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JAN 27 2004

FILE: WAC 02 248 52952 Office: CALIFORNIA SERVICE CENTER Date:

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:

SELF-REPRESENTED

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

fw 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 glass shaping applications engineer. The record does not contain an approved labor certification and the petitioner makes no affirmative request for a waiver of such certification. Further, the petitioner submitted no evidence to establish that the beneficiary has an advanced degree. As such, the director's decision was limited to whether the beneficiary qualifies as an alien of exceptional ability. The director determined that the beneficiary's expertise is not "significantly above that ordinarily encountered" and found the beneficiary to be ineligible for classification as an alien of exceptional ability.

In the director's request for evidence, issued August 30, 2002, the petitioner was given clear guidance on the types of evidence required to qualify the beneficiary as an alien of exceptional ability. Therefore, despite the director's failure to specifically address evidence related to each criterion in his denial, we do not find that the failure results in a reversible error. Further, while the director did not address the petitioner's failure to submit an approved labor certification or evidence establishing that a waiver of the labor certification would be appropriate, that issue is moot as the petitioner did not establish that the beneficiary qualifies as an alien of exceptional ability.

On appeal, the petitioner requests oral argument. We note that oral argument is limited to cases where good cause is shown. It must be shown that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, the petitioner has not shown that this case involves any facts or issues that cannot be adequately addressed in writing. Therefore, the request is denied.

The beneficiary's work is described on the Form ETA 750 as:

Precision molding and slumping of different types of glass, including soda lime and borosilicate type glasses. Mold and slump a variety of shapes with zero mold and tooling marks on glass surface after molding. Must also have experience in diamond grinding, cutting, drilling and polishing glass. Machine shop work such as operating a lathe, milling machine, and welding stainless steel and other metals. Ability to read CAD and other drawings. Some bi-lingual communication.

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.

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 submits evidence to establish 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; and

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

Evidence contained in the record demonstrates that the beneficiary has received a high school diploma and an “architectural CAD certificate.” However, the petitioner has failed to establish how the completion of a high school diploma or an “architectural CAD certificate” provide the beneficiary with qualifications significantly above that ordinarily encountered.

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

Initially, the only information related to the issue of the beneficiary’s ten years of full-time experience was the information contained in the Form ETA 750. The form reflects that the petitioner was employed by H.H. Barrera Welding and Metal in Mexico as a welding technician from January 1983 until March 1991. The form describes the beneficiary’s work as “stick welding of different welding metals and metal alloys, welding and assembly of glass fabrication, tooling and molds made of exotic metals.” The form also indicates that the beneficiary worked as an application engineer with Tomahawk II, Inc. from May 1999 until August 2000. In this position the beneficiary’s duties were described as “draft revision and conversion for Boeing Corp. and Navy in Wichita, Kansas. QA submitted drawings, ISO draw, and QA ISO draw using CAD.” Finally, the form indicates that the beneficiary was employed by the petitioner, from April 2001 until July 2002, as a glass shaping applications engineer.

In response to the director’s request for evidence the petitioner submitted a letter describing the beneficiary’s value to the petitioner. The letter does not describe the type of work performed by the beneficiary or provide the beneficiary’s dates of employment. We do note, however, that the record does contain copies of the petitioner’s quarterly wage and withholding reports indicating the beneficiary’s employment for the quarters ending 6/30/01, 9/30/01, 12/31/01, 3/31/02, and 6/30/02. Such reports sufficiently establish that the beneficiary worked for the petitioner for the dates stated on the Form ETA 750.

However, while we acknowledge the beneficiary’s employment with the petitioner from April 2001 until July 2002, the record lacks evidence of any of the beneficiary’s other claimed employment. The petitioner submits a letter from the beneficiary’s previous employer, H.H. Barrera, in Mexico. However, the letter was written in Spanish and was not accompanied by translation as required by regulation. Further, there are no letters to

corroborate the beneficiary's claimed employment with Tomahawk II, Inc. from May 1999 to August 2000. 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).

