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FILE: WAC 01 242 57064 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center. The petitioner filed an appeal, which the Administrative Appeals Office (AAO) deemed untimely. The AAO remanded the case to the director for treatment as a motion. After granting the motion to reopen, the director affirmed the denial of the petition. The matter is now before the AAO on certification. The director's October 20, 2003 decision will be affirmed.

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 or a member of the professions holding an advanced degree. The petitioner owns and operates a manufacturing and wholesale distribution business in Fresno, California that produces a chemical product that is applied to crops to reduce sun damage. 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 petitioner does not qualify as an advanced-degree professional, and also 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.

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) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements 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)(i), states:

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.

Section 101(a)(32) of the Act 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.

The regulation at 8 C.F.R. § 204.5(k)(2) states, in pertinent part:

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The petitioner’s occupation does not meet the regulatory definition of a profession at 8 C.F.R. § 204.5(k)(2) because the occupation is not listed in section 101(a)(32) of the Act, and a bachelor’s degree is not required for entry into the occupation. While the formal education that the petitioner claims to possess may relate to his work, there is no evidence that there is any mechanism in place that would prevent an individual with no bachelor’s degree from becoming an entrepreneur, company owner or president.¹ Therefore, as the owner of a manufacturing and wholesale agricultural product distributing company, the petitioner does not qualify as a professional, as defined by the pertinent regulations.

Because the petitioner does not qualify as an advanced-degree professional, he cannot receive a visa under section 203(b)(2) of the Act unless he qualifies 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.

We note that 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.” For example, every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows “exceptional” traits.

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.

The record contains no evidence pertaining to 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.

¹ The record contains no evidence showing that the petitioner has satisfied the regulation at 8 C.F.R. § 204.5(k)(3)(i). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows the submission of comparable evidence when the regulatory criteria do not readily apply to the alien's occupation. Therefore, because the petitioner has been "self-employed" for the last several years, other comparable evidence such as documented business transactions or tax returns dating back ten years or more would be acceptable under this criterion.

Here, the "occupation being sought" is ownership/presidency of an agricultural manufacturing company. According to statements in the record, the petitioner and his spouse started their present company in 1992.² This petition was filed on April 30, 2001. Therefore, assuming the petitioner's statements to be true, at the time of filing, the petitioner would have had fewer than ten years of experience in the agricultural product manufacturing business. A petitioner, however, must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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

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

Evidence of membership in professional associations.

The record contains no evidence to demonstrate that the petitioner has fulfilled the above three criteria as the owner of an agricultural product manufacturing business.

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

The petitioner submitted a several anecdotal letters (issued from 1992 to 1994) from California-based chemical companies and growers discussing results achieved with InsulCrop Sun Formula. These letters do not rise to the level of open recognition of the petitioner's work "for achievements and significant contributions to the industry." Rather, they represent private communications solicited by the petitioner regarding the effectiveness of his newly introduced product. It has not been explained how contributing to the success of one's own company and its local customers constitutes a significant contribution to the greater industry or field, beyond what would normally be expected of an effective agricultural product manufacturer.

For the reasons explained above, the available evidence is not adequate to satisfy the regulatory criteria for an alien of exceptional ability. The record portrays the petitioner as running a successful small business operation, but the record does not establish that the petitioner exhibits a degree of expertise significantly above that normally encountered among company owners throughout the agricultural industry.

Thus, the record contains no persuasive argument or evidence that the petitioner is a member of the professions, as the pertinent regulations define that term, or that the petitioner qualifies as an alien of exceptional ability. The director's October 20, 2003 decision, however, did not address the petitioner's eligibility as an alien of

² The record, however, contains no contemporaneous evidence of contracts or articles of incorporation dating back to 1992.

exceptional ability. The remaining issue to be determined, then, is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. This issue is moot, because the petitioner is ineligible under the classification sought, but the issue will be discussed because it was central to the director's decision.

Neither the statute nor 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 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.

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 occupation is so important that any alien qualified to work in this occupation 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 he merits the special benefit of a national interest waiver, over and above the visa classification sought. 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 note 6.

The petitioner submitted a total of six letters from businesses in California who have utilized or tested his product. Three letters addressed to the petitioner are cited here (others were cited in the director's decision). The most recent letter is dated September 28, 1994.

