



U.S. Citizenship
and Immigration
Services

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PUBLIC COPY

[Redacted]

FILE: [Redacted]

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]

*identifying data deleted to
prevent unwarranted
invasion of personal privacy*

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

Robert P. Wiemann, Director
Administrative Appeals Office

above that ordinarily encountered in the field, then the beneficiary qualifies as an alien of exceptional ability under section 203(b)(2) of the Act. A position which requires at least three of the six above factors can be said to require exceptional ability, thereby fulfilling the related requirement at 8 C.F.R. § 204.5(k)(4)(i).

8 C.F.R. § 204.5(k)(4)(i) also requires applicants for Schedule A designation to submit a fully executed uncertified Form ETA-750 Application for Labor Certification. This document indicates that the job requires a master's degree in business administration, as well as ten years of experience in the job offered. The Form ETA-750 lists no other special requirements for the position.

The experience and education requirements address, at most, two of the six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii). In the absence of other requirements, the petitioner has not established that the job requires exceptional ability. Whether or not the beneficiary, individually, meets additional regulatory criteria is beside the point. The beneficiary's individual qualifications do not establish that the position inherently requires exceptional ability.

The petitioner submits an evaluation from C.E.I.E. Specialists, indicating that "an MBA degreed person is indeed considered one of exceptional ability" because most schools that offer baccalaureate programs in business administration do not also offer magisterial programs in that specialty. The regulations offer a controlling definition of "exceptional ability," and the petitioner cannot offer a different, superseding definition. Therefore, this attempt to equate an M.B.A. degree with exceptional ability fails.

Department of Labor regulations at 20 C.F.R. § 656.22(d) state that applications for labor certifications under Group II of Schedule A must include documentary evidence testifying to the current widespread acclaim and international recognition accorded the aliens by recognized experts in their field; and documentation showing that their work in that field during the past year did, and their intended work in the United States will, require exceptional ability. Applicants for designation under Schedule A, Group II, must submit documentation from at least two of seven specified categories:

- (1) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.
- (2) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievements of their members, as judged by recognized international experts in their disciplines or fields.
- (3) Published material in professional publications about the alien, relating to the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.
- (4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.
- (5) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.
- (6) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.

(7) Evidence of the display of alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

The record reflects no attempt by the petitioner to satisfy the above criteria. The petitioner's submission is divided into sections, but these sections conform much more closely to the criteria at 8 C.F.R. § 204.5(k)(3)(ii) than to the criteria at 20 C.F.R. § 656.22(d). Indeed, the petitioner's submissions make no direct mention of designation under Group II of Schedule A. The petitioner's application for such designation is merely implied by the petitioner's submission of an uncertified Form ETA-750.¹ The initial submission contains documentation of the beneficiary's education and past experience, but neither the petitioner nor counsel explains how this documentation demonstrates current widespread acclaim or international recognition.

The director, in denying the petition, found that the petitioner has not met any of the criteria set forth at 20 C.F.R. § 656.22(d). The director further determined "it has not been shown that the alien's work in the field during the past year required or demonstrated exceptional ability." The record contains little information that specifically relates to the beneficiary's work during the year immediately prior to the petition's January 8, 2003 filing date.

On appeal, counsel states that the director should have classified the beneficiary as an alien of exceptional ability, because "on August 13, 1999, and again [on] February 21, 2002, the same organization found that the alien was qualified as an alien of exceptional ability." The dates referenced by counsel refer to earlier petitions, rather than any finding by the director relating to the petition now under review in this proceeding. (The petitioner has previously filed numerous petitions on behalf of this beneficiary, every one of which has been denied or revoked.) Furthermore, the regulations contain two different "exceptional ability" standards, one set forth at 8 C.F.R. § 204.5(k)(3), requiring only a degree of expertise significantly above that ordinarily encountered, and another, more stringent group at 20 C.F.R. § 656.22(d), calling for widespread acclaim and international recognition. In an August 1999 remand order (pertaining to an appeal filed in connection with an earlier petition), the AAO found that the beneficiary meets the exceptional ability standards at 8 C.F.R. § 204.5(k)(3), but made no comparable finding regarding the Department of Labor's standards (which establish eligibility for designation under Schedule A, Group II). Counsel's reference to a February 21, 2002 finding in the petitioner's favor refers to an approval that was later revoked; the AAO subsequently upheld the revocation. The now-revoked February 2002 approval creates no binding precedent, nor does it in any other way compel CIS to approve the present petition.

The director had specifically stated that the petitioner has failed "to establish that the alien qualifies as one of exceptional ability, as contemplated by 20 CFR," i.e., Department of Labor regulations requiring acclaim. The director's decision does not contain any finding regarding the much less strict "expertise" criteria of 8 C.F.R. § 204.5(k)(3)(ii). Therefore, any argument by counsel with regard to the latter criteria is off point and fails to address the grounds for denial.

