PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: WAC-01-242-55297 Office: California Service Center Date: MAY 29 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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 to classify the beneficiary 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 to employ the beneficiary as a director of art and photography. The petitioner asserts that the beneficiary qualifies for Schedule A, Group II classification. The director found that the beneficiary does not qualify for classification as an alien of exceptional ability and 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 asserts that the petitioner submitted sufficient evidence demonstrating the beneficiary's exceptional ability and that the petitioner requested Schedule A, Group II designation, not a waiver of the labor certification in the national interest.

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.

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 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." The petitioner claims to meet 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 director concluded that the beneficiary's high school diploma and college course work could not serve to meet this criterion. Counsel does not challenge this determination on appeal and we concur with the director.

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

Initially, the petitioner submitted the beneficiary's personal affidavit that he has operated his own company since 1987. The beneficiary also testified to his income during that period. In addition, the petitioner submitted some customer letters and artwork completed during that period. The director noted that the payroll documentation submitted did not relate to the beneficiary and concluded that the beneficiary's personal statement as to his employment was not supported by the record.

On appeal, counsel argues that the petitioner complied with the regulation by submitting a letter from the beneficiary's employer, the beneficiary. Counsel further asserts that the payroll documentation was submitted as evidence of the petitioner's ability to prospectively pay the beneficiary the proffered wage, not as evidence of the beneficiary's past employment.

While the beneficiary may have been his own employer, 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). The petitioner did not submit contracts between the beneficiary and his clients that might reflect employment from 1991 through the date of filing, ten years later. Nor did the petitioner submit copies of the beneficiary's tax returns for that entire period. The petitioner did submit some letters from clients. [redacted] Jr., Executive Director of the Joshua Tree National Park Association, asserts that the beneficiary has worked for that association since 1996. In addition, in a letter dated March 6, 1995, [redacted] Vice President of Marketing for WCT Products, Inc., asserts that the beneficiary did all their artwork for their mail order catalog for "the past two years."

On appeal, counsel references a letter from Dr. [redacted] dated June 20, 1994 as evidence of the beneficiary's employment back to 1991. Dr. [redacted] a psychiatrist in Arizona, claims to have known the beneficiary "both personally and professionally for close to three years" and previously "through his professional reputation." Dr. [redacted] further states "I have had personal contact with [the beneficiary] on an almost daily basis." Dr. [redacted] does not explain this contact in light of the fact that he resides in a different state than the beneficiary. This assertion by an individual who does not claim to have hired the beneficiary has minimal evidentiary value on the issue of the beneficiary's alleged full-time employment since at least 1991.

On appeal, the petitioner submits a new letter from [redacted] Art Director for Design Clothes, Inc. Mr [redacted] asserts that he met the beneficiary in 1987 when the beneficiary moved into his apartment complex. Mr [redacted] continues, "over the years I have

stayed in constant contact with [the beneficiary] and we have worked on several projects together, including album cover and poster illustration/design work." Mr. [redacted] concludes, "I have known [the beneficiary] since 1987, during which time he has supported himself as an artist/art director and made significant contributions to the field of art in the United States."

Finally, the petitioner submitted several copies of what is alleged to be the beneficiary's compact disc artwork and web artwork. The director noted that the beneficiary was not always credited for this work. In response, counsel asserts that the beneficiary is sometimes credited but it is at the discretion of the company commissioning the work.

Regardless of whether it is common not to credit the artist, it is the petitioner's burden to establish that the beneficiary is the artist of the work submitted. Seven of the compact discs credit the beneficiary or Unknown Origin, the beneficiary's company, with the layout. The earliest of these six compact discs was released in 1991 and credits the beneficiary with graphics design and [redacted] with the cover illustration. Several other compact discs credi[redacted] with illustration, design, and layout but not the beneficiary or Unknown Origin. Counsel asserts that Ms [redacted] is the beneficiary's art director. 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). While the record supports that the beneficiary and Ms. [redacted] worked on some of the same projects, the record does not include a letter from Ms. [redacted] or other evidence confirming that Ms. [redacted] worked for the beneficiary's company continuously from 1991 up to the date of filing and did no outside work on her own.