A letter from [REDACTED] PIPCO Tree Fruit Growers and Packers, Fresno, CA, states:

As we were discussing yesterday, our plums this year had virtually no pit burn. As the only difference between this year and last year was the application of your Sun Formula, it seems that it is doing its job.

Thanks for supplying us direct. I hope that this helps with your sales.

A letter from [REDACTED] of Rockwood Chemical Company, Brawley, California, states:

As promised, here are the results of the tests that we ran with your Sun Formula. Result: Tomatoes – Sprayed crops showed up to 46.6% reduction in damage. Bell peppers – Sprayed crops showed up to 50% reduction in damage.

I hope that this helps with your marketing efforts. I think that some of our growers will be more than interested in Sun Formula next growing season.

A letter from [REDACTED] of Vaquero Farms, Inc., Firebaugh, California, states:

I field tested the product InsulCrop, Sun Formula.

The test was performed on tomatoes.

Upon pulp testing a variety of samples from the test plots, I found that on average, the internal temperature of the treated tomatoes was 5 to 8 degrees Fahrenheit cooler than those that were untreated.

The director's October 20, 2003 decision stated:

The self-petitioner has not persuasively demonstrated that the proposed benefit of his prospective employment will be national in scope. The evidence of record indicates that the self-petitioner's products have been only tested and used in parts of Northern and Central California with mild results. The evidence of record has not shown that his products have been tested or used in other agricultural regions in the United States such as the Midwest. Moreover, no testimonial letters were submitted from recognized public...agencies or institutions like the U.S. Department of Agriculture or recognizable research institutions of agriculture like the University of California at Davis to vouch for the self-petitioner's importance to the national interest.

* * *

Although the petitioner appears to be a competent manufacturer of agricultural products, there is little evidence to persuade [Citizenship and Immigration Services] that granting a waiver of the job offer

requirement would be in the national interest in this case.... [T]he evidence shows that the products the self-petitioner's company manufactures are primarily the result of the efforts of a Nevada-based scientist who provided the base formulation for the [petitioner's company's] products.

After a complete review of the record, we concur with the director's findings. While the petitioner has successfully operated a relatively small manufacturing and distribution business in California, the evidence presented in this case is not adequate to demonstrate that his work has had and will continue to have a nationally significant impact on the U.S. economy or the agricultural industry in general. Many of the assertions made by the petitioner in this case (such as the extent of his product's distribution, for example) are unsupported by documentary evidence. *See Matter of Treasure Craft of California, supra.*

The director's October 20, 2003 decision afforded the petitioner the opportunity to submit a brief or written statement to the Administrative Appeals Office within thirty days. The decision stated: "This case has been certified for review to the Administrative Appeals Unit (AAU). [REDACTED] Within thirty days of this notice, you may submit to the office where your case was sent, a brief or written statement."

More than fifty days later, the petitioner submitted a response (dated December 11, 2003) to the director's Notice of Certification. There is, however, no regulation that allows the petitioner an open-ended or indefinite period in which to respond to the Notice of Certification. The regulation at 8 C.F.R. § 103.4(a)(2) states "[t]he affected party may submit a brief to the officer to whom the case is certified within 30 days after service of the notice." The regulations do not state or imply that the petitioner may freely supplement the record up until the date of review. Any consideration at all given to an untimely submission to the AAO is entirely discretionary.

The petitioner's response included a letter from U.S. Congressman [REDACTED] 19th District, California. Congressman [REDACTED] letter states:

I am writing on behalf of [the petitioner], a constituent in my Congressional District...

* * *

Central California is home to the largest agricultural base in the nation. Much of the United States is dependent upon the products that are grown here. [The petitioner] and his company, InsulCrop, have developed a product which is being widely used by growers to increase crop production. The "Sun Formula" produced by InsulCrop is the first of its kind; no other agricultural product in the nation has developed a product that protects the crops in the manner that InsulCrop is able to. This protection and increased productivity has helped the local farmers provide for the growing national demand for fresh fruits and vegetables.

In this matter, the local effectiveness of the petitioner's product is not in question. The petitioner, however, has not established that the impact of his product is significant at the national level. Beyond demonstrating that the petitioner's product has "helped the local farmers," the petitioner must show that his product is viewed throughout the greater U.S. agricultural industry as particularly significant.

