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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 98 248 52515 Office: California Service Center Date: 30 JAN 2002

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:



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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 in the alternative as a member of the professions holding an advanced degree. The petitioner seeks employment as director of Bizfinity, Inc. (formerly known first as Modulus Software, Inc., and then as eCompany Network Corporation), a company which the petitioner had co-founded in 1998. 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 first issue to be addressed is whether the petitioner is a member of the professions with an advanced degree, and/or an alien of exceptional ability. In the notice of decision, the director stated "[n]o representations have been made that the beneficiary has exceptional ability." The record, however, readily contradicts this finding. Counsel's cover letter accompanying the initial filing repeatedly states that the petitioner seeks classification as an alien of exceptional ability.

The director must make the initial determination regarding the classification sought, but we offer the following observations.

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. Initially, counsel claimed that the petitioner meets three of the 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.

Counsel states that the petitioner "is the holder of a Bachelor's degree from Oxford University in the field of Modern Languages (French and German), and is eligible to receive a Master's degree without further study." Documentation from Oxford University states that the petitioner holds a degree not in "Modern Languages," but rather in "Modern Languages." Neither counsel nor the petitioner has explained how a degree in Modern Languages relates to the area of claimed exceptional ability (i.e. management of software design companies). The director should allow the petitioner an opportunity to address this issue.

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.

Counsel states that the petitioner "possesses over 18 years of experience in the field of high technology," all of it at companies that the petitioner has founded or co-founded. The petitioner claims the following employment:

Founder	[REDACTED]	1980 - 10/1987
Mng. Director	[REDACTED]	11/1987 - 8/1993
Founder/Dir.	[REDACTED]	9/1993 - present

The petitioner's work with The Computer Centre was not full-time, as the regulation requires; the petitioner states he worked only "20+" hours per week for this company. Therefore, only the petitioner's employment with [REDACTED] can count toward the ten year requirement.

8 C.F.R. 204.5(k) (3) (iii) allows for the submission of comparable evidence if the stated regulatory standards do not readily apply to the alien's occupation. In this instance, the petitioner claims to have been employed by businesses that he himself founded, and letters from himself to verify his own employment would not represent independent verification of employment. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner must therefore submit some form of verifiable documentation to support his employment claims, and the director should afford the petitioner a reasonable opportunity to do so.

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

Counsel asserts that the petitioner has won such recognition, but does not elaborate except to state that some witness letters in the record constitute such recognition. The director must weigh the evidence of record and determine whether such evidence (including the aforementioned letters as well as trade articles) constitutes qualifying recognition.

On appeal, counsel claims that the petitioner has satisfied a fourth criterion:

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

Counsel states that the petitioner "commands a high salary of \$150,000," but the record contains nothing to support this claim. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

For the \$150,000 figure to warrant consideration at all, the petitioner must show that he earned that salary at the time he filed the petition in September 1998. The petitioner must then show that \$150,000 is an exceptionally high salary for a co-founder and executive of a successful software business. Because the petitioner is a top executive, it cannot suffice for him to show only that he earns more than most software designers; such a comparison would be lopsided.

The director, having erroneously concluded that the petitioner does not seek classification as an alien of exceptional ability, stated "consideration of this petition will be limited to the issues of whether the petitioner seeks the beneficiary's services in a position that requires an advanced degree." The director, however, gave no further consideration to that issue. Also, because the petitioner seeks a national interest waiver, the structure of the regulations does not mandate that the position sought must require an advanced degree. Rather, as counsel observes on appeal, the petitioner must show that he is a member of the professions, with

either an advanced degree, or five years of progressive post-baccalaureate experience.

The Service's regulation at 8 C.F.R. 204.5(k)(3)(i) states:

To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Counsel asserts that the petitioner has met this requirement, with a bachelor's degree and well over five years of post-baccalaureate experience. Leaving aside the absence of any readily discernible connection between the petitioner's Modern Language degree and his career in computer software, counsel has not addressed a crucial section of the regulations. 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 claims to have been managing software companies since he was about 16 years old, several years before he obtained his baccalaureate degree in Modern Languages. This claim, on its face, appears to demonstrate that the petitioner himself does not consider a baccalaureate degree to be a minimum requirement for entry into the occupation. The petitioner has not claimed any college-level education in a field related to his occupation, nor has he established that his position requires, at a minimum, a bachelor's degree. Absent such evidence, the record does not support a finding that the petitioner is a member of the professions as the pertinent regulations define that term. The director should afford the petitioner the opportunity to address this critical deficiency.

If the petitioner fails to show that he qualifies for the visa classification sought, either as an alien of exceptional ability or as an advanced degree professional, he is necessarily ineligible for the added benefit of the national interest waiver.

In denying the petitioner's request for the waiver, the director relied on several premises that appear to be erroneous. For example, the director found that the petitioner has not established that his employer could not simply replace him with a qualified U.S. worker, or obtain a labor certification on his behalf. The petitioner's status as a founder and executive of Bizfinity raises significant obstacles to labor certification, and witnesses have attested that the continued survival of the company is contingent on the petitioner's continued involvement.

This is not to say that the petitioner has presented a clear-cut, unambiguous case for a national interest waiver, but it does show that the director's denial rested at least in part on flawed reasoning. Any new finding regarding the petitioner's waiver request should give due consideration to the petitioner's employment situation.

We note that much of the evidence submitted on appeal concerns the success of the petitioner's business subsequent to the September 1998 filing date. Developments after the filing date can show the viability of the petitioner's business, but cannot themselves justify approval of a petition with a priority date that falls before those developments took place. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and 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. The director should take the above binding case law into consideration when requesting and evaluating further information and evidence.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.