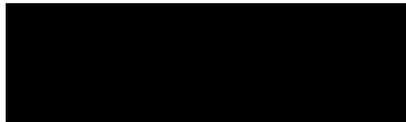




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U.S. Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



Public Copy

File: [Redacted] Office: Vermont Service Center Date:

JUL 26 2001

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: **Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)**

IN BEHALF OF PETITIONER:



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 which 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 which 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 which 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, Vermont Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

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 an alien of exceptional ability in the arts. The petitioner is a visual artist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner did not qualify for classification as an alien of exceptional ability, and 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 had argued that the petitioner qualifies not only as an alien of exceptional ability, but also as a member of the professions holding an advanced degree. The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, dismissed the appeal, noting that a promised supplement to the record had not arrived.

On motion, counsel submits a copy of the missing supplement and maintains the petitioner's eligibility for the classification sought. We will consider the evidence and arguments contained in this submission.

Counsel states that the petitioner "meets the regulatory definition of advanced degree professional, as he possesses a Master's degree in Art Education, which degree relates directly to the services he performs." Even a cursory review of this regulatory definition refutes counsel's claim. 8 C.F.R. 204.5(k)(2) defines a "profession" as "one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation."

That the petitioner holds a master's degree has absolutely no bearing on whether the field of conceptual art requires at least a bachelor's degree. While the petitioner's degree "relates directly to the services he performs," counsel offers no evidence that there is any mechanism in place which would prevent a person with no degree from becoming a conceptual artist. Counsel has, thus, failed to offer any persuasive argument or evidence that the petitioner is a member of the professions, as the pertinent regulations define that term. One does not automatically become an advanced-degree professional simply by obtaining an advanced degree in a field relevant to one's occupation.

Counsel asserts that the petitioner "considerably exceeds the regulatory standard for qualification as an alien of exceptional ability, as a conceptual artist holding a Master's degree in Art Education." Counsel cites the regulation at 8 C.F.R. 204.5(k)(2), which defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Counsel asserts that the petitioner meets this description and therefore qualifies as an alien of exceptional ability.

Counsel does not address the regulation at 8 C.F.R. 204.5(k)(3), which states, in pertinent part:

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

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

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

Counsel, in this appeal submission, does not specify which three of these six criteria the petitioner has satisfied, nor which criteria do not readily apply to the petitioner's occupation. The AAO, in its prior decision dismissing the appeal, addressed each of the above six criteria, finding that the petitioner had satisfied only the first criterion (pertaining to academic degrees). We need not repeat, in detail, those unrebutted arguments here. The plain wording of the regulation demands that an alien must satisfy at least three of these criteria (or establish that the criteria are inapplicable not only to the alien, but to the occupation), and

general assertions to the effect that the petitioner is renowned or respected cannot circumvent or override that regulation.

The supplement to the appeal includes letters from [REDACTED], editor-in-chief of Art in America, and musician [REDACTED]. A very broad reading of the regulations might place these letters in the context of recognition by peers for significant contributions, but even then the petitioner will have satisfied only two of the regulatory criteria. The director's and the AAO's adherence to these regulations can hardly be construed as adjudicative error.

A month after filing the instant motion, counsel submitted "additional materials relating to [the petitioner's] continuing activities as an exceptionally innovative and productive artist whose work has had a significant impact on the contemporary art scene."

The regulation at 8 C.F.R. 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already-submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation which allows a petitioner to submit further evidence to supplement a previously-filed motion. By filing a motion, the petitioner does not guarantee himself an open-ended period in which to add new evidence to the record.

We note that this supplemental submission does not address the fundamental issue of the petitioner's eligibility for the visa classification he seeks. Counsel, on motion, does not address or rebut any of the specific points which the AAO made in its discussion of this issue.

The petitioner has established that several figures in the New York art community, including prominent ones such as Jeff Koons, sincerely admire the quality of the petitioner's work. The petitioner, however, has not shown that he meets the regulatory criteria for the underlying visa classification, and counsel's vague, broadly-worded interpretations cannot replace these plainly-worded criteria. Consequently, the petitioner cannot qualify for the national interest waiver, which by law is limited to the classifications for which the petitioner has failed to establish eligibility.

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. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

**ORDER:** The Associate Commissioner's decision of July 28, 1998 is affirmed. The petition is denied.