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

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536



File: WAC 01 077 55293 Office: CALIFORNIA SERVICE CENTER

Date: MAY 06 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)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**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 in business. The petitioner seeks employment as a certified public accountant (CPA). 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, and 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 petitioner does not claim to be a member of the professions holding an advanced degree or the equivalent. Rather, the petitioner claims exceptional ability in business, specifically the field of accounting. 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.

The petitioner does not specify which of the regulatory criteria she has fulfilled, but the evidence submitted and claims advanced appear to fit most closely in the following 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.

The petitioner graduated from Central Philippine University in 1985, and received an award as that university's "most promising Accounting Graduate" of the year. To this extent, the petitioner's educational background appears to show higher-than-usual ability. The petitioner continues to pursue an advanced degree but has not yet received it.

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.

The petitioner claims fourteen years of experience in her field. The petitioner submits a list of several claimed former employers for the period between January 1986 and December 1999. While the period between January 1986 and December 1999 is nearly fourteen years, the petitioner does not claim uninterrupted employment. There are gaps of up to a year in length between several periods of employment. The petitioner submits materials from several employers, but not all of these materials are letters attesting to full-time employment.

A letter from the CPA firm of Sycip, Gorres, Velayo & Company in Manila, the Philippines, indicates that the petitioner worked as a staff auditor for one year, eight and a half months, from January 16, 1986 to October 31, 1987. A certificate from Saudi Arabia's Ministry of Defense and Aviation, Medical Services Division, indicates that the petitioner worked as an accounts officer (general ledger) at King Fahd Military Complex for two years, from May 19, 1991 to May 18, 1993.

An electronic mail message dated October 25, 2000 indicates that the petitioner "has been with us for a few months," but the message is an internal communication and thus does not identify the employer. A certificate from Cedars-Sinai Health Systems shows that the petitioner completed an orientation program for new employees on September 13, 1999, thus indicating that she was hired shortly before that date. The certificate does not list the petitioner's duties or establish that the petitioner was still employed there as of the filing date.

The above evidence does not document ten years of full-time employment, and most of it does not even consist of letters from the employer. The petitioner has therefore submitted insufficient evidence to satisfy this criterion.

Evidence of membership in professional associations.

The petitioner submits a copy of her completed application seeking student affiliate membership in the American Institute of Certified Public Accountants (AICPA). The petitioner signed the application and dated it "12/01/2000," but the application form, printed off the Internet, is dated "12/18/2000." Thus, the petitioner printed the form several weeks after the date when she purportedly signed the form. The record contains no evidence that the petitioner was a member as of the petition's January 5, 2001 filing date; even if she was, she would apparently have been a student affiliate member rather than a full member.

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

The petitioner submits a copy of her CPA certificate issued to her in the Philippines in 1986. The petitioner has, however, been working in the United States since 1996. The petitioner submits no evidence that a Philippine CPA certificate is reciprocally recognized by U.S. authorities. As discussed below, there is reason to believe that the petitioner's Philippine certificate is not recognized in the United States.

The petitioner submits the results from her May 1998 CPA examination. The results do not indicate whether or not the petitioner passed the examination. On her AICPA application, discussed above, the petitioner indicated that she sat for her CPA examination in November 2000, and identified herself as a "graduate student" and a "college graduate who is waiting to pass the CPA examination." It is not clear why the petitioner would sit for the exam again in November 2000, and say she was "waiting to pass," if she had already passed the exam two and a half years earlier.

With regard to the 1998 exam results, the petitioner scored as follows on the four main sections: AUDIT, 78; LPR, 82; FARE, 75; ARE, 77. These four sections are divided into 20 subsections. Of the 20 subsections of the exam, the petitioner scored below 50% in two sections and above 80% in four sections. The remaining 14 sections show scores ranging between 50% and 80%, half of which fall in the 71-80% bracket. Whether these constitute passing marks or not, the petitioner has not submitted evidence to show that these scores demonstrate exceptional ability, i.e. that the petitioner's abilities as an accountant exceed those ordinarily encountered in the field.

In a subsequent submission, the petitioner has submitted a copy of a CPA certificate that the University of Illinois awarded to the petitioner on February 9, 2001. This certificate has no meaning unless the petitioner was not considered a CPA in the United States prior to February 9, 2001.

The petitioner filed her petition on January 2, 2001, more than five weeks before she was certified as a CPA by any U.S. authority. In *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), the Immigration and Naturalization Service (now the Bureau) held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. The certificate in the record indicates that the petitioner was not recognized as a CPA in the U.S. until after the filing date, and therefore any evidence pertaining to that certification cannot retroactively establish eligibility before the petitioner received that certification. We note that, on the

Form I-140 petition, the petitioner identified her occupation not merely as “accountant,” but “certified public accountant.”

In denying the petition, the director stated that the petitioner has failed to establish exceptional ability. On appeal, the petitioner asserts that she has CPA credentials, failing to acknowledge that she did not receive her U.S. CPA certification until after the filing date. The petitioner asserts that she “intends to continue to act in the capacity of a CPA,” although that intent is not immediately apparent from the petitioner’s establishment of a business development firm which clearly provides services beyond the field of accounting. Indeed, the petitioner acknowledges her work “developing businesses,” which is not a function of a CPA.

