.

The director found that the beneficiary works in an area of substantial intrinsic merit, real estate appraisal. We cannot agree. In *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 217, modifies the phrase "intrinsic merit" with the word, "substantial," which is defined as "considerable in quantity: significantly large." Webster's Ninth New Collegiate Dictionary 1176 (1990). Real estate appraisal has merit within the community such that it is a useful service for which owners, buyers and sellers will pay. While the concept of intrinsic merit is to be interpreted broadly, to hold that every occupation that provides a useful service has *substantial* intrinsic merit would make that standard meaningless. The arguments that appraisers impact the construction and development industries and, as such, the economy, are tenuous at best. We find that the petitioner's services do not rise to the level of *substantial* intrinsic merit such that the national interest is implicated.

Regarding the national scope of the petitioner's work, counsel has asserted that the construction industry has an impact on the national economy, that the construction industry cannot flourish without support from the field of real estate and that the local economy will benefit from more

housing for professionals. The petitioner submitted materials corroborating counsel's claims regarding the construction industry as a whole. The director concluded that the petitioner had not established that the beneficiary's work would have an impact at the national level. On appeal, counsel simply asserts that the petitioner submitted evidence demonstrating that the proposed benefits of the beneficiary's work would be national in scope. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217, n.3 discusses this issue as follows:

For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

We concur with counsel that the construction industry in general has a major impact on the national economy. Counsel has never explained, however, how a single real estate appraiser can have a noticeable impact at the national level.

It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this beneficiary's contributions in the field are of such unusual significance that the beneficiary merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

Counsel initially asserts that the alien employment certification process should be waived because the location where the beneficiary will work has a high number of retirees and lacks individuals "who have attained the higher level of education that [the beneficiary] has and in the area which he has." Counsel also discusses the importance to the economy of having more workers with advanced degrees. In response to the director's request for additional evidence, counsel asserts that the alien employment certification process should be waived because it is designed to protect U.S. workers and the beneficiary's employment will create more jobs for U.S. workers. Counsel concludes that the beneficiary will serve the national interest to a greater degree than an available U.S. worker with the same minimum qualifications because the beneficiary has a baccalaureate degree and MBA and "also has experience working in sales for one of the largest Telecommunications companies in Great Britain,

The petitioner failed to submit any evidence corroborating counsel's assertion and establishing the beneficiary's accomplishments with

The director concluded that the petitioner had provided no evidence of specific prior achievements by the beneficiary or of skills that could not be articulated on an application for alien employment certification. On appeal, counsel asserts that the petitioner has established the beneficiary's exceptional ability through his MBA and appraiser's license.

As discussed above, the petitioner has not established that the beneficiary is an alien of exceptional ability. Regardless, that classification normally requires an application for alien employment certification certified by the Department of Labor. Thus, we cannot conclude that meeting two, or even the requisite three criteria for that classification warrants a waiver of that requirement.

It is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *Id.* at 217. We also decline to establish blanket waivers for everyone with an advanced degree as Congress clearly intended the alien employment certification process to apply to advanced degree professionals unless a waiver of that process is warranted in the national interest. Moreover, as stated in *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, it cannot suffice to state that the alien possesses useful skills, or a "unique background." When discussing claims that the beneficiary in that case possessed specialized design techniques, the AAO asserted that such expertise:

would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. [The] assertion of a labor shortage, therefore, should be tested through the labor certification process. . . . The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

*Id.* at 220-221. Thus, the beneficiary's MBA and alleged license do not warrant a waiver of the alien employment certification process. Ultimately, the record lacks evidence that the beneficiary has a past record of success in his field with any influence on the field as a whole.

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 a Department of Labor certified alien employment 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. For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.