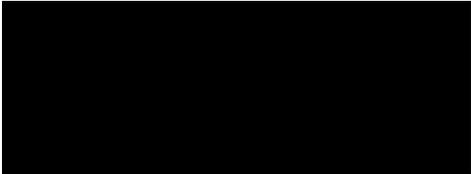


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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



File: WAC 02 065 54237 Office: CALIFORNIA SERVICE CENTER

Date:

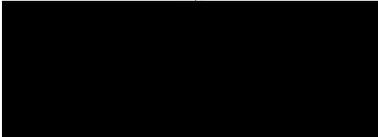
NOV 06 2003

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:



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 Citizenship and Immigration Services (CIS) 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 is a martial arts school that seeks to employ the beneficiary as an instructor, while the beneficiary also continues to compete as an athlete in her own right. 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 beneficiary 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.

On appeal, counsel states that a brief is forthcoming within 30 days. To date, over seven 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. We will consider counsel's comments on the appeal form itself.

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.

While counsel refers to the beneficiary as a "professional," this term is used in the vernacular sense of a "professional" athlete as one who is paid for her work, rather than an unpaid "amateur." 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 any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The beneficiary's occupation is not listed in that section of the Act. Furthermore, there is no evidence that the occupation requires a bachelor's degree or that the beneficiary possesses such a degree, let alone an advanced degree. There is, therefore, no evidence that the beneficiary qualifies for classification as a

member of the professions holding an advanced degree, or that the petitioner seeks to classify the beneficiary as such.

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 further below. In the initial submission, counsel does not specify which of these criteria the beneficiary meets. Instead, counsel makes various claims such as the assertion that the beneficiary has received “numerous awards from the several major martial arts organizations. The latest awards indicate that she is now competing at the 4th Black Belt level. . . . [S]he will soon attain the 5th Black Belt level, which carries the designation of the title ‘master,’ and will likely represent one of the few female holders of this title worldwide.”

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.

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.

There is no evidence that the beneficiary holds any academic degrees, in the martial arts or in any other field.

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.

Gordon Jue, vice president of business affairs at the United States International Taekwondo Federation (USITF), states that the beneficiary “has more than 15 years as a Black Belt and Instructor.” Mr. Jue does not indicate that the beneficiary was, during that time, directly employed by the USITF, nor does he specify whether or not that experience was consistently full-time. The petitioner indicates that the beneficiary last entered the United States in September 1995, and therefore it would appear that some of the beneficiary’s qualifying employment experience would have to be outside the United States. Mr. Jue does not explain whether he has relied on evidence or first-hand knowledge to attest to the beneficiary’s activities outside the United States. The record contains nothing from any identified employer outside the United States.

The regulatory references to “full-time experience,” “employers” and “the occupation” make it clear that the ten years must be in the form of paid, full-time employment. It cannot suffice for the petitioner simply to demonstrate that the beneficiary has been involved in the martial arts for over ten years.

The record indicates that the beneficiary founded the petitioning facility in May 1993, eight years and seven months before the filing date. Rebecca Polstra, the petitioner's treasurer and secretary, states that the beneficiary is the petitioner's "sole full-time instructor," but there is no indication or documentary evidence that the beneficiary's work has been consistently full-time since May 1993. Given the petitioner's claim that the beneficiary last entered the United States in 1995, the beneficiary would appear to have been abroad for at least some of the intervening period. The petitioner has not submitted documentation from current or former employers to establish at least ten years of full-time experience, nor has the petitioner explained the absence of such documentation. Therefore, the petitioner has not satisfied this criterion.

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

The record contains two Instructor Certificates issued to the beneficiary by the International Taekwondo Council, identifying the beneficiary as a Certified Instructor. The certificates are dated July 1995 and July 1999. The record contains no background information about these certificates. If every taekwondo instructor must be certified, then the beneficiary's possession of such a certificate does nothing to distinguish her from other instructors in the field. Mandatory certification, because of its universal nature, does not establish a level of expertise above what is normally encountered in the field. Rather, holding mandatory certification would, itself, be normally encountered in the field.

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

The record is silent with regard to the beneficiary's remuneration.

Evidence of membership in professional associations.

Counsel cites evidence of the beneficiary's membership in the International Taekwondo Federation and the International Taekwondo Council. There are also references to the beneficiary's membership in the "ATA," but the record does not even reveal the full name of this association, let alone establish her membership therein. The record does not indicate what requirements one must meet to join these organizations. If membership is open to anyone who participates in taekwondo, then it is difficult to see how such membership demonstrates a level of expertise beyond what is normally encountered in the field. The burden is on the petitioner to establish that membership in these associations requires or demonstrates exceptional ability.

