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Immigration and Naturalization Service

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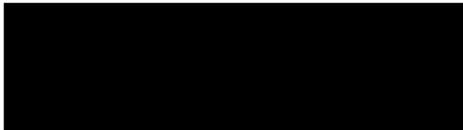
Date: FEB 27 2003

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:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont 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 a member of the professions holding an advanced degree or 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 found that the petitioner does not qualify for classification as an alien of exceptional ability or an advanced degree professional. 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.

On appeal, counsel contends that the director misinterpreted the evidence. He contends that the petitioner qualifies as an alien of exceptional ability and that his achievements merit a national interest waiver.

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 petitioner seeks employment as an art designer/artist. Form ETA 750-B, submitted with his petition, indicates that he desires to open an art gallery. The record contains a copy of his degree and an academic evaluation stating that the petitioner obtained the U.S. equivalent of a Bachelor of Arts degree in textile design from the Central Academy of Arts and Design, China, in 1984. The record also contains a 1989 "Certificate of Professional Titles" [sic] from the "Beijing Second Light Industry Co." stating that the [the petitioner] "is a qualified [sic] for the professional position of a 'senior design artist.'"

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 Service 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.

Petitioner’s evidence shows that he holds a baccalaureate degree related to his area of expertise. The record does not contain any evidence that a baccalaureate degree is the minimum requirement necessary to become an artist or art designer. Therefore we cannot conclude that the petitioner can be considered to be a member of the professions holding an advanced degree. Unless the petitioner can demonstrate that he qualifies as an alien with exceptional ability, the visa classification under section 203(b)(2) of the Act is unavailable to him.

Eligibility requirements for classification as an alien of exceptional ability in the sciences, the arts or business are set forth at 8 C.F.R. § 204.5(k)(3)(ii). Out of the six criteria described, an alien must satisfy at least three. A discussion of these criteria follows below.

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 place the alien above others in the field in order to fulfill the criteria; qualifications possessed by every member of a given field cannot demonstrate “a degree of expertise significantly above that ordinarily encountered.”

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’s baccalaureate degree in textile design appears to satisfy this criterion because it is not required training for his occupation, but rather is an indication of his expertise.

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

This represents a specific evidentiary requirement. Although the petitioner submitted a personal statement and attested to his work experience on the Form ETA 750-B accompanying his petition, the record contains little independent evidence from current or former employers documenting the duration of his employment or describing his duties. The record contains several letters from current and former colleagues attesting to the petitioner’s talent, but those testimonials are more applicable to another criterion. As such, the evidence submitted does not

document that the petitioner has at least ten years of full-time experience as an artist/art designer. 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).

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

Counsel asserts on appeal that the petitioner's membership in the "Chinese Artists' Association" satisfies this criterion. The record contains evidence that the petitioner became a member on August 1, 1987. There is no independent evidence from the Chinese Artists' Association documenting what the membership requirements are, how the petitioner's selection demonstrates exceptional ability, or how this association would act as a "certification" or "licensing" entity for individuals employed as artists or art directors, as counsel contends.

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

The record contains copies of the petitioner's pay slips from an employer in China. Counsel contends on appeal that the evidence shows that the petitioner was paid a much higher salary than others in similar jobs. It is not clear what specific comparisons counsel is making for this argument, because the petitioner's job title is not readily apparent from the pay records, and the record contains no independent corroboration or authority for counsel's argument regarding salary levels. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is also no argument that the petitioner's current U.S. annual salary of \$30,000 as an art designer in New York represents a level of remuneration demonstrating exceptional ability. Counsel states that the petitioner has not been able use his talents in the U.S. to the maximum extent because he lacks permanent residence. Nevertheless, the evaluation of this criterion for exceptional ability is grounded in objective evidence, not speculation.

Evidence of membership in professional associations

For the reasons previously noted, the petitioner's evidence showing only his membership in the Chinese Artists' Association does not satisfy this criterion.

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

While the record contains several letters attesting to the petitioner's ability, we note that evidence created specifically for the petition carries significantly less weight than would evidence which existed independently of the petition, such as awards. The record does include several examples of honors the petitioner has received in China for graphic design and painting. He received first prize in 1986 for a book design from the Chinese Artists' Association; a "best setting award" in 1997 from the organizing committee of the "National Environment Protection Exhibition;" a

1989 certificate of selection, notifying him that one of his paintings was selected for the China Contemporary Oil Painting Exhibition to be selected for exhibit in Singapore; a 1995 certificate showing that one of his paintings was selected for exhibition for the "Justice Peace - The Fiftieth Anniversary of the Victory of Anti-Fascist War International Fine Arts Exhibition;" a third prize for a painting exhibited at the "Paintings, Calligraphy and Photography Exhibition of Nation Employees of the Chemistry Industry in 1991;" a 1994 certificate of selection showing that one of the petitioner's paintings would be exhibited in the "Eighth National Arts Exhibition;" a certificate notifying the petitioner that one of his paintings appeared in an exhibition at the China Art Museum on March 6, 1997; a 1993 certificate for a distinguished award for a painting exhibited at the National Chinese Paintings Exhibition; and a certificate claiming that his painting "Southern China" won the 10th Asian Oil Painting Exhibition held in Japan. We note that counsel states in another part of the record that this painting was only "selected" to be exhibited at the 10th Asian Oil Painting Exhibition. It is the petitioner's burden to resolve any inconsistencies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While the petitioner's record appears to be impressive, we note that it would be far more convincing if it were accompanied by evidence showing the significance of these honors, such as how many artists participated in the various exhibitions, and how the selection or ranking process was determined. Even if the petitioner met this criterion, he has not established that he meets at least three criteria. In light of the above, we concur with the director's primary determination that the petitioner has not established that he is an alien of exceptional ability.