We note that the credits on [redacted] album, The Prison, list the artists as kindergarten students, the art director as [redacted] and the graphics are credited to Whitman/Bowen and Associates with special thanks to [redacted] The photograph of the [redacted] store is credited t[redacted] The album does not credit the beneficiary or Ms. [redacted] or Unknown Origins.

On appeal, the petitioner submits invoices for Unknown Origin, including one from 1991. The evidence is extremely minimal that the beneficiary worked full-time since at least 1991. The beneficiary claims no income in 1990, 1991, and 1993. Even if we accepted that the beneficiary meets this criterion, it is only one criterion. The beneficiary must meet at least three.

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

The petitioner submitted the beneficiary's attestation of his income for 1989 through 2000. His income ranged from none at all in 1990, 1991, and 1993 to an estimated $38,990 in 2000. The petitioner did not submit the beneficiary's tax returns in support of these claims. The director noted that the proffered wage is $68,000 and concluded that no evidence was submitted of the beneficiary's past wages.

On appeal, the petitioner submits his Schedule C from 1999 reflecting business income of $33,357. Counsel further states that the beneficiary's income is low because he has donated his time to the Joshua Tree National Park Association, the San Diego Natural History Museum and the California Council for the Humanities and has had to pay the expenses of running a business. Thus, counsel argues, the beneficiary's income evidence should be considered "comparable evidence" pursuant to 8 C.F.R. § 204.5(k)(3)(iii).

We acknowledge that there may be credible reasons why an alien with exceptional ability is not able to meet this criterion. Further, an inability to meet this criterion is not prima facie evidence of ineligibility. Were an alien able to meet three other criteria, his failure to meet this criterion would not be problematic. That said, the fact that evidence is insufficient to meet one of the criteria, for whatever reason, does not warrant the consideration of that same insufficient evidence as "comparable evidence" of exceptional ability. It remains that the beneficiary's income, for whatever reason, is not indicative of exceptional ability.

Evidence of membership in professional associations

Initially, counsel asserted that the beneficiary was a member of the HTML Writers Guild. As stated above, the assertions of counsel do not constitute evidence. *Id.* Thus, the director was not incorrect to state that no evidence was submitted to meet this criterion. On appeal, counsel asserts that such evidence was submitted. In addition, counsel asserts that the HTML Writers Guild has merged with the International Webmasters Association. The petitioner submits the beneficiary's membership certificate from the International Webmasters Association. The petitioner did not, however, submit any information regarding the association's membership requirements. Regardless of the association's prestige, if its membership requirements are not exclusive, membership in the association cannot be considered evidence that the beneficiary has a degree of expertise significantly above that ordinarily encountered.[1]

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

In support of this criterion, the petitioner submits reference letters praising the beneficiary's abilities. Opinions from witnesses whom the petitioner has selected are insufficient. Independent evidence that already existed prior to the preparation of the visa petition package carries greater weight than new materials prepared especially for submission with the petition. On his resume, the beneficiary lists several awards. As evidence of these awards, the petitioner submitted a list of the awards and their logos. The petitioner did not, however, submit the award certificates themselves or any other objective evidence to support the beneficiary's claim to have won these awards.

---

[1] The website for the International Webmasters Association, www.membercenter.org/join/ indicates: "Any individual that is interested in the study of Web technologies is encouraged to join the IWA-HWG as a Full or Trial Member." Thus, membership in this organization is not evidence of a degree of expertise significantly above that ordinarily encountered.

On appeal, counsel asserts that the beneficiary did not keep evidence of the awards because he did not realize their importance. That the beneficiary did not feel at the time that the awards were significant enough to save the evidence of such awards suggests that the awards themselves are not particularly significant.

The petitioner submits evidence that one of the beneficiary's sites, the website for punk musician [redacted] was listed in the May 1998 "Best 100 on the Web" issue of *.net Magazine*, included in *The Box*, and written up in *Crimewave USA Magazine*. The May 1998 issue of *.net Magazine* included [redacted] website under "Culture." The record contains no evidence regarding the significance of this publication or its selection criteria.[2] The highlighted photograph and comparison photograph in *The Box* are not attributed to the beneficiary. The write up in *Crimewave USA Magazine* is written by a contributor to th[redacted] website and cannot be considered objective evidence of the website's significance. Thus, the evidence submitted on appeal does not overcome the director's conclusion that the beneficiary has not been recognized by his peers for achievements and significant contributions.

