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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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AUG 27 2002

File:

Office: Nebraska Service Center

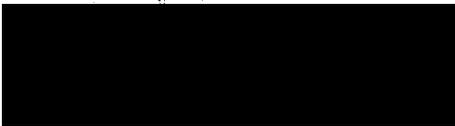
Date:

IN RE: 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)

IN BEHALF OF PETITIONER:



Public Copy

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, Director  
Administrative Appeals Office

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

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 or a member of the professions holding an advanced degree. The petitioner is an artist who seeks to operate his own gallery/café. 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 has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

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 only issue raised in the director's decision is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

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.

The petitioner describes himself as an "artist/entrepreneur" who seeks to engage in "painting, ceramics, [and] establishing a gallery and a teaching studio." Counsel describes the petitioner as "an artist who specializes in 'curvism,' a style that he applies in various art mediums."

Most of the exhibits submitted with the petition are letters from individuals currently or previously based in the vicinity of Cleveland, Ohio. State Representative Erin Sullivan of the Ohio House of Representatives states "I have known [the petitioner] for several years and can attest not only to his talent as an artist but also to his contributions in the Cleveland neighborhood Tremont, where he lives." Rep. Sullivan's letter is typical of many letters in the record, attesting in general terms to the petitioner's artistic talent and personal character, particularly the petitioner's involvement in local charity fundraising events and in revitalizing the Tremont neighborhood. These witnesses, from a variety of fields, identify themselves as friends and business associates of the petitioner.

Various gallery owners and art sellers assert that the petitioner is an established local artist. Julie Macdonald, editor in chief of *Art Business News*, states:

I . . . have been involved in the art industry, both in New York and Cleveland, for about five years. I have had the pleasure of making the acquaintance of [the petitioner] through my business dealings and as a collector of his work. . . . I believe that [the petitioner] and his artwork have what it takes to be successful not only in Cleveland, but in the national art scene as well.

"Curvism" as he calls his work, has made a name for itself in the Cleveland area. I have been in attendance at many of his shows and watched as people immediately relate to the colorful ceramic work he creates. But more than his work, [the

petitioner] has brought a sense of the art world to Cleveland, which the city was lacking for some time.

The petitioner submits promotional materials relating to his work, as well as copies of published articles. One article, from *Downtown Tab* (subtitled *Cleveland's Urban Alternative*) is about a pub in Tremont; the article mentions briefly that the petitioner designed the ceramic flooring in the basement of the pub. An article from the *Cleveland Plain Dealer*, entitled "Art is business this man wants to be in," profiles the petitioner as an ambitious young artist. The article describes the petitioner's work, his studio, and places that sell and show his work. The article does not indicate how the petitioner's work or impact as an artist has differed from that of countless other aspiring artists. Indeed, the general tone of the article seems to indicate that the petitioner has yet to enjoy significant success as an artist.

The petitioner submits materials showing that one of his pieces was depicted in *Art Business News*. As the petitioner has demonstrated, the editor in chief of that publication is a former Cleveland resident who was familiar with the petitioner's work.

The petitioner submits a copy of the articles of incorporation of a not for profit corporation of which he is one of three trustees. The purpose of the corporation is "[t]o operate a facility for teaching art and displaying works of art." The articles of incorporation are dated June 1997, over two years before the filing of the petition, but the record contains no evidence that the corporation was actually operating such a facility at the time of filing. The articles identify another person as the sole incorporator.

The petitioner submits a substantial number of photographs of his work. These photographs demonstrate the existence of that work, but do not show that it is in the national interest to ensure the admission of the petitioner, compared with other artists. The plain wording of the statute and regulations indicates that artists are generally subject to the job offer/labor certification requirement.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted two new witness letters and arguments from counsel. State Rep. Erin Sullivan, in her second letter on the petitioner's behalf, states that the petitioner "is an asset to the Greater Cleveland community," and that the petitioner's works are on display "throughout the Cleveland Tremont neighborhood" and "the Little Italy neighborhood of Cleveland." Rep. Sullivan states that the petitioner "is not just a contributing artist and he is not just an entrepreneur. He represents the best that America has to offer - opportunity, talent, a strong work ethic, and a neighboring community."

Keith A. Sutton, general partner of Tremont Ridge Phase I Limited Partnership, states that the partnership is constructing new housing in Cleveland, having "completed 35 homes with another 10 under construction" and a new contract to construct "the Phoenix project." Mr. Sutton asserts that this housing "helps everyone in the area." The petitioner's contribution to the housing construction project appears to be limited to mosaic tile decorations that "put the finishing touches on our homes." Without inquiring as to the national importance of the project, there is no indication that the success of

the project, or the benefit to the community, depends to any appreciable extent on the petitioner's involvement.

Counsel argues that the petitioner "has contributed his skills as an artist to renovating not one but two areas: the Cleveland Tremont area . . . and the Little Italy neighborhood of Cleveland." Impact in two Cleveland neighborhoods is still local to Cleveland. The record indicates that the rehabilitation of Tremont has been affected by numerous factors, such as the construction of new housing and revitalization of local businesses. While the petitioner has been an outspoken advocate of the area's renewal, the evidence of record does not indicate that the petitioner is responsible for a significant part of this activity.

Counsel states that the petitioner has invested \$30,000 in the renovation of a historical building "so as to convert it into a gallery-coffee establishment which will employ up to eighteen people." A lower-priority immigrant classification is available for entrepreneurs who invest a minimum of \$500,000 in a job-creating enterprise. We cannot find that an investment of less than one-twelfth of that amount is a major factor in granting the petitioner a higher-priority classification with an added benefit in the form of a waiver, even if the petitioner had shown that his plans had actually come to fruition in the form of a viable business as of the petition's filing date.