The petitioner states: "The [director's] statement that our products have only been tested and used in parts of ...California is wrong. Being the manufacturer of the products, we have very little knowledge of the final destination of each order. We do know that a lot of product is used in our immediate geographic area on tomatoes." Here, the petitioner disputes the director's observation about the limited geographic distribution of his product, yet no evidence has been provided to show that the petitioner's product has significantly impacted crop production in other parts of the country. In this proceeding, the burden is on the petitioner to demonstrate the national scope of his work. The record contains general information about the "scope of agriculture in the San Joaquin Valley/Fresno" region, but the record contains no substantive evidence regarding the number or percentage growers in this region that regularly utilize InsulCrop's Sun Formula. The petitioner's subjective assertions regarding the importance and widespread usage of his product are not widely confirmed by major growers from throughout the United States.

The petitioner mentions a letter from U.S. Congressman ██████████ 20th District, California, who serves on the House Agriculture Committee. In the same manner as Congressman ██████████ Congressman ██████████ notes that the petitioner is a constituent. The petitioner asserts that the director dismissed Congressman ██████████ opinion by referring to the letter as a "standard letter of Congressional inquiry." Congressman ██████████ letter states: "[The petitioner] believes that those investigating [his] case...may have misunderstood [his] business and its relevance to the community.... [The petitioner] claims that [Citizenship and Immigration Services] made their decision assuming that [the petitioner and his spouse] had not developed their product..." This letter cites the petitioner as the source of the information and requests that CIS give "careful consideration" to the petitioner's immigrant visa petition. Congressman ██████████ letter does not offer any explanation as to the national impact of the petitioner's work, nor information regarding how his work is of greater benefit than that of other capable businessmen in the agricultural industry.

In this case, the petitioner's assertions regarding his product's potential to influence the U.S. agricultural industry are not adequate to demonstrate eligibility for a national interest waiver. We cannot ignore that the petitioner's product has existed for more than a decade, yet there is no supporting evidence indicating that the "Sun Formula" is widely utilized outside of California or, to an even lesser extent, regularly applied to the majority of the tomato crops in the San Joaquin Valley/Fresno area. For example, other than some early, small-scale tests by a few local California growers in the early 1990's, the record contains no objective data as to the specific increase in harvested acreage that, in terms of the tomato industry as a whole, has resulted from direct utilization of the Sun Formula in large-scale farming operations. Nor has the petitioner presented any recent verification letters from large-scale U.S. farming operations confirming their utilization of the petitioner's product and its importance to the U.S. agricultural industry. Moreover, the record is void of independent evidence (from sources such as trade publications, for example) showing the level of national benefit that can be ascribed specifically to the petitioner or his product.

The petitioner has provided information indicating that annual sales for his company total approximately \$300,000. It has not been shown that his company enjoys a greater market share or has been significantly more successful at the national level than other U.S. businesses that manufacture agricultural products for growers. Nor has the petitioner shown that his company provides a service of intrinsically greater value than that of other viable agricultural product manufacturing businesses. The petitioner engages in what is, inherently, a small local business involving yearly sales of a few hundred thousand dollars. The petitioner,

like any other business owner, plays a significant role in directing the activities of his company. The statute, however, does not automatically qualify small business owners for the national interest waiver, and the petitioner does not establish the national importance of his activities simply by describing them. In this case, we find that being a competent business owner is not adequate to demonstrate eligibility for a national interest waiver.

We do not dispute the fact that the petitioner's company has provided economic benefits to some growers in California, but the petitioner's ability to impact the U.S. agricultural industry beyond his local customers has not been demonstrated. Outdated anecdotal observations from a few California companies (which conduct business with the petitioner) do not establish that the petitioner's impact on the agricultural industry has been any greater than that of other company owners who supply chemical products for crops. In this matter, the available evidence does not persuasively demonstrate that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. In any event, we cannot consider the petitioner for the national interest waiver if he has not shown that he qualifies for the underlying classification. The petitioner clearly runs a successful local business, but his talent does not rise to a level of exceptional ability or meet the higher burden of national interest.

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 the 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 project or occupation, 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.

ORDER: The director's October 20, 2003 decision is affirmed and the petition remains denied.