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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN-02-272-51186 Office: NEBRASKA SERVICE CENTER Date: MAR 25 2004

IN RE: Petitioner: [redacted]
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:

[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.

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

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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 software consultant. 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 beneficiary does not qualify for classification as either an alien of exceptional ability or a member of the professions holding an advanced degree, 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.

On appeal, counsel raises five arguments and asserts that she will send a brief and/or additional evidence to this office within 30 days. Counsel dates the appeal August 7, 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.

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 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*

In response to the director's request for additional documentation, the petitioner asserted that the beneficiary meets this criterion because his work experience is equivalent to a bachelor's degree in the field. The petitioner submitted a "Determination of Expertise" prepared by Dr. Jonatan Jelen at Mercy College. Dr. Jelen summarizes thirteen years of employment by the beneficiary, but does not indicate what evidence he considered in support of this summary. He concludes:

> Considering the equivalency ratio mandated by the Immigration and Naturalization Service [now Citizenship and Immigration Services (CIS)] of three years of work experience for one year of college training, twelve of [the beneficiary's] more than thirteen years reflect the time equivalent of not less than four years of Bachelor's-level academic raining in Computer Information Systems and related areas.
>
> * * *
>
> [I]t is my judgment that [the beneficiary] has attained the equivalent of a Bachelor of Science in Computer Information Systems with a concentration in Management from an accredited institution of higher education in the United States.

The director determined that this criterion requires an actual degree, not the equivalent of a degree through experience. The director acknowledged that 8 C.F.R. § 204.5(k)(3)(iii) permits the consideration of "comparable evidence" but only "if the above standards do not readily apply to the beneficiary's occupation." The director concluded that this criterion is applicable to software consultants. Thus, the director did not consider whether the beneficiary's experience might be comparable evidence to meet this criterion.

On appeal, counsel asserts that the evaluation by Dr. Jelen should have been given weight under the comparable evidence standard. We concur with the director that this criterion is applicable to software consultants. The petitioner has provided no evidence that colleges and universities worldwide do not offer baccalaureate degrees in the beneficiary's occupation. Dr. Jelen acknowledges that there are degree programs in computer information systems. Another reference, Dr. George Wolberg, has a Ph.D. in Computer Science from Columbia University. As degrees appear widely available in the beneficiary's field, we need not consider whether the beneficiary's claimed experience is comparable to a degree.

Even if we were to consider comparable evidence for this criterion, the petitioner's claimed experience is not persuasive. As noted by the director, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), relating to nonimmigrant visas for aliens in specialty occupations, provides: "For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks." The petitioner has not demonstrated that this regulation is relevant to the immigrant classification at issue in the instant petition. Moreover, the alien's work experience is its own criterion, to be discussed below. The requirement that a beneficiary meet at least three criteria would be meaningless if evidence directly related to one criterion was necessarily comparable evidence to meet another 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

In response to the director's request for additional documentation, the petitioner submitted what counsel characterizes as "letters from current or former employers showing that the alien has at least ten years of full-time experience." The record includes three letters purporting to document the beneficiary's employment from April 1989 through February 1993. These letters are not on company letterhead and the authors do not identify themselves as the beneficiary's employer or otherwise explain how they have first-hand knowledge of the beneficiary's employment. The signatures are illegible and the letters do not include the printed names of the authors or their titles.

A final letter signed by three reverends attests to the beneficiary's employment from July 1993 through the date of the letter, March 19, 2003. According to the letter, prior to 1994 the beneficiary volunteered his services with the petitioning Armenian church in Southfield, Michigan and "several other American-Armenian churches in this region." In 1994, the beneficiary began volunteering his services for the Armenian Congregational Church of Greater Detroit. Between 1994 and 1999, the beneficiary provided volunteer services to the St. Vartan Armenian Catholic Church.

The director concluded that the beneficiary's work experience prior to 1993 was not that of a software consultant and that the beneficiary's subsequent volunteer work cannot constitute full-time experience to meet this criterion. On appeal, counsel argues: "Voluntary work constitutes employment under [D]epartment of [L]abor and immigration regulations." Counsel provides no citations to statutes, laws, or precedent decisions to support this argument. Regardless, the record still lacks evidence that the beneficiary's volunteer work was full-time. The regulations unambiguously require full-time employment. Thus, we concur with the director that the beneficiary's recent work is insufficient to meet this criterion. Moreover, as the letters purporting to document the beneficiary's earlier work overseas are not clearly from his employers at the time, we cannot accept them as evidence of his work experience during those years.

Even if the record established that the beneficiary does meet the above criteria, and we reiterate our finding that this is not the case, they are only two criteria. The regulations require that a beneficiary meet at least three criteria. The remaining criteria as set forth at 8 C.F.R. § 204.5(k)(3)(ii) are:

> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (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.