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work but finding that the petitioner's work is not national in scope and that the petitioner's contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director noted the petitioner's civic activism and prolific output as an artist, but found that these factors do not distinguish the petitioner to a degree that would warrant the special benefit of the waiver.

On appeal, counsel submits copies of previously submitted documents and asserts that the petitioner's impact is not local to Cleveland, because he "did have coverage in the Art Business News, which is published in New York." As we have noted above, this coverage appears to stem directly from the fact that the editor in chief of that publication is a former Cleveland resident who had previously been one of the petitioner's local supporters. Even then, the petitioner's work is mentioned only peripherally in the context of the larger article. Counsel also notes that one of the petitioner's art pieces was used to decorate a house which, in turn, was the main setting for a season of *The Real World* on MTV. The record contains nothing from MTV to explain how the petitioner's work came to be selected, to show that the petitioner's work had any impact apart from being one of many decorative pieces in the background, or even to indicate that the petitioner received screen credit for providing the piece.

The petitioner was afforded an opportunity to request further time to submit additional evidence. Pursuant to 8 C.F.R. 103.3(a)(2)(vii), the petitioner must explain in advance that good cause exists for such an extension. Neither the petitioner nor counsel indicated, upon filing the appeal, that any further material was forthcoming. Nevertheless, over a year after the filing of the appeal, the petitioner has submitted further evidence, with no explanation to provide good cause for the untimely submission. There is no regulation that allows the petitioner an open-ended or indefinite period in which to

supplement the appeal. Any consideration at all given to such untimely submissions, which are not preceded by timely requests for an extension, is discretionary.

Part of the latest submission is the same April 1999 issue of *Art Business News* from which the petitioner had previously submitted a photocopied article. The petitioner also submits additional photographs of houses bearing his art work. The remainder of the submission consists of an issue of the *Free Times* dated September 5, 2001, and an issue of the *Plain Dealer* dated October 9, 2001. These publications include articles about the petitioner's gallery/café, decorated entirely by the petitioner, which opened shortly before the articles were published. While this evidence demonstrates that the petitioner's plan for a gallery/café came to fruition two years after he filed the petition, operating a viable local business is not presumptive evidence of eligibility for a national interest waiver. Furthermore, in Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Developments that took place years after the filing date, and local news coverage of those developments, cannot retroactively demonstrate that the petitioner was already eligible at the time of filing.

The petitioner has shown that he is an ambitious artist and, after the filing date, a successful entrepreneur. The record also shows that the petitioner is one of many artists and others in the community to participate in the revitalization of a Cleveland neighborhood. The petitioner has not, however, shown that his impact (artistically, economically or otherwise) has been of a magnitude that would justify a national interest waiver.

Upon review of the director's decision, we note an additional issue not addressed by the director. Because we concur with the findings in the director's decision, which are sufficient to warrant denial of the petition, the director's omission of the additional issue does not constitute an error that prejudiced the outcome of the decision.

The director did not address the issue of whether the petitioner is a member of the professions with an advanced degree, and/or an alien of exceptional ability. The director stated "[t]he Service is not persuaded that an advanced degree or exceptional ability is required by the occupation; however, the issue is moot because the petitioner is requesting an exemption from the job offer requirement." The director's reasoning is correct as far as it goes, but the petitioner still must establish that the alien qualifies as an advanced degree professional or as an alien of exceptional ability. The director made no finding regarding the petitioner's eligibility for the classification sought.

The petitioner has not specified which of the two classifications he seeks. The regulation at 8 C.F.R. 204.5(k)(2) states, in pertinent part:

*Advanced degree* means any United States academic or professional degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

*Profession* means 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.

The petitioner holds no master's degree, and earned his baccalaureate less than five years before he filed the petition. The petitioner thus holds neither an advanced degree nor its equivalent. The petitioner has also failed to show that his occupation requires, at a minimum, a baccalaureate degree. Therefore, the petitioner cannot be considered to be a member of the professions holding an advanced degree.

Because the petitioner is not an advanced-degree professional, the petitioner cannot receive a visa under section 203(b)(3) of the Act unless he 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. These criteria follow 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.

*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.*

The petitioner claims the following post-secondary education:

INSTITUTION	FIELD	FROM	TO	DEGREE
David Meyer College	Mgmt./Admin.	9/94	6/96	B.S.
Case Western Reserve U.	Management	12/88	5/94	None
Vienna School of Tech.	Architecture/3-D Design	9/86	3/88	Design

The petitioner submits no official academic records or other documentation from any of these institutions except for a copy of his diploma from David Meyer College, reflecting his bachelor's degree in management. A degree in management does not appear to relate to the area of claimed exceptional ability, i.e. the fine arts.

*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 petitioner claims to have been a student until 1996. He submits no evidence to show that he had been a full-time artist for at least ten years as of the petition's filing date.

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

The petitioner claims no license or certification.

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

*Evidence of membership in professional associations.*

The record contains nothing regarding the above two criteria.

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

The record does not reflect that the petitioner has earned any formal recognition for his art work. A general reputation as an active member of the community and promoter of the arts is not evidence of recognition, and planning to operate one's own gallery does not constitute *prima facie* evidence of exceptional ability in the arts or in business.

For the above reasons, the petitioner has not established that he qualifies for the underlying immigrant classification, let alone the added benefit of the national interest waiver.

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 an approved labor 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, U.S.C. 1361. The petitioner has not sustained that burden.

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

**ORDER:** The appeal is dismissed.