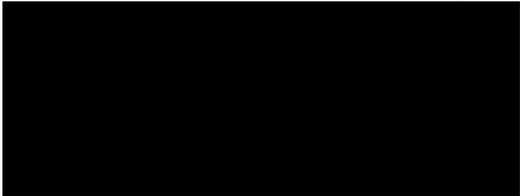




U.S. Citizenship
and Immigration
Services

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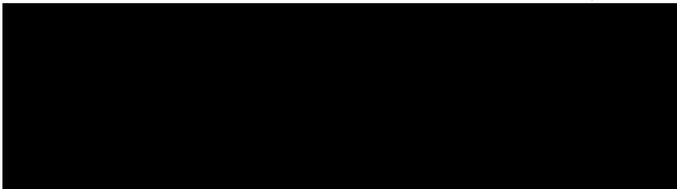
FILE: WAC 03 206 53589 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

DEC 29 2004

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:



PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 an executive manager. 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 had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. As we concur with the director that the petitioner has not established that the beneficiary is qualified for classification as an alien of exceptional ability, we need not reach the second issue.

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 requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks to classify the beneficiary as an alien of exceptional ability in business. 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. The regulatory 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 beneficiary does not have a degree.

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 beneficiary indicates that he has operated the petitioning company since September 1996. The record contains a June 14, 1996 letter from the Arizona Department of Environmental Quality assigning an identification number to the petitioning company. The letter from the California Department of Forestry and Fire Protection indicates that the State of California has been doing business with the beneficiary since 1997. In a letter dated May 8, 2003, [REDACTED] the Business Development Manager for [REDACTED] Corporation, asserts that his company built the petitioner's facility in 1992 for the U.S. Air Force and that the petitioner has operated the facility for the past seven years.

At best, the above evidence establishes that the beneficiary had seven years experience managing the petitioning company as of the date of filing. On appeal, counsel asserts that the ten-year requirement is arbitrary and that the technology used by the petitioning company has not existed for ten years. The director's request for evidence of ten years of experience was not arbitrary. Rather, ten years of experience is one of the six criteria for the classification sought, only three of which must be met. Moreover, the petitioner seeks to classify the beneficiary as an alien of exceptional ability in business. As such, the petitioner may submit evidence of ten years of experience in business that is not limited to managing the petitioning company. While the beneficiary lists other business experience in his biography, the record lacks evidence of such experience as required by 8 C.F.R. § 204.5(k)(3)(ii)(B). While the lack of evidence of ten years of business experience does not preclude eligibility, it remains that the petitioner has not established that the beneficiary meets this criterion.

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

While the petitioning company has the necessary licenses to operate, the beneficiary has no professional licenses. Licenses required for operation do not demonstrate a degree of expertise above that ordinarily encountered in the field.

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

The proffered wage listed on the petition is \$150,000. The petitioner submits no evidence of the beneficiary's past remuneration, such as Forms W-2 or tax returns. Moreover, the record lacks comparative evidence suggesting that the beneficiary's salary is comparatively high such that it is evidence of a degree of expertise above that ordinarily encountered.

Evidence of membership in professional associations

The petitioner submitted no evidence relating to this criterion.

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

The petitioner provides several letters from clients attesting to the quality of services provided by the beneficiary and the petitioning company. [REDACTED] of Raytheon Missile Systems asserts that the petitioner "makes it possible for Raytheon to reuse certain Exchange missile parts and deliver missiles as new to our customers." Mac Bolton of Boeing asserts that his site is unable to perform paint stripping. He further states:

During the recent preparations for carrier deployments to the mideast, [the beneficiary] advised on how to strip paint by layer from [F-18 fighter aircraft flight control components in need of repair] so we could find needed serial numbers. When the Air Force needed advice on how to strip very thin metals without damaging them . . . [the beneficiary] was the individual we turned to. He proved that he could strip a coke can and not put a dent in it. Our Wichita Boeing facility consulted with him on how to strip large aircraft areas. When another of our Boeing Company teams allowed the stripping of paint without proper knowledge, the damaged, beyond repair, all the flight controls on a KC-135. By sending the components here, [the beneficiary] showed how it could be done without damaging any metal.