Moreover, our attempt to verify the beneficiary's awards pursuant to counsel's invitation reveals that many of the awards are either insignificant or can be downloaded to the "awardee's" site by anyone.

Upon review of the website relating to [redacted] Award, [redacted] we discovered the following information:

> My name is [redacted] and I have been making Web pages for over 6 years now. I don't consider myself to be an amazing Web site designer, nor do I consider most of my own sites "elite," but I do know what I like. The award I give is to honor Web sites that I like. What do I like? I like sites that are both visually appealing, and informative. The design of a site is very important, but the content is even more so. I will not award sites that do not meet these two very important requirements. But in order to be an "elite" site, a Web must surpass these two prerequisites. The site must be unique, or in some way, stand out above the rest. It is for this reason, that people find it so hard to win the award.
>
> . . .
>
> I have often been asked what gives me the right to judge other sites. The truth is, I am no better at Web designing than most of the applicants. But I do take the time and effort to look at the nominated sites. The award comes from me, and so I make the judgment.

---

[2] The website www.website-awards.net lists the top British award grantors as Assess Risk Web Award, Favourite Website Awards, IPPA, and Yell.com.

This information makes clear that the award is selected by a single individual based on his own taste. We cannot conclude that this individual's opinion is evidence that the beneficiary has been recognized by his peers for achievements and significant contributions.[3]

Of even more concern, two of the other awards listed by the beneficiary, the "Award Award" and the "Blue Jay Web Award" are available to anyone who visits the relevant websites; www.geocities.com/SoHo/Studios/7253/award.htlm[4] for the "Award Award" and www. sdplastics.com/bluejay.html[5] for the "Blue Jay Web Award." This information raises serious concern about the significance of the remaining awards.

Further, while counsel asserts that the Looksmart Editor's Choice Award is the most prestigious award received, a review of Looksmart's website, www.looksmart.com, revealed no information regarding the prestige of their awards. We note that www.website-awards.net lists the top U.S. award grantors as 42nd Street Awards, Circus World Awards, International Web Page Awards, Lone Star Design Award, Mesweet's Award Site, Nem5Awards Program, PeaceWork Certified Sites, StarSite Award Program, Surreal Graphics and Awards, The Beeline, The Webby Awards, the Ultraweb Awards, and the Web Marketing Association. In addition, this same website includes three articles on "fee based awards" which discuss Looksmart's search engine. We note that simply paying an application fee and subsequently qualifying for inclusion on a search engine based on meeting certain technical criteria is not recognition for achievements and significant contributions.

Finally, the awards allegedly won by the petitioner in the 1980's for his greeting cards are not in the record.

In light of the above, we concur with the director that the record does not establish that the beneficiary is an alien of exceptional ability. Thus, the director's error in considering the national interest waiver instead of Schedule A, Group II eligibility is not reversible error. Nevertheless, we will consider that issue as well.

20 C.F.R. § 656.10(b) provides:

> Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts including college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States. For purposes

---

[3] We note that this page invites winners to download an award image for display on the award-winning site. While we do not find any misrepresentation, if it is possible to download the award image without winning the award, the image is hardly evidence that the award was issued as claimed.

[4] This page provides: "If you have a great site and feel you deserve the Award AWARD please take it."

[5] This page provides: "You are invited to take and use the Blue Jay Web Award for yourself."

> of this group, the term "science or art" means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university in order to qualify for the Group II occupation.

20 C.F.R. § 656.22(d) provides:

> An employer seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the *widespread acclaim and international recognition* accorded the alien by recognized experts in their field; and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) In addition, the same provision requires documentation concerning the alien from at least two of the following seven groups:

> (1) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.
>
> (2) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields.
>
> (3) Published material in professional publications about the alien, relating to the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.
>
> (4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.
>
> (5) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.
>
> (6) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.
>
> (7) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

Counsel asserts that the beneficiary meets criterion one and seven. Given the emphasized introductory language to the criteria in 20 C.F.R. § 656.22(d), the evidence submitted to meet these criteria should reflect "widespread acclaim and international recognition." For the reasons discussed above, the petitioner has not demonstrated that the beneficiary has won any significant prizes, let alone prizes that are internationally recognized. We note that simply because *.net magazine* is a British publication does not mean the "awards" it issues are recognized internationally as significant awards for excellence.