As the petitioner has not demonstrated that he is an alien of exceptional ability or an advanced degree professional, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue, as it is also a basis of the director's decision.

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, 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.

Eligibility for the waiver must rest with the alien's qualifications rather than with the position sought. This applies whether the position is publicly or privately funded. It is generally not accepted that a given project is of such importance that any alien qualified to work on it must also qualify for a national interest waiver. The 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 sought. 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 note 6.

Visual arts is an area of endeavor that has substantial intrinsic merit. Although the petitioner has not established that his art or its influence is national in scope, the proposed benefit of the petitioner's employment as an artist or art designer could conceivably have a national impact. The remaining issue to determine is whether the petitioner has established that he will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The petitioner submits several witness letters in support of his petition. Du Dukai, a professor of fine arts at Tshinghua University, China who has mural works displayed at the Beijing International Airport, characterizes the petitioner as an "exceptional painter and designer in China, who has already built up a reputation among his peers. His techniques at oil painting is mature [sic] as well as practical, honestly showing life and society, perfectly adding elements of Eastern aestheticism and cultural inner strength."

Jie He, a professor at the Central Academy of Art and Design in Beijing, praises the petitioner's graphic design work, noting that he was invited to design logos for some prominent Beijing hotels.

Aoyama Fukujima, the president of the Japan Naoya [sic] Academy of Arts, praises the petitioner's work as being at the "top level." We note that this individual's letter was apparently

written in Japanese, but the English translation provided indicates the translation is from Chinese. The translation is accompanied by an unidentified Chinese document. As such, it does not comply with the regulations governing translation requirements at 8 C.F.R. § 103.2(b)(3) and cannot be considered.

Eva Harley, a stylist and chief designer at Dan River, Inc., describes the petitioner's work as the "perfect integration of Chinese traditional art and essence of western art." Dianne Stein, a senior stylist with Dan River, Inc., states that she has worked with the petitioner for years and found his expertise in traditional Chinese brush painting to be particularly impressive.

Lee Bian, a "design designer" for Design Connections Studio, the petitioner's current employer, has known the petitioner for years and praises his unique combination of Oriental and Western culture that the petitioner uses in his paintings.

Don Simon, an art and humanities teacher at Rhode Island College, and Sally Caswell of "Gene Dwigging Studio," both submit letters dated February 2002 echoing the sentiments expressed by the other witnesses in praising the petitioner's expertise.

Although we do not discount the opinions of these experts, we note that at least four of them appear to be the petitioner's former or current colleagues or collaborators. While such letters are important in providing details about the petitioner's specific artistic work, they cannot by themselves establish the petitioner's impact or influence in the field as a whole. The record would be more persuasive were it supported by the opinions of independent experts, independent reviews published in respected known media or some equivalent evidence.

The record contains evidence that the petitioner published three books in China about flower patterns, plant patterns and watercolor painting, but no first hand evidence about the extent of circulation or sales of these books has been provided in order to support a claim that this petitioner has influenced the art world to any significant degree.

The petitioner also states that he has held several solo exhibitions in the United States since 1998, including one at an art gallery at a Sheraton Hotel in New York City. Included in the material submitted with the petitioner's appeal are copies of articles appearing in the Chinese media describing the exhibition of the petitioner's work. They appeared in the *People's Daily* in 1997, the *People's Daily* (Overseas Edition) in 1998, the *World Journal* in 2000, and the *International Daily* in 1998. The articles basically discuss the petitioner's style and advertise his exhibitions at the China Art Museum, the Yellow River Art Gallery in San Diego, California, and the Sheraton Hotel exhibition. No evidence has been submitted from any of these entities or from acknowledged art critics discussing the impact or success that these exhibitions generated..0 Additionally, the articles are in Chinese language publications, which cannot show an influence outside the Chinese community.

"Abstracts" of articles that the petitioner claims to have authored, which are also contained in the record, cannot be considered because they do not comply with the requirements for a full English

language translation as set forth in 8 C.F.R. § 103.2 (b)(3). That regulation requires that any foreign language documents must be accompanied by a full English language translation which is certified as accurate and complete and which the translator certifies that he/she is competent to translate from the foreign language into English.

It must be emphasized that even if the petitioner demonstrates that he has exceptional ability, pursuant to *Matter of New York State Dept. of Transportation* exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that petitioner presents to his field of endeavor must greatly exceed the “achievements and significant contributions” contemplated in 8 C.F.R. § 204.5(k)(3)(ii)(F) for an alien of exceptional ability. It is not sufficient to state that the alien possesses unique training or is a talented artist or art designer. The labor certification process exists because protecting jobs and employment opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. The alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process.

It is clear that the petitioner possesses superior artistic skills; however, the evidence does not support the claim that this petitioner’s work or influence greatly exceeds the significant contributions of an alien of exceptional ability. We cannot conclude that the petitioner has already influenced the field of art or artistic design to the level necessary to justify waiving the labor certification process.

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, 8 U.S.C. § 1361. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.