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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC 98 070 52402 Office: California Service Center

Date: 28 FEB 2002

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations 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 an alien of exceptional ability. The petitioner, a customized advertising consulting service, seeks to employ the beneficiary as a Director of International Marketing. The petitioner asserts that the beneficiary is eligible for blanket certification under Group II of Schedule A. The director found that the beneficiary failed to qualify for classification as an alien of exceptional ability. The director also found 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.

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 regulation at 8 C.F.R. 204.5(k)(4)(i) states, in pertinent part:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, [or] by an application for Schedule A designation (if applicable). . . . To apply for Schedule A designation . . . a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. . . . The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part:

The director may exempt the requirement of a job offer, and thus of a labor

certification . . . if such exemption would be in the national interest. To apply for the exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate.

The petition was filed with the California Service Center on January 12, 1998. The petitioner, in this instance, has submitted in duplicate both Form ETA-750 and Form ETA-750B. However, on the Form ETA-750, the petitioner has written the phrase "Schedule A/Group II." A further review of the petitioner's supporting documentation clearly reflects a request for Schedule A/Group II classification.

The first issue to be decided is whether the beneficiary is a member of the professions holding an advanced degree or equivalent, and/or an alien of exceptional ability. The beneficiary has not listed any degrees or certificates received under Part 11 of Form ETA-750B. Further, counsel states that the beneficiary is seeking classification as an alien of exceptional ability.

Because the beneficiary is not an advanced-degree professional, the beneficiary cannot receive a visa under section 203(b)(2) of the Act unless she 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 record contains no evidence to fulfill this criterion.

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.

On appeal, counsel states: "The California Service Center's denial itself reiterates the fact that the evidence proves [the beneficiary] has worked in the advertising and marketing industry since 1982." It should be noted that the director's decision merely summarized the beneficiary's work experience listed on Form ETA-750B and its continuation sheet. Therefore, counsel's reference to "evidence" is misleading. There is no evidence in the record to support

the petitioner's claim that the beneficiary has at least ten years of experience in marketing. The plain wording of the regulation requires "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." The petitioner has failed to provide letters from the beneficiary's former employers detailing her work experience for the last ten years and demonstrating that it relates to the occupation sought. Thus, the beneficiary has failed to satisfy this criterion.

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

The record contains no evidence to fulfill this criterion.

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

Counsel states: "Evidence submitted with the petition shows that the petitioner's base salary, not including other remuneration, is more than \$2,800 per week. This comes to \$145,600 per year." However, a complete review of the record reveals that the only reference to the petitioner's salary is the amount listed under Part 12 of Form ETA-750. This does not constitute evidence nor is it supported by any additional documentation contained in the record. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner offers no evidence in the form of income tax returns or payroll records to demonstrate the beneficiary's salary or remuneration. Thus, the record contains no evidence to fulfill this criterion.

Evidence of membership in professional associations.

On appeal, counsel states: "[The beneficiary] submitted evidence that she is a member of the Beverly Hills Chamber of Commerce, the Los Angeles Conventions and Visitors Bureau, and that she has been instrumental in making her employer, California Advertising, Inc., the only business representing Beverly Hills merchants available through the Visitor's Bureau to the overseas Japanese Market." Representing one's employer does not constitute membership in a professional association.

Section 101(a)(32) of the Act provides:

The term "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) states, in pertinent part:

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 has offered no evidence to establish that the Beverly Hills Chamber of Commerce and the Los Angeles Conventions and Visitors Bureau qualify as "professional associations" rather than local business associations. No affirmative evidence of membership requirements has accompanied the petition and the petitioner has not established that being a professional is a condition for admission to membership in these organizations.

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

In a letter accompanying the initial petition, counsel states:

[The beneficiary] is the founder and publisher of the "Japanese Tourist Guide" which is circulated to over 800,000 Japanese tourists who are coming to the United States as tourists. The Japanese Tourist Guide, published in Japanese, is designed to be a primary source of visitor information regarding Southern California and Las Vegas. It is the first publication of its kind in these markets.

With regard to the "800,000 Japanese tourists" figure, the petitioner's own material indicates a total quarterly print run of 120,000 copies. Counsel cites no source for the 800,000 figure. Furthermore, the record contains no evidence that every copy printed is actually distributed to Japanese tourists; the guides are placed on airplanes and in hotels, where Japanese tourists may or may not take advantage of the guides' availability.

Counsel asserts "Japanese tourists to Los Angeles and Las Vegas generate approximately \$800 million in revenue to local businesses. Through [the beneficiary's] expertise, Japanese tourism to Southern California and Las Vegas has increased 10%." Counsel does not cite any support for this claim. Even if Japanese tourism to those areas has increased by ten percent, it does not necessarily follow that this entire increase is due to the beneficiary's tourist guides.

Counsel states that the beneficiary "was nominated as 'Entrepreneur of the Year' in Beverly Hills, California in 1995 and 1996." Counsel asserts that the beneficiary's very nomination is "evidence of major cultural and business contributions." It is noted that the record contains no evidence of this claimed nomination from the nominating body itself. Counsel refers only to a letter from Mike Teofilovich of D&M Plastics Corporation which states: "[The beneficiary] was nominated as Entrepreneur of the Year in Beverly Hills in 1995 and 1996- an extraordinary accomplishment given the heavy competition in this 'big money' market." Even if the nomination were adequately documented in the record, it shows only that the petitioner was considered for a local honor that she did not actually receive.

