



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: EAC 99 208 53824 Office: VERMONT SERVICE CENTER

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:



PUBLIC COPY

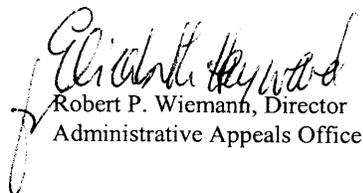
INSTRUCTIONS:

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.


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 an alien of exceptional ability. The petitioner seeks employment as a painter. 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 qualifies for classification as a member of the professions holding an advanced degree, but 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.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements 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 sole issue raised by the director is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The application for a national interest waiver cannot be approved. The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, “[t]o apply for the [national interest] exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate.” The record does not contain this document, and therefore, by regulation, the petitioner has not properly applied for a waiver of the job offer requirement. The director, however, did not cite this deficiency in the decision or at any prior time, instead deciding the waiver request entirely on its merits.

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.

Counsel explains why a national interest waiver should be in order:

[The petitioner’s] work represents a benefit which is national in scope. He has exhibited in New York and Washington and is currently preparing a series of exhibitions throughout the country. As is common with most art, the importance of his paintings transcend[s] any localized benefit which might be attributed to a single painting. . . .

Due to the unique nature of the work of [the petitioner,] it can be demonstrated that the national interest would be adversely affected if a labor certification were required of him. In the generic commercial employment sense, a fine arts painter can be found to do a specific job or fill a specific position. Thus, a labor certification application would surely fail [the petitioner] as a means of securing an immigrant visa. On the other hand, nobody but [the petitioner] can develop the themes and techniques which define his work as his. . . . We believe that the unique character of his work demonstrates that it would be contrary to the national

interest to potentially deprive the American public and the art world of [the petitioner's] work by making available to U.S. workers the position sought by him.

We concur that the petitioner's occupation is, at least potentially, national in scope. Some painters achieve national or even international fame, often lasting long after their lifetimes, enriching our cultural heritage while influencing other artists. Whether or not this particular alien has done so is irrelevant to the question of whether or not the fine arts are national in scope. The merits of this particular artist's work are more properly considered under the third prong of *Matter of New York State Dept. of Transportation*.

Counsel contends that the petitioner's "work is being recognized internationally and thus suggests that it is capable of influencing the art world as a whole." The claim of international recognition appears to derive from evidence showing that the petitioner has exhibited his works in Singapore and Malaysia as well as the United States. The petitioner claims to have exhibited in other countries as well but the evidence in the record is limited to the three named countries. With regard to the petitioner's exhibitions in Singapore and in neighboring Malaysia, the record shows that the petitioner resided in Singapore for several years in the early 1990s. Therefore, it is neither surprising nor a sign of wide renown that the petitioner would show his works in and around the area where he resided at the time.

The petitioner's initial submission consists almost entirely of documentation regarding exhibitions of his work, in the form of exhibition brochures, critiques, and media articles (two of which focus on the manner in which the petitioner has decorated his apartment). The articles by art critics offer descriptions and interpretations of the petitioner's work, but they do not show that the petitioner's work stands out to an extent that would justify a national interest waiver. A critic does not establish the special significance of an artist's work merely by describing it.

Along with the above documentation, the petitioner submits several witness letters. [REDACTED] who has edited several art publications, deems the petitioner "a talented and highly regarded fine artist who, in my considered opinion, will make a valuable cultural contribution to this country." In a separate letter, Mr. McCormack states that the petitioner's "unique ability to combine down-to-earth imagery with transcendental elements within an aesthetically harmonious format . . . makes [the petitioner] a rare and rewarding painter whose intriguing neo-surreal compositions make a significant contribution to post-modern art."

Lee Sonnier of Media/Right Properties states:

Media/Right Properties represents only artists that are on the cutting edge in their particular discipline. We have only a few clients because we are very exclusive.

[The petitioner] has [been] accepted to be represented by this agency. We believe he is one of our most important artists. Nonetheless, his talent and the importance

of his work was evident to us long before we were asked to evaluate him for this purpose. That is why we agree to represent him. . . .

The importance of [the petitioner's] work on developing art trends cannot be overstated. His techniques and style are unlike anything being done by American artists; they are as original as his subject matter and themes. . . .

[The petitioner's] work is so original that no serious student of art could agree that his work is capable of duplication or substitution. . . . [The petitioner] is unique. The importance of his work for art in America is potentially very great.