On appeal, the petitioner submits a translation of the letter from [REDACTED]. The translation states that the beneficiary was employed from "1980 until 1988" and "mastered the techniques necessary for specialized artistic ironwork used in residential homes and churches...and completed projects involving bronze casting, iron casting and iron forging." In this translated letter, the dates listed for the beneficiary's employment are completely different from those claimed on the Form ETA 750.¹ Further, we note that the translated letter does not indicate that the beneficiary performed any work with glass, as stated on the Form ETA 750. 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).

Given the lack of evidence as well as the inconsistencies in the record, we are unable to find that the beneficiary qualifies for this criterion. The petitioner has failed to demonstrate that the beneficiary has ten years of full-time experience in his occupation.

Evidence of membership in professional associations

The record reflects that the beneficiary is a member of the American Physical Society. The petitioner did not, however, submit any information regarding the association's membership requirements. As the petitioner has not shown that membership in the American Physical Society requires exceptional ability or elevates the beneficiary above others in his field, membership in the association cannot be considered evidence that the beneficiary has a degree of expertise significantly above that ordinarily encountered.

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

The petitioner makes no claim and the record contains no evidence that the beneficiary has commanded a salary or other remuneration indicative of the beneficiary's exceptional ability.

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

In support of this criterion, the petitioner submits letters praising the beneficiary's abilities. Opinions from the petitioner and past employers do not objectively establish that the beneficiary has been recognized by his peers, governmental entities, or professional or business organizations. Further, while the petitioner notes the

¹ The Form I-140, Immigrant Petition for Alien Worker, indicates that the beneficiary illegally entered the United States in July 1990. This date is eight months before the date listed on the Form ETA 750 as the date the beneficiary claims to have completed employment in Mexico as a welding technician.

positive impact the beneficiary's work has had on the petitioner's business, there is no evidence that the beneficiary's work is considered as a significant contribution to the industry.

On appeal, the petitioner includes pictures of its "specialized products" and indicates that the beneficiary is "personally responsible" for the making of these products. The petitioner states that it would like to provide more proof of the "sophisticated work" that the beneficiary does, but as much of the petitioner's work is for the military, the petitioner is not allowed to publicly present such proof. Even if the petitioner were able to provide such proof, the fact that the beneficiary is engaged in "sophisticated work" does not establish that the beneficiary is an alien of exceptional ability. While we do not doubt the beneficiary's skill and value to the petitioner, such evidence does not establish that the beneficiary has been recognized by others for his achievements and significant contributions to the industry. The beneficiary, therefore, does not meet this criterion.

The remaining issue is whether the petitioner has established that the beneficiary is eligible under Schedule A, Group II, which requires a job offer but not an individual labor certification.

20 C.F.R. § 656.10(b) provides that Group II includes:

Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts including college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States. For purposes of this group, the term "science or art" means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university in order to qualify for the Group II occupation.

20 C.F.R. § 656.22(d) provides:

An employer seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the *widespread acclaim and international recognition* accorded the alien by recognized experts in their field; and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) In addition, the same provision requires documentation concerning the alien from at least two of the following seven groups:

- (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 achievement 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 the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

The criterion stated in these regulations require evidence of an even greater standard than that required to show an alien has exceptional ability. Despite the fact that the director specifically requested further evidence related to the Schedule A, Group II criteria, the petitioner did not submit any further evidence. The petitioner's letter, submitted in response to the director's request for further evidence, indicates the petitioner's confusion. It appears that the petitioner believed the portion of the request for evidence related to Schedule A, Group II, was a request for evidence related to classification as an alien of extraordinary ability. In fact, the petitioner's copy of the director's request for evidence contains a large "X," marked in pencil, through the portion related to Schedule A, Group II. The record remains absent any evidence to demonstrate eligibility under Schedule A, Group II.

Beyond the decision of the director, it is noted that the statute requires either an approved labor certification or evidence that a waiver of the labor certification would be in the national interest of the United States. The petitioner submitted neither. As the petitioner failed to prove that the beneficiary is an alien of exceptional ability, the issue of whether the national interest would be served by waiving the labor certification requirement is moot. Thus this issue will not be addressed further.

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. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.