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U.S. Citizenship
and Immigration
Services

B5

JAN 29 2004

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:
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.

for *Mari Johnson*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the AAO's previous decision will be affirmed and the petition will be denied.

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 in the arts. The petitioner seeks employment as a balalaika player and conductor of folk orchestras. 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 offered no finding regarding the petitioner's eligibility for the classification sought, but found that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO affirmed the director's decision and dismissed the appeal, adding that the petitioner does not qualify for the classification sought.

The regulation at 8 C.F.R. § 204.5(k)(3) sets forth the criteria for determining that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business:

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

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

(E) Evidence of membership in professional associations; or

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

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

The petitioner has not contested the AAO's finding that he does not qualify as a member of the professions holding an advanced degree. The AAO had also determined that the petitioner does not qualify for classification as an alien of exceptional ability. The AAO found that the petitioner had fulfilled only one of the above six criteria for exceptional ability, specifically 8 C.F.R. § 204.5(k)(3)(ii)(B) pertaining to ten or more years of experience in the occupation sought. Counsel, on motion, maintains that the petitioner meets two other criteria and thus qualifies as an alien of exceptional ability.

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.

Counsel disputes the AAO's finding that "[t]he petitioner has no postsecondary training in music." Counsel notes the petitioner's diploma from the N.K. Krupskaya Leningrad State Institute of Culture, evaluated as being equivalent to a United States bachelor's degree in Education and Music. This evidence was included in the initial submission.

That being said, we must consider the regulatory definition of "exceptional ability." 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given field of endeavor. Therefore, the petitioner's evidence cannot fulfill the regulatory criteria unless such evidence demonstrates a degree of expertise significantly above that ordinarily encountered in the petitioner's field. By way of analogy, we note that every medical doctor holds a degree in medicine, but it would defy logic to conclude that this tends to indicate that every doctor possesses greater expertise than most doctors. The question, therefore, is not whether the petitioner has a degree in music, but whether that degree establishes a degree of expertise significantly above that ordinarily encountered among balalaika players and folk orchestra conductors.

The Department of Labor's *Occupational Outlook Handbook*, 2002-2003 edition, page 132, indicates that "[m]usic directors, composers, conductors, and arrangers need considerable related work experience or advanced training in these subjects." A degree is not mandatory, hence conducting is not a profession, but such degrees appear to be common among conductors. The petitioner has not shown that his bachelor's degree represents a level of educational attainment significantly above what is ordinarily encountered in his field. We are not required to presume that every graduate of a conservatory or holder of a bachelor's degree related to music satisfies this criterion. We note that anyone holding an advanced degree (master's or higher) possesses a greater level of education than the petitioner, and thus would have a stronger *prima facie* claim of exceptional ability by virtue of educational background. Because counsel, on motion, offers no substantive evidence or argument beyond the basic observation that the petitioner holds a bachelor's degree related to music, we find that the petitioner has not persuasively met this criterion.

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

The AAO had stated "[t]he record does not establish any institutional recognition of the petitioner's ability in music. Instead, the petitioner has submitted a number of letters from witnesses." On motion, counsel states that

the regulations contain “absolutely no requirement [of] ‘institutional recognition,’” and that “the regulation itself indicates that letters from peers are acceptable.”

The regulation in question does not mention “letters,” which is significant, considering that counsel’s arguments rely on the exact wording of the regulation. Rather, the regulation calls for “evidence of recognition.” The various evidentiary criteria refer, generally, to types of objective documentation (such as university degrees) that exist independent of the petition, rather than materials created especially in furtherance of the petition. Documents (such as witness letters) that exist only because they are needed for the petition carry somewhat less weight than materials (such as awards) presented to the petitioner purely by virtue of his achievements and contributions to the field. Ideally, an alien should be able to establish eligibility by assembling existing evidence, rather than arranging for its creation just prior to filing the petition.

That being said, the record contains direct documentation of awards that the AAO evidently overlooked during the initial appellate review, which suffice to satisfy a second criterion of exceptional ability.

The petitioner, on motion, claims to have satisfied three of the six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii). Because, by regulation, the petitioner must satisfy at least three criteria, failure to satisfy any one of the three claimed criteria precludes a finding of eligibility. Because the petitioner, on motion, has established satisfaction of only one additional criterion in addition to the one previously granted, the petitioner has not met the minimum regulatory threshold of three out of six criteria. We therefore affirm the AAO’s prior finding that the petitioner has not established exceptional ability.

