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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

PUBLIC COPY



APR 16 2003

File: WAC-99-132-53042 Office: California 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)

ON BEHALF OF PETITIONER:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

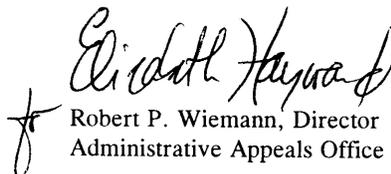
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office 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 Bureau of Citizenship and Immigration Services (Bureau) 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.


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 Administrative Appeals Office 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. 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 did not determine whether the petitioner qualifies for classification as an alien of exceptional ability, but 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.

(i) . . . the Attorney General may, when the Attorney General 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.

Neither the statute nor pertinent 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 the 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, 22 I&N Dec. 215 (Comm. 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.

We concur with the director that the petitioner works in an area of intrinsic merit, as a special education tutor. The director next determined that the proposed benefits of her work would not be national in scope. The petitioner's arguments regarding the national scope of her work revolve around her success with ██████████ an individual with Down Syndrome who the petitioner tutored. The record clearly establishes that Mr. ██████████ has had remarkable accomplishments, graduating from high school as "a mainstreamed student" and becoming an accomplished artist whose works have been exhibited and published. Mr. ██████████ has had some national exposure; he was featured on Public Television, has delivered speeches at Down Syndrome conventions, and was honored by the United States Congress. Mr. ██████████ parents confirm that the petitioner played a significant role in improving his social behavior, preparing him for mainstream education, and encouraging him to participate in his painting lessons with ██████████ Counsel claims that Mr. ██████████ national impact must, in part, be attributed to the petitioner.

Matter of New York State Dept. of Transportation provides some guidance on the issue of whether the proposed benefits of an alien's work will be national in scope. That decision provides:

For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest,

¹ While we recognize the challenges for mainstreamed children with disabilities, we note that the "Down Syndrome: Myths and Truths" information from the National Down Syndrome Society provided by the petitioner indicates that it is not unusual for children with Down Syndrome to be mainstreamed and that "the trend is for full inclusion in the social and educational life of the community."

the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, n. 3. The petitioner works as an in-home tutor. It does not appear that she has more than one or two students at a time. The petitioner does not claim and the record does not reflect that she lectures, writes published articles in her field, or develops curriculum beyond that which she uses for her students. The direct benefits of her tutelage, however great, accrue primarily to her students. The only proposed benefit claimed that would have a national impact is extremely indirect: providing an inspiration to others with disabilities by contributing to the success of a disabled individual. The letters submitted on appeal do not assert otherwise. While they refer to a “ripple effect” beyond the petitioner’s students, they are still making the same assertion that her successful student inspires others with disabilities and their parents. We do not doubt the impact of the petitioner on Mr. [REDACTED] or the importance of effective tutoring for disabled children. Nevertheless, we cannot conclude that the success of her student overcomes the conclusion set forth in *Matter of New York State Dept. of Transportation* that a single teacher’s national impact is negligible.

Finally, it remains to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien’s own qualifications rather than with the position sought. In other words, we do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner’s contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence *on the field* as a whole. *Id.* at 219, n. 6.

The petitioner submitted a letter from Mr. [REDACTED] father, [REDACTED] describing his son’s transformation under the petitioner’s tutelage. Similarly, the petitioner submitted a letter from [REDACTED] and [REDACTED] who describe the petitioner’s work with their young child, [REDACTED]. We do not doubt these assessments of the petitioner’s success with [REDACTED] and [REDACTED]. They do not bear on the petitioner’s influence on the field, however. The petitioner cannot establish her eligibility by demonstrating her success with two students. Instead, the petitioner must demonstrate that she has influenced the field of special education tutoring as a whole.

[REDACTED] art teacher, discusses his progress as an artist. Mr. [REDACTED] asserts that Mr. [REDACTED] would talk about how the petitioner would prepare his paints at home, provide inspiration through stories and music, serve as an appreciative audience, and clean up the paints when he was done. Mr. [REDACTED] asserts that without the petitioner’s “daily support and consistent help” Mr. [REDACTED] would not have progressed in art so rapidly. Mr. [REDACTED] is not a special education expert and his letter does not provide examples of how the petitioner has influenced the field of

special education.

██████████ Director and Founder of the Down Syndrome Connection in Danville, California, discusses the challenges faced by individuals with Down Syndrome. She provides general praise of the petitioner's work with Mr. ██████████ which she observed at Down Syndrome functions. She notes that Mr. ██████████ was inspired by ██████████ the actor with Down Syndrome who appeared on "Life Goes On." Ms. ██████████ asserts that now Mr. ██████████ provides such inspiration for others with Down Syndrome. While Ms. ██████████ asserts that special education tutors are needed in this country, she does not provide examples of the petitioner's influence on the field beyond having tutored a success story.

██████████ a special day class teacher at ██████████ high school discusses the challenges of switching to mainstream classes and how the petitioner provided important support during that time for Mr. ██████████ Ms. ██████████ does not assert that the petitioner has influenced the special education or mainstream inclusion programs nationwide or even at San Ramon Valley High School.