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

The record demonstrates that the beneficiary has won or placed highly at several regional and national taekwondo competitions. As an instructor, the beneficiary received a 2001 National Personal

Achievement Award from the International Taekwondo Council. The beneficiary has thus received recognition both as an athlete and as an instructor, satisfying this criterion.

Beyond the above criteria, the petitioner places considerable emphasis on the exceedingly small number of female 5th degree black belts in taekwondo (two in the United States, twelve in the world). This information is not relevant, however, because the beneficiary was not a 5th degree black belt when the petition was filed. Rather, she was two years short of being eligible to test for the 5th degree black belt. Several of the petitioner's arguments are based on the assumption that the beneficiary would eventually qualify for this level. These assumptions regarding future events are, necessarily, speculative and conjectural. Aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). Arguments based on further qualifications that the beneficiary might one day achieve carry no weight.

Also, the fact that the beneficiary is a 4th degree black belt appears to have at least as much to do with the passage of time as with her athletic abilities. With each level of black belt, a year is added to the minimum time in grade before the black belt holder can attempt to qualify for the next level. For instance, a 3rd degree black belt must wait three years before becoming eligible to test for the 4th degree black belt. Because even the finest athletes must wait several years before attaining higher degree black belts, irrespective of ability, to hold a higher degree black belt seems to rely at least as much on experience as on technical expertise.

In denying the petition, the director discussed the petitioner's claim that the beneficiary qualifies as an alien of exceptional ability. On appeal, counsel states that the director failed to consider "letters from high ranking athletic association officials which stated that she would soon be among the dozen premier female athletic performers in her field." It remains that the beneficiary was not yet at this rarefied level of achievement at the time the petition was filed in December 2001, and hypothetical speculation about what the beneficiary might achieve in the future is not, by any reasonable standard, evidence of the beneficiary's present exceptional ability.

8 C.F.R. § 204.5(k)(3)(iii) allows the submission of "comparable evidence" beyond the six criteria listed above, but only if those standards do not readily apply to the beneficiary's occupation. The comparable evidence clause is not in effect if the standards do, in fact, readily apply, but this particular beneficiary cannot meet them.

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 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. We note that the director did not advise the beneficiary of this deficiency, but even if this missing document had been submitted, the waiver request would still be subject to denial on its merits.

Counsel states that the beneficiary’s “numerous awards and letters from state and local community and government offices point to a substantial benefit to the United States.” Pursuant to section 203(b)(2)(A), all aliens of exceptional ability are required to “substantially benefit prospectively the . . . United States.” That same section of the statute requires a job offer from a U.S. employer. Clearly, then, “substantial prospective benefit” alone does not justify a national interest waiver, even leaving aside the petitioner’s failure in this instance to establish that the beneficiary qualifies for the underlying immigrant classification. Counsel’s cover letter accompanying the initial filing does not address this issue, nor does counsel even specifically mention the national interest waiver.

Rebecca Polstra, identified above, indicates that the petitioning facility relies on the beneficiary's efforts, and that the petitioner and the beneficiary have received recognition for charitable activities. Ms. Polstra adds that "approximately 10% of our students receive state or national status" in competition. Other witnesses affirm that the petitioning center produces a significant number of successful students. The record also indicates that the petitioner and the beneficiary have been active in local charitable events.

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 evidence showing that the beneficiary and several of her students have performed well in national competitions.

The director denied the petition, stating that the beneficiary's contributions do not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek for the beneficiary.

On appeal, counsel states that the beneficiary's "past nationwide impact will continue in the future and at the highest black-belt level for a female performer." The petitioner has claimed that the beneficiary's students have fared well in national competitions, but the petitioner has not explained why it is in the national interest for national taekwondo champions to have trained at the petitioning center with the beneficiary rather than with other qualified, certified instructors in the United States. The beneficiary's success and skill as an athletic instructor do not inherently serve the national interest to an extent that automatically justifies a waiver. Also, the beneficiary's community charitable activities, while admirable, have generally had a local rather than a national impact.

Based on the evidence submitted, the petitioner has not established that the beneficiary qualifies as an alien of exceptional ability. The beneficiary does not qualify for the underlying classification, and does not qualify for a waiver of the requirement of an approved labor certification.

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.