The remaining issue concerns the petitioner’s claim of eligibility for a national interest waiver. Because the petitioner has not established eligibility for the underlying immigrant classification, the petitioner cannot qualify for the waiver. Nevertheless, we will discuss the issue briefly, in the interest of thoroughness.

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

The Service [now Citizenship and Immigration Services] 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 Dec. 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 petitioner's national interest claim rests on several witness letters. The AAO discussed examples of these letters in its appellate decision. While the AAO acknowledged that the authors of these letters had high praise for the petitioner's musical prowess, the AAO concluded "[i]t cannot suffice simply to establish that the petitioner's balalaika concerts have been appreciated." By law, exceptional ability is not a *prima facie* basis for a national interest waiver; aliens of exceptional ability are, as a matter of course, subject to the statutory job offer requirement. Therefore, attestations concerning an alien's ability cannot suffice to establish eligibility for the special benefit of a national interest waiver.

Counsel states that the AAO "disregarded opinions from two branches of the U.S. military about the importance and national impact of [the petitioner's] work." The record, on its face, refutes this assertion. The original AAO decision contains a passage which reads "On appeal, counsel asserts that the letters from the two officials of the armed forces detailed how the petitioner's performances helped to raise the cultural awareness of the members of the armed forces who will be serving all over the world." The AAO decision contains an excerpt from one of the two letters. Given that the AAO clearly acknowledged, and quoted, these materials, the claim that the AAO "disregarded" such materials is baseless. Counsel does not elaborate further; the discussion that immediately follows this assertion concerns the intrinsic merit of the petitioner's field (which the AAO did not contest).

Counsel asserts that "[c]ultural exchange artists are generally self employed and as such are unable to proceed through the labor certification process." We acknowledge that permanent employment, amenable to labor certification, is a rarity in the arts. It is equally true, however, that many more people in the United States seek to make a living in music and the arts than could ever plausibly do so. As indicated on page 132 of the *Occupational Outlook Handbook*, "[c]ompetition for musician, singer, and related worker jobs is expected to be keen. The vast number of persons with the desire to perform will exceed the number of openings. Talent alone is no guarantee of success." Congress plainly indicated that aliens of exceptional ability in the arts are subject to the job offer requirement. The relative unavailability of permanent employment in an already crowded field is not a strong argument for waiving the labor certification. The job offer requirement is to be waived when it is in the national interest to do so; not merely when it is impractical for the alien. Indeed, to waive the requirement on the grounds that a given alien cannot meet that requirement makes the requirement redundant.

Counsel asks the AAO "to consider two additional pieces of evidence." One of these is a local award presented to the petitioner by "the Russian-Jewish community of Denver, Colorado"; the other is "a letter from the State of Colorado, Colorado Council on the Arts . . . which indicates that [the petitioner] has received funding to 'provide performances on Russian culture and history using the medium of Russian music as a bridge to greater understanding of the Russian people.'" Counsel states that this letter shows that "a governmental entity considers [the petitioner's] work of such importance that tax dollars are earmarked to support it." The documentation shows that the petitioner was one of 281 applicants for a state arts grant, and that 57% of the applications were approved, receiving "less than 50% of the requested amount" owing to a shortage of funds. There is no indication that the petitioner's grant application was especially singled out from that majority of applications that were approved. The language regarding "performances on Russian culture and history" is shown in an indented

paragraph, suggesting that it is a quotation from the petitioner's own grant application rather than an independent finding by the council.

The new evidence concerns developments some two years after the petition's filing date. The beneficiary must be eligible for the classification sought as of the date of filing, pursuant to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The new evidence does not retroactively establish eligibility as of the filing date. At best, the evidence shows that the local Russian community appreciates the petitioner's work (which the AAO has not disputed), and that the petitioner received an arts grant which, statistically, was more likely to be approved than denied.

Counsel has, on motion, raised some valid concerns regarding the initial appellate decision. On the whole, however, the evidence and arguments advanced on motion do not demonstrate that the AAO erred when it dismissed the petitioner's appeal.

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 previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of January 21, 2000 is affirmed. The petition is denied.