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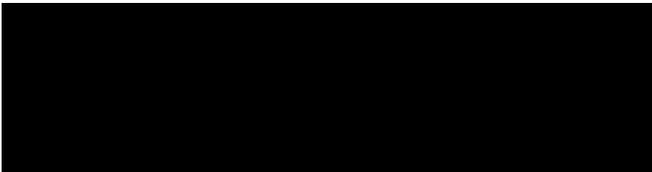
FILE: WAC-03-019-53421 Office: CALIFORNIA SERVICE CENTER Date:

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.

*Mari Johnson*

for 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 serigrapher of fine art. 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 did not contest that the beneficiary qualifies for classification as an alien of exceptional ability, but 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 director failed to consider several items of evidence and asserts that additional evidence or a brief will be submitted within 30 days. Counsel dated the appeal June 25, 2003. As of this date, more than seven months later, this office has received nothing further. The appeal will be adjudicated on the evidence of record.

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.

It appears from the record that the petitioner seeks to classify the beneficiary as an alien of exceptional ability, although the petitioner initially asserted that graphic artist is a "professional position which one can acquire a Degree in."

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.

Thus, the issue is not whether accredited institutions offer degrees in the beneficiary’s field, but whether a baccalaureate degree is required to practice in the field. The petitioner has not demonstrated that a baccalaureate degree is required or that the beneficiary has such a degree. Thus, the petitioner has not demonstrated that the beneficiary is a member of the professions or an advanced degree professional. As such, we must determine whether the beneficiary has established his eligibility as an alien of exceptional ability. The director did not request additional evidence relating to this issue or discuss this issue in his final decision. While we uphold the director’s determination that a waiver of the job offer is not warranted in the national interest for the reasons discussed below, we find that a discussion of the eligibility requirements for the classification sought is also warranted.

The petitioner seeks to classify the beneficiary 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 that the beneficiary meets 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*

On the Form ETA-750B, the beneficiary indicated that he obtained two “completion certificates” in graphic design. The petitioner, however, failed to submit the official transcripts evidencing either certificate or even the certificates themselves. Thus, the petitioner has not established that the beneficiary meets this criterion.

*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 petitioner indicates that the beneficiary has worked for the petitioning company since 1989. The record demonstrates that the petitioning corporation was incorporated in 1989. The record adequately supports the assertion that the beneficiary has been working there since 1989.

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

The record contains no evidence relating to this criterion.

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

The petitioner submitted its tax returns for 1999 and 2000. The tax return reflects that the petitioner compensated the beneficiary \$125,000 in 1999 and \$103,000 in 2000. The petitioner also submitted evidence that the average salaries for graphic designers, craft artists, fine artists, sketch artists, and cartoonists can average up to \$50,648 annually in various geographic zones.

This evidence is insufficient. The beneficiary is the sole officer of the company listed on its tax return. We note that the petitioner suffered a loss of \$29,216 in 1999 and \$134,752 in 2000. While Citizenship and Immigration Services (CIS) does not add back in depreciation, we note that depreciation only amounted to \$21,930 in 1999 and \$17,307 in 2000. Thus, even without consideration of depreciation the petitioner would have suffered losses of \$7,286 in 1999 and \$117,445 in 2000. We are not convinced that the beneficiary's decision to pay himself such an extravagant salary as to cause his own business to suffer a small loss in 1999 and an exceedingly large loss in 2000 is evidence of a degree of expertise significantly above that ordinarily encountered in the field.

*Evidence of membership in professional associations*

The petitioner submitted evidence that it pays membership dues for a listing in *Who's Who in the Screenprinting and Graphic Imaging Association International* published by the Screenprinting and Graphic Imaging Association International (SGIA). SGIA issued the petitioning company a Continuity Award in recognition of continuous membership in the association. First, it is the petitioner, and not the beneficiary, who is a member of SGIA. Regardless, the petitioner has not demonstrated that this membership requires anything other than the payment of dues. As such, it is not evidence that the beneficiary has a degree of expertise significantly above that ordinarily encountered in the field.