The petitioner attempts to address two exceptional ability criteria not discussed above:

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

The petitioner discusses the salary and stock options that she “will be receiving” through her newly founded company. The only evidence of this compensation package is an attestation prepared by the petitioner herself. The regulation requires evidence that the alien has commanded, rather than will command, remuneration that demonstrates exceptional ability. Furthermore, remuneration that the petitioner arranges for herself through the company she owns is not a reliable gauge of exceptional ability. Furthermore, remuneration that the petitioner plans to pay herself as a business developer is not evidence of remuneration that the petitioner has, in the past, commanded as a CPA.

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

The petitioner asserts that “the businesses that [she] has developed have thrived over the years; this is already an evaluation in itself.” While the record contains samples of the petitioner’s accounting work, the record does not establish that her employers and client companies owe their success in whole or in significant part to the petitioner’s accounting work. The petitioner lists various activities she has undertaken, and asserts that she “has made significant contributions to the business industry” (sic). The regulatory standard, however, requires “recognition for achievements and significant contributions.” By calling for evidence of recognition, the regulation ensures that others in the field have acknowledged the significance of the contributions. It cannot suffice simply to list the petitioner’s activities and unilaterally declare them to be significant.

For the reasons discussed above, the petitioner has not overcome the director’s finding that the petitioner does not qualify for classification as an alien of exceptional ability.

The remaining issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now the Bureau] 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.

The initial submission contained no discussion as to why the petitioner’s admission would serve the national interest to an extent that would justify a waiver of the job offer/labor certification requirement. Therefore, the director requested evidence that the petitioner qualifies for the waiver. In response, the petitioner has submitted letters attesting to her good moral character. At issue in this proceeding is not the petitioner’s moral character, but her eligibility for a waiver that normally applies to aliens seeking the classification she has chosen to pursue. Section 316(a)(3) of the Act, 8 U.S.C. § 1427(a)(3), indicates that all candidates for naturalization must show good moral character. Given that every aspiring naturalized citizen must show good moral character, we cannot assume that good moral character is grounds for a special waiver of statutory requirements.

██████████ identified only as a U.S. citizen, states in another letter that the petitioner “will be advantageous to the American economy because of her ability to develop businesses and bring them to positive result. The businesses that could be developed will bring about positive source of income and

employment for fellow Americans.” This letter carries minimal weight; Ms. [REDACTED] statements are vague, and she has not established her own expertise that would qualify her to evaluate the petitioner’s abilities as regards business development.

The petitioner has submitted documentation regarding ACL Development Company, Inc., described in the record as “a newly-formed business development firm which will begin operations effective January 1, 2002.” The petitioner is one of two principals of this firm. A memorandum in the record states, in part:

We hereby propose [the petitioner] to be the CEO/Manager of this promising Company.

She will lead the Company to realize its potentials in the research and development of new or already existing business ventures, putting new systems in place or improving them, operate for profits, and the possibility of selling when the right time comes.

We highly recommend her for this position as we believe she has the necessary experience and skills to accomplish our Company missions and goals. . . .

She is proven to deliver strong and sustainable operating, financial and service gains. . .

The only signature at the bottom of this memorandum is that of the petitioner. Thus, the above memorandum is a recommendation that the petitioner wrote on her own behalf.

When considering the documentation that the petitioner has submitted regarding ACL Development Company, we note that the petitioner acts as a “marketing and business development representative” for various clients. These are not strictly the duties of a certified public accountant, which in turn is the occupation that the petitioner originally claimed to be seeking. 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 Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, *supra*. In this instance, the petitioner initially sought immigrant classification and a waiver based on her work as a CPA. When asked for further information about how she would serve the national interest, the petitioner has submitted evidence about a newly formed company through which she would provide business services other than accounting. There is no evidence that ACL Development Company even existed as of the petition’s filing date. The company is never mentioned in the petitioner’s initial submission, nor did the petitioner originally express any intent to devote her efforts to business development ventures of this kind.

The director denied the petition, acknowledging the intrinsic merit and potential (if not realized) national scope of the petitioner’s work but finding that the petitioner’s own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek.

On appeal, the petitioner asserts that the petitioner “only started getting into business [in] the past five years [and] has not yet flunked a business.” While the petitioner’s apparent success in business is commendable, it does not follow that the petitioner’s admission will therefore serve the national interest. The petitioner’s logic suggests that the job offer/labor certification requirement ought to apply only to failed businessmen, and that those who have “not yet flunked a business” stand above their peers to such an extent that it is in the national interest to waive the statutory job offer requirement. A plain reading of the statute and regulations shows that aliens of exceptional ability are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one’s field of endeavor does not, by itself, compel the Service to grant a national interest waiver of the job offer requirement. If exceptional ability alone is not sufficient grounds for a waiver, then surely neither is the lower standard mentioned by the petitioner, i.e. absence of failure.

The petitioner submits documentation from the Minorities Interested in Legal Education (MILE) program; a form letter from a MILE program official begins with the salutation “Dear Future Law Student.” Even if an intention to attend law school were grounds for a national interest waiver (which it is not), this documentation does not show that the petitioner will serve the national interest as a CPA. Instead, it simply raises further doubt about the petitioner’s intention to continue working as a CPA at all.

The petitioner has not established exceptional ability in business. Even if the petitioner had established otherwise, the statute shows that it was not the intent of Congress that every alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. The petitioner’s vague assurances that her services will benefit U.S. businesses do not provide adequate grounds for such an exemption. 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.