Counsel's vague assertion on appeal that the beneficiary does, in fact, qualify as an alien of exceptional ability does not demonstrate that the petitioner has met any of the requirements listed at 20 C.F.R. § 656.22(d). The director offered specific findings relating to all seven of the criteria listed in those regulations, and counsel has offered no rebuttal to any of those findings. Indeed, as stated above, the petitioner has never in this proceeding made any coherent claims regarding those seven criteria, and it would serve no purpose to speculate here as to how the petitioner may have intended to address those standards. The

¹ The lack of an approved labor certification would also be consistent with an application for a national interest waiver pursuant to section 203(b)(2)(B) of the Act and 8 C.F.R. § 204.5(k)(4)(ii), but the I-140 petition form specifically indicates that the petitioner does not seek a national interest waiver.

burden is on the petitioner to present its case, not on the AAO to organize the evidence and make the petitioner's arguments.

The only specific evidence of exceptional ability cited on appeal consists of an "Expert Opinion Letter" and the beneficiary's membership in two associations. The petitioner has not shown, or even claimed, that either of these associations require outstanding achievements of their members as judged by recognized international experts, as required by 20 C.F.R. § 656.22(d)(2). One of the associations is in fact a university alumni association. The other, the American Society of Mechanical Engineers, boasts of "over 125,000 members," a very large number which does not readily suggest highly restrictive membership requirements. As for the letter, counsel refers to it as new evidence, but it is in fact a copy of the previously submitted letter from C.E.I.E. Specialists, contending that any alien who holds an M.B.A. degree is, by definition, exceptional.

Each petition is decided on its own merits. The director, in denying the petition, noted nevertheless that the petitioner has previously sought the same immigration benefits, with essentially the same evidence, and that both the director and the AAO have already illustrated the shortcomings of this evidence in decisions issued with regard to those petitions.

The remaining issue in the director's decision concerns the petitioner's ability to pay the beneficiary's proffered wage. 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

In order to establish eligibility in this matter, the petitioner must demonstrate its ability to pay the wage offered as of the petition's filing date, specifically January 8, 2003. The petitioner has proffered the beneficiary an annual wage of \$66,560. In an earlier proceeding, the AAO had found that the petitioner had established its ability to pay the beneficiary, but the proffered wage at that time was less than half the sum now offered to the beneficiary, and even then the AAO found that the petitioner had barely established its ability to pay the lower amount. The evidence in that earlier proceeding did not establish the petitioner's ability to pay \$66,560 per year.

In the latest petition, the petitioner asserts that the company's "tremendous growth" and "financial success clearly indicates our ability to meet the financial obligations of hiring a person of [the beneficiary's] professional status." By the regulation cited above, a mere statement attesting to the company's ability to pay is acceptable only where the prospective employer employs 100 or more workers. The I-140 petition form indicates that the petitioner has seven employees. Therefore, the clause permitting a statement from a financial officer does not apply.

The petitioner had submitted a Form 1120 U.S. Corporation Income Tax Return for calendar year 2000. The tax return contains the following information:

Assets	\$743,783.00
Officers compensation	\$30,800.00
Salaries	\$151,574.00
Taxable income	\$0.00
Cash	\$230,796.00
Current liabilities	\$538,782.00

All of the officer's compensation was paid to one officer, who is someone other than the beneficiary. The petitioner's current liabilities outweigh its current assets, and the record contains nothing to show how much of the \$151,574 in salaries was paid to the beneficiary. In any event, the tax return covers calendar year 2000, which ended more than two years before the January 2003 filing of the present petition. While tax documentation from 2002 would not have been available yet, 2001 documentation should have been, as well as a Form W-2 or other documentation to establish the amount paid to the beneficiary in 2002.

The director denied the petition, stating that the petitioner had failed to provide "recent evidence . . . to show the petitioner has the ability to pay the beneficiary's proffered wage." On appeal, counsel protests that the director should have issued "a request for additional evidence regarding the petitioner's ability to pay the proffered wage." Because the decision is now on appeal, the most expedient remedy for this error is to give consideration, at the appellate level, to any evidence that the petitioner would have offered in response to such a notice. The petitioner does, in fact, submit such evidence on appeal, in the form of a 2002 corporate tax return.

The 2002 return shows, once again, zero taxable income. Counsel claims that the taxable income is \$62,012 (several thousand dollars less than the proffered wage), but this entire amount is offset by "special deductions." (Key sections of Schedule C, meant to explain these special deductions, have been left blank or only partially completed.) The appellate submission does not include several of the supplementary schedules to the tax return, and therefore we cannot determine assets and other key information. We see only that the company reported no profit in 2000 and no profit in 2002. Once again, the petitioner provides a total figure for all salaries paid, but nothing to show the amount paid to the beneficiary.

The vast majority of the documentation submitted on appeal consists of invoices and other documents which establish that the petitioner is a *bona fide* business, but the director did not indicate otherwise. The documents submitted on appeal do not demonstrate that the petitioner has paid the beneficiary anything approaching the proffered wage, or that it has consistently been able to do so since the January 2003 filing date.

The petitioner has not established its ability to pay the beneficiary's proffered wage, and it has made no discernible effort to address the evidentiary requirements necessary establish that the beneficiary qualifies for designation under Schedule A, Group II.

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.