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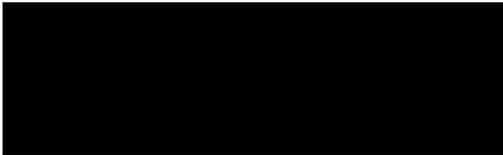
U.S. Department of Homeland Security
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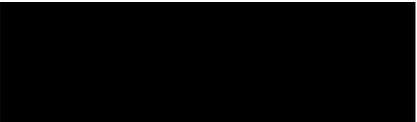


U.S. Citizenship
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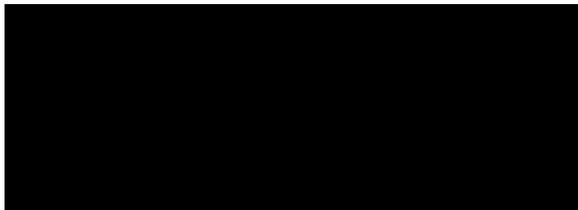


FILE: WAC-01-242-55296 Office: CALIFORNIA SERVICE CENTER Date: **FEB 10 2004**

IN RE: Petitioner: 
Beneficiary:

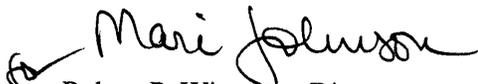
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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.


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. 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 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.

Specifically, the director found that the petitioner had only submitted evidence relating to the first criterion for the classification sought, three of which must be met to establish eligibility. Finally, the director determined that the petitioner had not demonstrated that she worked in an area of intrinsic merit, that the proposed benefits of her work would be national in scope, or that she would benefit the national interest to a greater degree than an available U.S. worker with the same minimum qualifications.

On appeal, counsel asserts that the petitioner has demonstrated her experience and education and that the director failed to explain why the evidence was insufficient. Subsequently, the petitioner, through counsel, submitted evidence of the petitioner's recent accomplishments.

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 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 petitioner submitted an evaluation from the International Education Research Foundation, Inc. (IERF) asserting that the petitioner’s architectural technician certification in July 1987 was equivalent to an Associate of Arts degree in Architectural Technology and that her diploma awarded by the Yerevan Art Theatrical Institute in June 1995 is equivalent to a Bachelor of Arts in Applied Arts with a concentration in Design. As noted by the director, the petitioner did not submit the actual diplomas or official transcripts.

We find that a degree is not required in the petitioner’s field. Thus, a degree would serve to meet this criterion. Nevertheless, despite the director’s request for evidence to support the petitioner’s academic achievements and specific statement in his decision that the foreign degrees were not in the record, the petitioner has not submitted those documents. Rather, the petitioner submits another evaluation. The new evaluation asserts that the petitioner’s 1995 Diploma is the equivalent of a Master of Arts degree. This evaluation conflicts with the previous evaluation.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). In the present matter, the unsupported and conflicting evaluations are deemed to be less than probative in evaluating the beneficiary’s foreign education. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Regardless, the petitioner has not submitted the official academic record documenting her education as required by 8 C.F.R. § 204.5(k)(3)(ii)(A) or even her degrees themselves. Thus, she has not established that she received the degrees.

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

Neither the petitioner nor counsel challenges the director’s assertion that no evidence was submitted relating to this criterion and we concur with the director.

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

Neither the petitioner nor counsel challenges the director’s assertion that no evidence was submitted relating to this criterion and we concur with the director.

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

The director concluded that the petitioner did not submit evidence to address this criterion and the petitioner does not challenge that conclusion on appeal. We simply note that in response to the director's request for additional documentation, the petitioner submitted a letter of intent for a proposed partnership whereby Ed Harker would produce the petitioner's project and would split the proceeds in half with the petitioner. The amount of remuneration the petitioner will receive from this contract is unknowable. Moreover, the contract is dated after the date of filing and cannot establish the petitioner's eligibility as of that date. See 8 C.F.R. § 103.2(b)(12). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, we concur with the director that the petitioner does not meet this criterion.

Evidence of membership in professional associations

Neither the petitioner nor counsel challenges the director's assertion that no evidence was submitted relating to this criterion. We acknowledge that initially, the petitioner asserted that she was a "paid member of the Armenian Artists' Union in Yerevan from 1995 until 1998." The petitioner, however, did not submit any evidence to support this assertion. 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). Even if the petitioner had submitted evidence of this membership, she would need to demonstrate that such membership is indicative of a degree of expertise significantly above that ordinarily encountered. The record contains no evidence of the membership requirements for the union. We note that if union membership is required to work in the field, it cannot be considered as evidence that the petitioner possesses a degree of expertise above that ordinarily encountered. For these reasons, we concur with the director that the petitioner did not submit any 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

While the director concluded that the petitioner did not submit any evidence relating to this criterion, the record contains some evidence that warrants discussion. Initially, the petitioner asserted that her work itself is "the best evidence of her significant contribution to the field of art." The petitioner submitted copies of photographs of her artwork, including work displayed at exhibitions. The petitioner also submitted, both initially and in response to the director's request for additional documentation, reference letters praising her skill.