The director concluded that the record did not contain evidence relating any of the remaining criteria. On appeal, counsel argues that "comparable evidence from high-level experts, such as: Mr. Azadian, world-wide expert on Armenian language & culture were totally regarded." Counsel does not identify the criterion for which the reference letters are "comparable." We note that reference letters prepared in support of the petition are not the type of unsolicited recognition contemplated by 8 C.F.R. § 204.5(k)(3)(ii)(F). The record

contains no evidence that peers in the computer software industry or professional software associations have issued certificates of excellence to the beneficiary or otherwise formally recognized the beneficiary's work.

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 addressed in 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 petitioner works in an area of intrinsic merit, computer programming in Armenian. The director then concluded that the proposed benefits of his work, preservation of Armenian culture and language and improved ability for Armenians to trace their ancestry, would not be national in scope because the petitioner had not demonstrated that the beneficiary has had or would have a national impact. The national scope inquiry relates to the beneficiary's occupation, and not the beneficiary's personal accomplishments in that occupation. The record does not clearly establish that a software computer consultant for a single Armenian church would have a national impact. Assuming that the beneficiary intends to provide consulting services to Armenian churches nationwide, and it is not at all clear that the beneficiary

intends to do so, such an occupation could have a national impact. Thus, at best, the beneficiary has established that his occupation has the potential for 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. 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 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 he 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 director concluded that the beneficiary had no accomplishments outside of Michigan and that his only distinguishing ability in software design is his fluency in Armenian. On appeal, counsel asserts that national interest waivers should be granted on the merits of the alien's achievements, such as a patent, and that the beneficiary's cultural and historical knowledge should be taken into consideration.

First, in a precedent decision, this office specifically held that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, *supra*, at 221 n. 7. Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* The nonprecedent decisions on which counsel relies do not hold otherwise. Moreover, while the record contains a reference to a patent, the patent itself is not in the record. Finally, the record contains no evidence that the beneficiary is recognized worldwide as a scholar of Armenian culture and folklore. The record contains no books on the subject authored by the beneficiary or evidence of their influence. The beneficiary only provided technical assistance, such as the installation of Armenian fonts, to a professor at the University of Michigan who has authored such a book. The record is not persuasive that such technical assistance rises to such a level as it can be considered to have influenced the field of software design.

Most of the record focuses on the databases the beneficiary designed for Armenian churches in Italy and Michigan. According to the beneficiary's U.S. references, while in Italy the beneficiary designed an Armenian/Italian dictionary computer program. Also in Italy, the beneficiary created an Armenian/Italian database with extensive religious records accessible to Armenian history and biblical scholars. The only confirmation of this work from the Italian church, however, is a letter from the General Abbot who confirms only that the petitioner designed an Armenian dictionary with spelling capabilities and that he transferred the copyright to the church. In the Detroit area, the beneficiary designed several administrative programs for Armenian churches, including programs to track donation pledges and catalog vital records.

The Reverend Father Garabed Kochakian, Pastor of the petitioning church, asserts that the beneficiary has developed an "historical database of baptismal certificates, marriage certificates, and death records." Reverend Kochakian asserts that these programs have been "tremendously effective in reuniting grandparents, parents, and children on a worldwide level for family reunification through the churches." The record does not explain how the beneficiary's programs developed for churches in the Detroit area have allowed family reunification on a worldwide scale.

The record does not reflect that the beneficiary's databases have incorporated historical records outside of Detroit or even that Detroit vital records dated prior to the development of these programs have been added to the databases. The record contains no news stories about the reunions or even personal affirmations from families reunited as a result of the beneficiary's databases. The beneficiary's own computer project reports indicate only that the vital records programs are designed simply to print the records in Armenian and English and that the pledge database provides reports. The project reports make no mention of these databases being amenable to genealogy research.

Nearly all of the evidence regarding the genealogy applications of the beneficiary's databases is in the form of assertions from members of the Armenian community in Detroit. The petitioner also submitted a general letter from the President of the Tekeyan Cultural Association, an Armenian association in Massachusetts. This letter, from a personal acquaintance of the beneficiary's, provides little evidence of the beneficiary's national influence. The record also contains a letter from Dr. George Wolberg, a professor at the City College of the City University of New York. Dr. Wolberg, however, states that his evaluation relies upon information provided to him by the beneficiary. Dr. Wolberg does not indicate that he personally utilized the beneficiary's databases to trace historical family genealogy.

The record also contains a letter from Kevork B. Bardakjian, a professor of Armenian Language and Literature and Director of the Armenian Studies Program at the University of Michigan, asserting that the beneficiary's technical assistance, such as the installation of Armenian fonts, was vital to the completion of his own book on Armenian literature. This letter, from a literature professor, is not evidence of the beneficiary's influence on the field of software design.

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.