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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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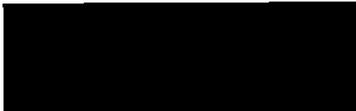
JUN 27 2001

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

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:



Identification 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, Texas 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 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 an alien of exceptional ability. The petitioner, an international oil and gas exploration and production firm, seeks to employ the beneficiary as its vice president of Finance and International Projects. 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 beneficiary does not qualify for the classification sought, 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. The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, affirmed the director's decision and dismissed the appeal.

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. -- The Attorney General may, when he 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 AAO found that the beneficiary cannot qualify as a member of the professions because he does not hold a baccalaureate degree, which is required by the pertinent regulatory definition of a profession at 8 C.F.R. 204.5(k)(2). The beneficiary's occupation is not among those identified as professions in section 101(a)(32) of the Act. The petitioner, on appeal, does not contest this finding, arguing instead that the beneficiary qualifies as an alien of exceptional ability.

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. Counsel maintains that the petitioner met three of these criteria, to be discussed below.

We note that 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." For example, every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows "exceptional" traits.

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 AAO has not contested that the petitioner has satisfied this criterion.

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

The petitioner claims to pay the beneficiary \$150,000 annually. The AAO, in its previous decision, stated "[t]he record does not document the beneficiary's past remuneration, or compare that remuneration to that of other executives in the petroleum industry." On motion, counsel cites Department of Labor statistics from 1997, showing that "Financial Managers" earned a mean annual wage of \$57,060, and that "General Managers and Top Executives" earned a mean annual wage of \$60,960. Counsel observes that \$150,000 is considerably higher than those cited amounts.

The Department of Labor's Occupational Outlook Handbook, ("Handbook"), 1998-1999 edition, page 49, indicates that, for general managers and top executives, "salary levels vary substantially depending upon the level of managerial responsibility, length of service, and type, size, and location of the firm." The petitioner has not controlled for any of these variables. The AAO had noted the absence of evidence comparing the beneficiary's remuneration "to that of other executives in the petroleum industry." If the petroleum industry, in general, pays higher wages than other industries, than the petitioner's higher salary is to be expected. A financial manager does not make himself "exceptional" simply by choosing to work in a particularly lucrative industry.

To demonstrate the extent to which these statistics are subject to manipulation, we note that the Handbook also indicates, on page 43, that "[t]he median annual salary of financial managers was \$40,700 in 1996." This figure is, indeed, much lower than the petitioner's figure of \$150,000. The same page of the Handbook also indicates, however, that the average annual wage for chief financial officers was \$142,900 in 1997, very close to the beneficiary's salary. Absent evidence that financial managers are generally considered to be executives at the vice-presidential level, it is not clear whether it is fair to compare the average compensation of financial managers with the beneficiary's earnings as a vice president of finance and international projects. The petitioner's new evidence on motion does not establish that the beneficiary earns considerably more than a majority of petroleum industry vice presidents.

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

The AAO had determined that the petitioner has not met this criterion. The evidence originally submitted in this regard consisted essentially of letters from the petitioner and its clients, stating that the beneficiary had contributed toward the success of various projects while fulfilling the duties required of his position.

On motion, counsel contends that the AAO abused its discretion by failing to consider witness letters. Counsel cites court cases which do not address the specific issue of exceptional ability, but counsel does not address the AAO's finding that witness letters, solicited by the petitioner for the specific purpose of supporting the visa petition, are not comparable to evidence of formal recognition (such as awards). The evidentiary criteria above generally pertain to objective, documentary evidence, which exists not because the alien seeks a benefit, but because of the alien's exceptional ability.

Counsel, on appeal, cites newspaper articles regarding business deals between the petitioner and the government of Azerbaijan. These articles are dated late April 1999, well over a year after the petition's late 1997 filing and several months after the August 1998 denial of the petition. See Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Furthermore, while counsel refers to these articles as evidence of recognition, the beneficiary's name does not appear in any of the articles.

We will discuss the witness letters further when we address the national interest issue, below.

Neither the statute nor Service 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 Service 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 Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 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.

Counsel states that the extent of the beneficiary's contribution is clear from letters submitted with the petition. Because the prior appellate decision contained no specific discussion of these letters, we address them here.

██████████ manager of Hewlett-Packard Company's International Business Center/Palo Alto, states that he and the beneficiary "have worked together on complex Russian oil business development

projects." Mr. [REDACTED] lists the beneficiary's tasks and states that the beneficiary "has demonstrated extensive knowledge and skill in developing and managing complex profitable strategies to assure the export of American manufactured products to Russian oil projects."

Mark Crandall, director of Trafigura, Ltd., formerly worked at Nobel Oil with the beneficiary. Mr. [REDACTED] describes the beneficiary's duties managing "Russian oil business development projects," and states that an "understanding of the peculiarities of the Russian oil and fiscal legislation plays a vital role in minimising the risk on investments in this sector." Mr. Crandall credits the beneficiary with "an extensive knowledge of the complex financial requirements for the development of international oil projects."¹

Dr. [REDACTED] who chairs the Energy Trade and Asset Finance Group at the law firm of Clyde & Co., "worked directly and intensely with [the beneficiary] - often on a day to day basis - on complex international oil and gas business development projects at Glencore UK Ltd." Dr. [REDACTED] states:

[The beneficiary] coordinated and managed several Russian oil business development projects. . . . together with me [the beneficiary] developed contract packages that met the difficult legislative requirements of the Russian government. The designing of complex controls and financial instruments with various financial institutions to control the flow of capital investments, loans and oil sale revenues in accordance with the requirements of shareholders and governmental controls, thus ensuring that business objectives and legislative requirements are met can be one of the most important and challenging areas in the international oil industry. As an international lawyer I can confirm that understanding the ever-changing and strange (often contradictory) elements of the Russian oil and fiscal legislation plays a vital role in minimising the risk on investments in this sector.

All of the above witnesses state that they have worked closely with the beneficiary on specific projects. As an executive for a petroleum company, one would expect the petitioner to be deeply involved in petroleum development projects. The statements of these witnesses do not indicate that the beneficiary has attracted recognition beyond those who have worked with him directly, or that the beneficiary's accomplishments are of demonstrably greater value

¹This phrase derives from a paragraph which appears in identical versions in several other witness letters. It is not clear who is the actual author of this common paragraph, but it is highly improbable that several individuals independently formulated the exact same paragraph.

than the achievements of other executives employed in comparable positions within the petroleum industry.

We note, with regard to the above-mentioned 1999 news articles pertaining to the petitioner's development deals in Azerbaijan, the articles also mention two other simultaneous ventures by Exxon and Mobil in Azerbaijan (both of which were already active in the region even before the new ventures). Given that two other deals were concluded at the same time as the petitioner's deal, we cannot conclude that the beneficiary's ability to enter into arrangements with foreign governments is unmatched, or that the market in Azerbaijan would be closed to U.S. involvement if not for the beneficiary.

The petitioner engages in what is, inherently, an international enterprise involving significant sums of money. The beneficiary, like any high-level executive, plays a significant role in directing major projects of the corporation which employs him. The statute, however, does not automatically qualify top executives for the national interest waiver, and the petitioner does not establish the relative importance of the beneficiary's contributions simply by describing them. 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. In any event, we cannot consider the beneficiary for the waiver if the petitioner has not shown that he qualifies for the underlying visa classification.

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.

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

ORDER: The Associate Commissioner's decision of July 19, 1999 is affirmed. The petition is denied.