The petitioner's influence on "developing art trends" is not explained, and the fact that the petitioner has his own unique painting style does not automatically establish him as an important artist. The opinions of the petitioner's agent, hired for the specific purpose of promoting the petitioner's work and advancing his career, cannot be considered to represent a consensus or the general viewpoint of the fine art community.

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 additional witness letters and arguments from counsel. Counsel observes that artists are generally self-employed or work "on a commission basis" in the manner of an independent contractor. Counsel contends "[t]his type of independent contractor arrangement makes the painter's work difficult to address in a labor certification setting where an employer offers a well defined job to a qualified employee. Indeed it is just the sort of thing that Congress had in mind when they legislated the 'national interest waiver' into existence."

Counsel does not cite legislative history or any other source to support the contention that Congress specifically had independent contractors in mind when the waiver was introduced. The plain language of the statute indicates that aliens with exceptional ability in the arts are generally subject to the job offer requirement. Congress specified that the only exemption to this requirement is when the alien's admission is in the national interest to do so. There is no statutory provision indicating that working as an independent contractor invariably serves the national interest. The Administrative Appeals Office lacks jurisdiction to nullify this clause or to declare that Congress erred by subjecting artists or contractors to the job offer requirement. A blanket waiver for artists or contractors would, however, essentially have such an effect.

Congress' creation of a blanket waiver for certain physicians, via section 203(b)(2)(B)(ii) of the Act, demonstrates that the original statute does not imply such blanket waivers; otherwise, the physician waiver legislation would have been redundant and had no purpose or meaningful effect. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Because Congress has created no comparable blanket waiver for independent contractors (in the arts or otherwise), counsel's contention is not persuasive.

Regarding the letters submitted with the petitioner's response to the director's notice, counsel asserts that the "objectivity of each of these referees is unquestionable." The first of these witnesses [REDACTED], who had already written earlier letters on the petitioner's behalf. In his latest letter, [REDACTED] states:

[The petitioner] has evolved a unique synthesis of figurative and abstract elements, combining powerful compositions with intriguing post-Pop imagery in a manner unlike that of any other contemporary painter. He produces paintings marked by an optimism, an accessibility, and a passion that is refreshing in a period when too many others indulge in irony and obscurity. That he does so within a multiethnic context makes his work all the more fascinating and relevant, since American art at its very best is a product of the 'melting pot.' . . . It is important in this regard to remember that some of the most important figures in post-war American art, such as Willem de Kooning, Arshille Gorky, Theodoros Stamos, and others, were foreign born. It is my considered opinion that [the petitioner] could very well produce work of a comparable caliber.

The petitioner has little demonstrably in common with the artists named except that they all "were foreign born." The assertion that the petitioner "could very well produce work of a comparable caliber" is speculative and carries negligible weight.

[REDACTED] curator of the Epstein Family Collection, "the world's largest private collection" of the works of [REDACTED] draws various parallels between Munch and the petitioner. For instance, both have worked outside of their native countries, through which "a process of fertilization occurs" that affects both the artist and "the artistic community of the adopted country." [REDACTED] states "[t]hrough exhibitions, sales of his work, and exposure to other artists, [the petitioner] benefits the artistic culture here." The same can be said of countless other artists, few if any of whom work in complete isolation from interaction with others. The assertion that the petitioner's contribution is especially vital because he is an alien is, again, a very broad argument that applies to all foreign-born artists.

[REDACTED] who has collected "a number of [the petitioner's] paintings," states that the petitioner's "exhibitions have been extremely well received in the respected Galleries of Miami, Soho and in the Waldorf Astoria Hotel in New York City." The record contains no objective evidence to demonstrate the extent or nature of the reception of the petitioner's work in the United States. [REDACTED] assertion that "[a]rtists and art students would greatly benefit from the analysis of [the petitioner's] works" is, once again, speculative, with no indication as to the extent to which the petitioner has already influenced newer artists.

[REDACTED] an art teacher who has "[s]erved as Coordinator of Art Education for Montgomery County [Maryland] Schools," states that the petitioner "is a prolific and serious artist, apparently with international commercial outlets for his work," and that the petitioner's

“artistic production reveals unexcelled mastery of the plastic arts.” Mr. Hrebenach’s brief letter amounts to little more than an endorsement of the petitioner’s credentials as an artist.

The director denied the petition, finding that the petitioner has not shown that his contribution to the arts warrants a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. On appeal, counsel states that a brief is forthcoming within 30 days. To date, 22 months after the filing of the appeal, the record contains no further submission and a decision shall be made based on the record as it now stands.