[REDACTED] of Boeing asserts that without the beneficiary's capabilities, Boeing would have trouble meeting its critical schedules. [REDACTED] of the California Department of Forestry and Fire Protection asserts that the petitioner's shop "is the only one in Arizona that is large enough to fit the Grumman S-2 inside to perform the necessary paint removal from the airframe" and that other companies use chemical processes that damage the metal. [REDACTED] of Marsh Aviation asserts that the beneficiary's involvement with Marsh "is vital because of the size of the hangar where his business is based as well as the gentle, non-corrosive methods employed by his company." [REDACTED] of [REDACTED] asserts that the beneficiary gives tours of his facility and that a New Haven company purchased a similar facility from Clemco after touring the beneficiary's facilities, also built by Clemco.

On appeal, counsel asserts that the director failed to consider a November 12, 2003 letter from a "high level manager at [REDACTED]" addressed to [REDACTED]. The petitioner's response to the director request for additional documentation is dated October 6, 2003. While counsel asserts that the letter was faxed to the California Service Center, the letter is not in the record. Moreover, the regulation at 8 C.F.R. § 103.2(b)(11) requires that all evidence submitted in response to a request for additional evidence must be submitted at one time. Counsel does not supply a copy of the letter to Senator McCain on appeal. According to counsel, the letter expressed the national importance of the beneficiary's skills and the necessity that the beneficiary be a lawful permanent resident in order for the petitioner to obtain certain contracts. Thus, it appears that the letter addresses the request for a waiver of the job offer requirement rather than the six regulatory criteria for exceptional ability.

Finally, the petitioner submitted evidence that the beneficiary gave a presentation at the 1999 Department of Defense Aerospace Coatings Conference. The record contains no evidence that the sponsors of the conference formally recognized the significance of this presentation above and beyond the other presentations.

In considering evidence submitted to meet this criterion, Citizenship and Immigration Services (CIS) finds formal recognition, such as awards or other honors, is more persuasive than letters from references selected

by the petitioner. On appeal, counsel asserts that the director "seems to presume fraud" by not accepting the reference letters as sufficient evidence of eligibility. We do not doubt the sincerity or credibility of the beneficiary's references. Rather, we find that unsolicited evidence in existence prior to the preparation of the petition is required to meet this criterion. Even if we were to accept that the beneficiary meets this criterion, an alien must meet at least three criteria. For the reasons discussed above, the petitioner has not established that the beneficiary meets any of the other criteria.

Throughout the proceedings, counsel barely addresses the above criteria, focusing instead on a subjective definition of "exceptional" and the elements for waiving the job offer requirement in the national interest set forth in *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215 (Comm. 1998). The regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii), discussed above, relieve CIS from making subjective determinations on "exceptional ability." In his initial brief, counsel notes that 8 C.F.R. § 204.5(k)(3)(iii) allows "comparable" evidence of exceptional ability "if the above standards do not readily apply to the beneficiary's occupation." Counsel then discusses the intrinsic merit of the services performed by the petitioning company but does not explain why the above criteria are not applicable to the beneficiary's occupation. Moreover, counsel does not specify the criterion or criteria for which the evidence submitted is "comparable" or explain how the evidence is comparable to the evidence required to meet the regulatory criteria.

According to *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), notice of evidentiary requirements may be given by the regulations or a request for additional evidence. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) clearly states six types of evidence that may be submitted to establish eligibility for the classification sought. Counsel quoted those requirements in his initial brief. In his noted dated July 16, 2003, the director listed the regulatory criteria and requested evidence relating to at least three of the six criteria. In his denial notice, the director again listed the criteria. The petitioner has had ample opportunity to demonstrate the beneficiary's eligibility for the classification sought and has not done so.

The national interest waiver of the job offer requirement is only available to advanced degree professionals and aliens of exceptional ability. The petitioner does not claim, and the evidence does not reflect, that the beneficiary is either a professional or that he has either an advanced degree or the equivalent thereof as defined at 8 C.F.R. § 204.5(k)(2). As the petitioner has not demonstrated that the beneficiary meets the regulatory requirements for exceptional ability, the issue of waiving the job offer requirement is moot. The petitioner has not demonstrated that the beneficiary is eligible for a classification for which the national interest waiver is available.

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.

ORDER: The appeal is dismissed.