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20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536

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U.S. Citizenship  
and Immigration  
Services

[REDACTED]

FILE: WAC-03-062-55398 Office: CALIFORNIA SERVICE CENTER Date: FEB 10 2004

IN RE: Petitioner: [REDACTED]  
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 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

**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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 a member of the professions holding an advanced degree. 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 did not qualify for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. The director further concluded 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 proposed benefits of the petitioner's work are not hypothetical and requests an adjudication of the petition "according to the appropriate standards."

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 classification as a member of the professions holding an advanced degree. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The director stated that "no representations have been made that the beneficiary has an advanced degree therefore, this petition will be limited to the issue of exceptional ability." In fact, counsel claimed initially that the petitioner was an advanced degree professional.

The record reflects that the petitioner holds a baccalaureate degree in Engineering and a “diploma” in accounting. The record does not contain an evaluation of these foreign degrees indicating that either degree is equivalent to an advanced degree. The director, however, failed to consider whether the petitioner had the equivalent of an advanced degree through five years of post-baccalaureate experience. While the record contains no letters from employers indicating the period of time for which the petitioner worked for the employer, the director never requested such evidence.

In addition, 8 C.F.R. § 204.5(k)(2) defines “profession” as follows:

Means 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.

8 C.F.R. § 101(a)(32) provides:

The term “profession” shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

While the petitioner has a degree as an engineer, he seeks to work as an executive. Neither counsel nor the petitioner has articulated why this position is a profession as defined in the regulations quoted above. Nevertheless, the director never requested evidence as to whether a baccalaureate degree is required for the position.

Rather, in his final decision, the director considered whether the petitioner had established that he is an alien of exceptional ability. The director’s discussion of this issue, however, used an incorrect standard. 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. Initially, the director correctly listed the criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii). The discussion that follows, however, is an evaluation of the evidence under the criteria for aliens of extraordinary ability set forth at 8 C.F.R. § 204.5(h)(3). For example, the director discusses judging the work of others, a criterion set forth at 8 C.F.R. § 204.5(h)(3)(iv) but not under 8 C.F.R. § 204.5(k)(3)(ii). Moreover, while the director correctly discusses the petitioner’s claimed memberships, the director discusses whether the associations required “outstanding achievements,” a requirement under 8 C.F.R. § 204.5(h)(3)(ii), but not 8 C.F.R. § 204.5(k)(3)(ii)(E).<sup>1</sup> We note that counsel also addressed the wrong criteria in her initial cover letter and makes no specific arguments regarding this issue on appeal.

As stated above, the director raised for the first time in his final decision that that the petitioner had not established eligibility for the classification sought. While the director also concluded that the petitioner had

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<sup>1</sup> While the petitioner need not demonstrate that the associations of which he is a member require outstanding achievements, 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.”

not established that a waiver of the job offer was warranted in the national interest, that conclusion appears based in large part on the previous discussion of the petitioner's inability to meet criteria not relevant to the classification sought. Thus, the director's entire decision is flawed. Therefore, the matter will be remanded for reconsideration of whether the petitioner qualifies for the classification sought as well as whether a waiver of the job offer requirement is warranted in the national interest.

Given the director's failure to advise the petitioner of the true deficiencies in the record, the director shall request the following additional evidence prior to issuing a new decision: (1) evidence of the petitioner's employment experience as documented by letters from employers, (2) evidence as to the educational requirements of the proposed employment, (3) evidence that the petitioner is a member of the Institution of Chemical Engineers (IChemE) and the institution's membership requirements, (4) the complete letter from [REDACTED] Secretary General of the European Isocyanate Producers Association (ISOPA),<sup>2</sup> (5) evidence regarding the selection process for Technical Chairman of the European Fuel Oxygenates Association (EFOA), (6) evidence (other than the unsupported assertions of the petitioner's references) that the European Union recognized the petitioner's work on an EFOA report through the adoption of legislation or otherwise, and (7) any other evidence the director finds necessary given the discussion above.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

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<sup>2</sup> The record contains only the first page of the letter. Thus, the signature page is missing.