On appeal, counsel asserts that the petitioner has submitted “substantial evidence of the uniqueness of the petitioner’s work. This is supported by [the definition of ‘painter’ in] the U.S. Department of Labor’s Dictionary of Occupational Titles.” The cited reference is not specific to the petitioner, but rather by nature refers to all painters. Counsel argues, in effect, that the petitioner’s work must be unique because every painter’s work is unique, the product of each painter’s personality. Counsel asserts that, because the petitioner “does not accept assignments or commissions, there is absolutely no element of his work that is based on objective standards or influences. Thus, by definition a painter cannot be the subject of a labor certification without negating the very elements of his work that make him a person who merits a national interest waiver.” As we have noted above, counsel’s arguments regarding the special nature of work as a painter cannot supersede the plain language of section 203(b)(2)(A) of the Act, indicating that aliens of exceptional ability in the arts are subject to the job offer requirement. The construction of the statute does not permit the finding that an alien is automatically exempt from the job offer requirement simply by having chosen an occupation in which permanent employment is rare or nonexistent.

Another issue that surfaces upon examination of the petition is the petitioner’s eligibility for the classification sought. The director stated that the beneficiary petitioner qualifies as a member of the professions holding an advanced degree. The record, however, does not support this conclusion. The regulation at 8 C.F.R. § 204.5(k)(2) defines a “profession” as “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 not shown that painting fits this definition of a profession, nor has the petitioner claimed to be a member of the professions holding an advanced degree. Indeed, the petitioner claims only three years of post-secondary education, and he has submitted no academic records to support that claim. Rather, the petitioner has sought classification as an alien of exceptional ability.

The regulations at 8 C.F.R. § 204.5(k)(3)(ii) and (iii) set forth the criteria for determining that the alien is an alien of exceptional ability in the sciences, the arts, or business:

- (ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

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

(E) Evidence of membership in professional associations; or

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

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

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; 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.

In the introductory letter accompanying the petition, counsel does not discuss the above criteria or how the petitioner has satisfied them. Counsel simply declares, without elaboration, that the petitioner seeks classification as an alien of exceptional ability in the arts. Because the petitioner has not addressed any of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), the petitioner has not shown that those standards do not readily apply to his occupation. Therefore, the petitioner has not triggered the comparable evidence clause at 8 C.F.R. § 204.5(k)(3)(iii). If the standards do, in fact, readily apply to the occupation, an alien does not trigger the clause simply by failing to address those standards.

As noted above, the majority of the evidence in the record consists of documentation regarding exhibitions of the petitioner's work. This evidence shows that the local press has covered the petitioner's exhibitions, but the petitioner does not show that such coverage is unusual or beyond what is expected in his field. These exhibitions have taken place in cities around the world, but the

record does not show that this is a result of any international reputation as claimed. As noted above, the petitioner was living on the Malay Peninsula at the time that his works were shown there. There is no indication that the petitioner had any reputation at all on the Malay Peninsula before he arrived and began working there. The record contains nothing from the management of the Hilton International Hotel to clarify the terms of the exhibition or who initiated the event.

A 1997 issue of *Artspeak*, a New York-based art magazine, includes a discussion of the petitioner's work. An advertisement on the same page reads, in part, "You don't need to have a show to expose your work to collectors, galleries & art coordinators throughout the world. Reserve space now for a superb color reproduction and review of your work in the coming issues of ARTSPEAK." Coverage in *Artspeak* appears to carry significantly less weight if such coverage can be commissioned at the artist's request.

The petitioner has also submitted several witness letters, discussed above. While we have not disregarded these letters, the subjective opinions of the petitioner's chosen witnesses cannot carry the same weight as the objective, verifiable evidentiary standards set forth in the above-cited regulations. The petitioner has not established, or even specifically claimed, to have met at least three of the regulatory criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, by regulation, the petitioner has not met his burden of proof to establish that he qualifies as an alien of exceptional ability in the arts. The director's error in failing to address the petitioner's claim of exceptional ability is mitigated because, without an approved labor certification or a national interest waiver, this petition could not have been approved even if the petitioner had established eligibility.

As is clear from a plain reading of the statute, it was not the intent of Congress that exceptional ability in the arts is grounds for an exemption 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 occupation, rather than on the merits of the individual alien. While the petitioner has succeeded in describing his work, he has not shown objectively that his work is of greater significance than that of other dedicated artists. The petitioner has also failed to establish eligibility for the underlying immigrant classification as an alien of exceptional ability in the arts. 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. 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.