██████████ Principal of the Fourth Middle School of Shanghai, provides examples of students who were contemplating suicide or who had run away from home whom the petitioner assisted while a teacher there. Mr. ██████████ does not indicate that other schools or teachers were influenced by the petitioner's work. While the petitioner was awarded Outstanding Teacher by the Shanghai Education Bureau in 1985, recognition from peers is merely one element required for aliens of exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one, or even all three of those requirements warrants a waiver of the labor certification requirement.

In response to the director's request for additional documentation, the petitioner submitted a letter from ██████████ Director of Art Ability, "a program to utilize the visual arts to expand the life horizon for people with disabilities," at Bryn Mawr hospital in Pennsylvania. Ms. ██████████ states that she met the petitioner through Art Ability's 2001 exhibition and learned of her care for ██████████ Ms. ██████████ discusses the importance of behind the scenes support for disabled artists. Ms. ██████████ does not provide examples of other special education tutors influenced by the petitioner's work.

The remainder of the record includes evidence regarding Mr. ██████████ achievements: newspaper articles about Mr. ██████████ photographs of him speaking at National Down Syndrome Society conferences, his entry as one of 25 Role Models in *Exceptional Parent*, promotional materials about the Public Television special on his life, the Oakland California City Council Commendation, a tribute to Mr. ██████████ by California Congressman ██████████ in the Congressional Record, and a published book of Mr. ██████████ art work. None of these materials mention the petitioner as a motivating force in Mr. ██████████ life. On appeal, the petitioner submits a letter from parents of a child with Down Syndrome who appear to have learned about her work from the Public Television special on Mr. ██████████ While they express hope that their son can also achieve such success, they do not indicate that they are special education specialists who have been influenced by the petitioner's techniques. Regardless, Mr. ██████████ accomplishments, while reflective of the effectiveness of the petitioner's tutelage for him, do not reflect on the petitioner's influence on the field of special education as a whole.

The director noted the lack of letters from public agencies or government organizations. On appeal, counsel faults the director for requiring evidence beyond the regulatory provisions and failing to consider evidence that was submitted. We do not find that the director failed to consider the evidence submitted. The director noted, as we do, that the evidence primarily focuses on the artistic accomplishments and notoriety of [REDACTED]. On appeal, counsel refers to [REDACTED] as the petitioner's "work" which has appeared on national television. Unlike an artist, whose artistic work may influence others through its mere presentation, or a physicist whose equations may influence other physicists, we do not find that [REDACTED] artistic success, as portrayed in the media, influences the petitioner's field of special education. In other words, there is nothing about the coverage of Mr. [REDACTED] success included in the record that would allow other special education tutors to learn and emulate the petitioner's tutoring techniques or style.

We agree with counsel that a petitioner need not submit public agency or government letters to establish eligibility for a national interest waiver. Nevertheless, evidence from independent experts in the petitioner's field, in the form of references to the petitioner's work in their own publications, letters to the Service, or comparable evidence, is necessary to establish that the petitioner has a track record of success with some degree of influence on the field as a whole. In this case, the petitioner has submitted no evidence of invitations for her to speak at special education conferences, letters from independent experts in special education who have heard of her work with Mr. [REDACTED] and commenting on her abilities, or a case study on [REDACTED] success in a scholarly journal focusing on the petitioner's role with his education. While this list might not be exhaustive of how a person in the petitioner's field might establish an influence on the field, it reflects the type of independent, objective evidence required to make such a showing. Accolades from parents who are understandably grateful for the petitioner's positive influence on their child or hopeful for their own children's future cannot establish the petitioner's influence in the field among her peers. Moreover, letters from other individuals with a personal connection to the petitioner, few of whom are educated in the petitioner's field, are insufficient.

While not argued on appeal, the petitioner previously submitted evidence regarding a shortage of special education teachers. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. As evidence that the petitioner's profession is amenable to labor certification, the record contains evidence that a previous labor certification and immigrant visa petition were approved in behalf of the petitioner in 1992. Counsel asserts that this labor certification is no longer viable because the child whom the petitioner was to tutor succumbed to his illness. Counsel argues that it would waste Department of Labor resources to resubmit a new labor certification application from a new employer and that the waiver should be granted on this basis. An approved labor certification, even if rendered unusable due to tragic circumstances beyond the petitioner's control, is evidence that a waiver of that process is not necessary. Nor does one labor certification approval remove the Department of Labor's jurisdiction over the issue of whether a shortage exists, especially more than seven years after a previous determination on the issue.

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.

Beyond the director's decision, as stated above, the director did not determine whether the petitioner even qualifies for the classification sought. The petitioner seeks classification 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.

The regulation at 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.' The petitioner has adequately established that she has more than ten years experience and that she has received peer recognition for achievements in the field through a teaching award in Shanghai. The petitioner claims to meet the following final criterion:

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 submits evidence of part-time education resulting in a two-year certification in middle school education. As stated above, the petitioner must demonstrate that her degree places her above others in the field. The record contains no evidence regarding the percentage of special education tutors who have degrees. If it is common for members of the petitioner's field to have degrees, her degree does not set her above others in her field. Given the lack of evidence regarding this issue, the petitioner has not established that she meets this criterion. As the petitioner has only established that she meets two criteria, she has not established her eligibility for the classification sought.

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.

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.