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

The record contains several personal reference letters. We find that this criterion contemplates objective evidence already in existence prior to preparation of the petition. In response to the director's request for additional documentation, the petitioner submitted evidence that it received a Golden Image Award and an Honorable Mention from SGIA at their 2002 Convention and Exposition. Even if we credited the beneficiary with an award issued to his company, the convention was held from October 30, 2002 through November 2, 2002. The petition was filed October 24, 2002. Thus, we cannot consider the award as evidence of the beneficiary's eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

As the petitioner has not demonstrated that the beneficiary 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 as it was the sole basis of the director's decision.

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.

We concur with the director that the beneficiary works in an area of intrinsic merit, graphic arts. The director then concluded that beneficiary’s work is not in the national in scope. The issue is whether the proposed benefits of his work, availability of reasonably priced serigraphs of fine art to the general public, would be national in scope. More specifically, we look at the beneficiary’s occupation itself, and not what the beneficiary has personally done in that occupation. We find that a serigrapher’s work is available for dissemination nationally and his services are available to artists nationally. Thus, we find that the beneficiary meets this prong.

It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien’s own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this beneficiary’s contributions in the field are of such unusual significance that the beneficiary merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner submitted a list of several artist-clients for whom the beneficiary creates serigraphs of their artwork. Serigraphs are silkscreen copies of artwork that are superior in quality to lithographs. The beneficiary’s clients are based mostly in California, with a client in Florida, a client in Connecticut, and a

client in Nevada. One of the beneficiary's clients is Hiro Yamagata, an artist whose work has been displayed at the Guggenheim Museum in Bilbao, Spain and at the 1997 Academy Awards Governor's Ball. [REDACTED] has also painted canvases of professional golf tournaments, the serigraphs of which were sold as limited editions signed by [REDACTED]. In a letter, Mr. Yamagata asserts that the beneficiary has unique and rare talents in the area of fine art reproduction.

Jungo Shuden, Art Director for Hakuhodo, Inc. in Japan, asserts that the beneficiary has printed limited editions of Mr. Shuden's work. Mr. Shuden further asserts that the beneficiary studied serigraphy at a prestigious silk-screening studio in Japan and that few artists in Japan and no artists in the United States perform this type of serigraphic art.

Scott Brown, Partner of Scott Arts Graphics, asserts that he has "at times" obtained the beneficiary's services to create serigraphs of paintings by [REDACTED]. Scott, reported in *Time Magazine* to have been named the most reproduced artist in America by the *Guinness Book of Records*. While Mr. Brown asserts that Ms. Scott would not allow her work to be reproduced by anyone who did not exhibit ability beyond that ordinarily found among serigraphers, that sentiment is not echoed by Ms. Scott herself. Moreover, it is not clear that the beneficiary does all of her serigraphs. In fact, as the most reproduced artist in American, it is possible that she avails herself of numerous serigraphers.

The record contains a near identical letter from [REDACTED] Publishing regarding the art of Sahall. The near identical language of the two letters suggests that while the authors attest to the language with their signatures, they did not compose the language themselves. The record also contains letters from beneficiary's colleagues from school and business providing general praise of the beneficiary's talent. In response to the director's request for additional documentation, the petitioner submitted evidence that one of the beneficiary's former interns is now restoring famous artwork.

Finally, the petitioner submitted a 1991 pamphlet prepared by the beneficiary for a workshop and articles about Kusuo Saito, the beneficiary's mentor in Japan. The record contains no information regarding the significance or circulation of the pamphlets or the articles.

The above documentation does not indicate that the beneficiary has been particularly influential on the field of silk-screening. That the beneficiary has satisfied customers and has mentored an art restorer who has been able to work in his field is not evidence of a track record of success with a degree of influence on the field of serigraphy. Specifically, the record contains no evidence of an original contribution to the art. The petitioner cannot demonstrate the beneficiary's eligibility for a waiver of the job offer simply because he has successful clients.

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.

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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.