Counsel argues that the beneficiary also meets this criterion through letters submitted from local government officials, business leaders and other professionals.

Nancy Riela, Membership Sales Manager for the Beverly Hills Chamber of Commerce, states "[i]t is through the extraordinary talent of [the beneficiary] that the merchants who advertise in her publication . . . get a sizable share of the annual \$500,000 spent by Japanese tourists in Southern California each year." Like counsel, Ms. Riela provides no evidence (such as data from customer surveys) to demonstrate that the beneficiary is largely responsible for the spending patterns of Japanese tourists in Los Angeles. The discrepancy between counsel's figure of \$800 million and Ms. Riela's figure of \$500 thousand is noted.

Masatoshi Nagami, Director of the Japan National Tourist Organization, states that the beneficiary "has made important contributions to the communities of Southern California in terms of business and international cultural exchange." Herbert M. Fischer, President of Mediacy (a video duplicating company), states that the beneficiary "is among the very top in her field. . . . She has received international acclaim for her work." David Lovering, sales executive with Frye & Smith (a printing company), states that the beneficiary has used her "unique business acumen and marketing insight" to make her tourist guides successful. Mike Teofilovich, founder and CEO of D&M Plastics Corp., states that "the merchants who advertise in . . . 'The Japanese Tourist Guide' get a sizable share of the annual \$18 million spent by Japanese tourists in Southern California each year." Thus Mr. Teofilovich provides yet another figure which differs by orders of magnitude from those provided by others, pertaining to local revenue from Japanese tourists. Given these widely divergent figures, no such figure can be given credence without proper documentation. (Promotional materials for the petitioner state that Japanese tourists spend \$18.4 million per day in Los Angeles.)

Additional witnesses from the advertising and tourism industries submitted in response to the director's request for evidence offer letters of support similar to those accompanying the initial petition. These letters reaffirm the conclusion that the beneficiary is appreciated in the Los Angeles/Beverly Hills business community.

Member of Congress Rod R. Blagojevich states that the beneficiary's guides "have directly and indirectly generated millions of dollars in revenue for the markets of Southern California and greater Las Vegas." Rep. Blagojevich echoes several assertions previously made by counsel.

Beverly Hills Mayor Les Bronte repeats previous statements to the effect that Japanese tourism contributes to local businesses, and that the beneficiary contributes not only economically but also by fostering goodwill between Japan and the United States. This office does not deny that the petitioner has provided useful information to Japanese tourists in Beverly Hills and Las Vegas, but such local contributions do not automatically translate to achievements and significant contributions to the industry.

We do not dispute the credibility of the petitioner's witnesses or the beneficiary's positive influence on Japanese tourism in and around the Los Angeles/Beverly Hills community. However, the construction of the regulations demonstrates the Service's preference for verifiable, documentary evidence, rather than subjective opinions of witnesses selected by the petitioner.

The petitioner has offered various letters, some of these with conflicting information, to demonstrate that the beneficiary's efforts have significantly impacted the industry. We note that the record reflects little formal recognition or awards for the petitioner's work as an international marketing director, arising from various groups taking the initiative to recognize the petitioner's contributions, as opposed to private letters solicited from selected witnesses expressly for the purpose of supporting the visa petition. Independent evidence from outside the petitioner's local community which would have existed whether or not this petition was filed is more persuasive than subjective statements from individuals with an expressed interest in the beneficiary's continued employment and her continuing contribution to the local business community.

However, the record does reflect a degree of support from government officials, business leaders and other professionals sufficient to minimally satisfy this criterion.

On appeal, counsel indicates that the "Japanese Tourist Guide" itself constitutes other comparable evidence to show exceptional ability. The guide, however, has already been addressed under the previous criterion. Furthermore, in order to offer other comparable evidence, the petitioner must demonstrate that each of the above regulatory criteria would not readily apply to the beneficiary's occupation. In fact, counsel has offered arguments that four of the above regulatory criteria are applicable to the beneficiary's occupation.

For the reasons explained above, the available evidence is sufficient to minimally satisfy only one of the regulatory criteria regarding exceptional ability. The record portrays the beneficiary as a competent and dedicated marketing manager, but the evidence submitted does not establish that the beneficiary exhibits a degree of expertise significantly above that normally encountered in the occupation. In denying the petition, the director addressed the issue of exceptional ability and offered additional discussion regarding the beneficiary's eligibility for a national interest waiver.

The remaining issue is whether the petitioner has established that the beneficiary is eligible under Schedule A, Group II, which requires a job offer but not an individual labor certification. On appeal, counsel states that the director did not apply the correct standard and that the petitioner was not requesting a national interest waiver. Counsel argues correctly that the petitioner's actions were consistent with an application for Schedule A, group II pre-certification, and that the director had not addressed this request. This issue is moot, however, because the beneficiary is ineligible for classification as a member of the professions holding an advanced degree or equivalent, or as an alien of exceptional ability.

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.

ORDER: The appeal is dismissed.