Regarding the last criterion, counsel asserts that the beneficiary's work has been displayed in more than one country because it appears on the Internet, which can be accessed internationally. Counsel notes that the Supreme Court has found that the Internet is accessible worldwide and that work that appears on the Internet can be considered "published." Neither conclusion is relevant to the issue of whether or not publication on the Internet is evidence of the beneficiary's "widespread acclaim and international recognition." It is inherent in the job of web design that one's work will appear on the Internet. Such "publication" is not similar to the competitive process of having one's work selected to appear in a significant artistic exhibition. Nor is the design of websites similar to having one's work included on a major museum's website as claimed by counsel. Having customers is not remotely akin to having a major museum select one's work for exhibition on the Internet or at the museum itself. Rather, the beneficiary's design of websites is evidence that the beneficiary is competent and is able to work in his field.

As discussed above, the record contains insufficient evidence of the significance of the awards the beneficiary's sites have allegedly won. Thus, we cannot conclude that these awards transform the beneficiary's sites into artistic exhibitions. Counsel references exhibitions sponsored by the 29 Palms Inn in 1996 and 1998 that featured the petitioner's photographs. The only evidence of these "exhibitions" is a print out from a website sponsored by the 29 Palms Inn featuring photographs copyrighted by Unknown Origin. Even if we accepted this as an exhibition, counsel concedes that 29 Palms Inn exhibits local as well as international artists. We cannot conclude that these two exhibitions are evidence of the beneficiary's "widespread acclaim and international recognition."

Finally, the record includes two photographs that counsel asserts show the beneficiary's display at the 1983 Harrogate International Gift Show and Birmingham International Exhibition. The beneficiary apparently displayed lounge chair greeting cards at these exhibitions. These exhibitions, which occurred 18 years before the filing date of the petition, cannot be considered evidence of the beneficiary's "widespread acclaim and international recognition" at the time of filing.

Beyond the decision of the director, the record is deficient in additional areas. First, the petitioner must establish that the beneficiary qualifies for the job offer as defined on the Form ETA-750A. Part 14 of the ETA-750A requires a bachelor's degree in art. Part 15 does not indicate that an equivalent of that degree would be acceptable. The letter from the petitioner describing the job requirements reiterates this education requirement. The beneficiary does not have a bachelor's degree in any field. As such, the beneficiary does not meet the requirements of the job offer.

Second, the petitioner must establish that the job described on the Form ETA-750A requires an alien of exceptional ability as defined in 8 C.F.R. § 204.5(k)(3)(ii). The ETA-750A requires only four, not ten years of experience as required by 8 C.F.R. § 204.5(k)(ii)(B). In addition, the ETA-750A does not require any licensing, prior salary, memberships, or recognition from peers. The only criterion set forth at 8 C.F.R. § 204.5(3)(ii) addressed by the ETA-750A is the degree. A degree is not generally required to practice in the field of art. Thus, a bachelor's degree in art might constitute evidence indicative of exceptional ability. The ETA-750A, however, does not indicate that a successful candidate must meet at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Thus, the job does not require an alien of exceptional ability.

Finally, 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is April 1, 2003. The beneficiary's salary as stated on the labor certification is $68,000 annually.

Initially, counsel asserted that the petitioner grossed over $2,000,000 in 2000 and employs 15 workers. Counsel further asserted that "the company's financial documents" were "attached herein." Instead, however, the petitioner submitted a "Cash Requirements and Deposits Report." This document evidences a $20,262.51 payroll transaction. That the petitioner completed a payroll transaction is not evidence that it has the ability to pay the beneficiary the proffered wage. The petitioner did not submit the documentation required by 8 C.F.R. § 204.5(g)(2) quoted above. Without tax returns, including schedule L, or financial statements reflecting either net income equal to or above the proffered wage at the time of filing or net current assets equal to or above the proffered wage at the time of filing, the petitioner cannot establish that it had the ability to pay the beneficiary the proffered wage at the time of filing.

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. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.