We find that exhibitions and letters prepared in support of the petition are not the type of recognition from the field contemplated by the regulation. Nevertheless, the petitioner also submitted the Gyumri Second International Biennial Grand Prize awarded to the petitioner at a show in West Hollywood, California, October 3, 2000. While the record contains little evidence regarding the significance of the show or the award, we find that this award is minimally sufficient to meet this criterion.

Even if we accepted the evaluations as evidence of the petitioner's degree, she would only meet two of the above criteria. A petitioner must meet three to establish eligibility. The petitioner was specifically advised of the criteria and the lack of evidence to meet them. On appeal, neither counsel nor the petitioner challenges

that conclusion. Rather, counsel asserts that the petitioner would benefit the national interest. As the petitioner has not demonstrated that she is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue.

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

The Service 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 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 director questioned whether “the activities of the [petitioner] as a visual artist would meet the requirements of ‘substantial intrinsic merit.’” We disagree and find that work in the field of visual art does have substantial intrinsic merit.

Next, the director concluded that the petitioner had not demonstrated how her work would be national in scope. On appeal, counsel asserts that the petitioner has reached a level where her work is sought out by art critics and other professionals and that she has “much to offer the art community in the United States.” What is relevant is whether the proposed benefits of the petitioner’s work would be national in scope. Specifically, we look at the occupation itself in determining whether the benefits could be national in scope. Initially, the petitioner indicated that she intended to exhibit her art in Los Angeles, teach art classes in the Armenian and Russian communities as well as for the general public, to produce documentaries for public television and

“Web cast,” and “continue to build my career as an Architect of Interior and Exterior Design.” We find that artists and documentary artistic directors can have a national impact.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Initially, the petitioner requested a waiver of the job offer requirement because artists “are traditionally self-employed.” CIS acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, note 5.

Eligibility for the waiver must rest with the alien’s own qualifications rather than with the position sought. At issue is whether this petitioner’s contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner submitted reference letters from [REDACTED] the petitioner’s mentor; [REDACTED] the “grandfather” of contemporary Armenian art and ideological leader of Group Bunker (a group of Armenian artists who immigrated to France and the U.S.) according to the petitioner; [REDACTED] Coordinator of the Gyumri International Biennial; Ovannes Kochinian, owner of a gallery in Los Angeles, California; [REDACTED] owner of a café in California; [REDACTED] Art and Communication Coordinator for Lark Gallery;¹ and [REDACTED] a writer, director and composer associated with the Magic Cinema in California. All of the reference letters provide general praise of the petitioner’s skills and [REDACTED] requests the petitioner’s assistance on several screenplays being contemplated by [REDACTED]

In response to the director’s request for additional documentation, the petitioner submitted more reference letters [REDACTED] Bettio, Founder and Director of the Park Labrea Arts Council and a senator in the California Senior Legislature,² provides general praise of the petitioner’s art, which he viewed at a recent exhibition, and recounts her credentials.

The petitioner also submitted a letter from [REDACTED] an art curator who has evaluated art for, among others, the United Nations and Director’s Guild of America. [REDACTED] asserts that Los Angeles is a center for artists seeking to have a national influence and that success in Los Angeles suggests an ability to succeed anywhere in the United States. [REDACTED] then evaluates the petitioner’s art, asserting that “she contributes something new and extremely valuable to us in the United States.”

[REDACTED] a lecturer in Armenian Studies at the University of California, Los Angeles (UCLA), discusses the positive reactions of UCLA students to the petitioner’s exhibition there.

¹ An Internet art gallery affiliated with the Bunker Group according to its website, www.larkgallery.com.

² According to the official Internet site for the California Senior Legislature (CSL), www.thevrys.com/csl, CSL is a nonpartisan volunteer organization that convenes to hold model legislative sessions designed to prepare legislation relevant to older California residents for potential introduction in California’s official legislature.

Finally, as stated above, the petitioner submitted a letter of intent for a proposed partnership whereby Ed Harker would produce the petitioner's project and would split the proceeds in half with the petitioner. While the petitioner submitted evidence that Mr. Harker is a successful screenwriter and producer, she has not submitted the same type of evidence demonstrating her own track record of success as a documentary artistic director.

On appeal, the petitioner submits evidence of new exhibitions of her work and foreign-language newspaper articles about herself. The evidence of record does not establish that the petitioner has a track record of success with some degree of influence on the field as a whole. The record does not reflect that she has influenced avant-garde art beyond the Armenian community in Los Angeles.

Finally, 8 C.F.R. § 204.5(k)(4)(ii) provides that when requesting a waiver of the job offer, the petitioner must submit Form ETA-750B. The director requested that the petitioner submit this form. In response, the petitioner asserted that she was waiting for the Department of Labor (DOL) to return the form. We note that Form ETA-750B does not need to be certified by DOL. It remains, the petitioner has not submitted this form.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. 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.