



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

APR 09 2008

SRC 07 004 52671

IN RE:

Petitioner:



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:

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 sciences. The petitioner seeks employment as a nutritionist. 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 failed to establish that she qualifies for classification as an alien of exceptional ability in the sciences, or 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:

(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 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)(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:

(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.

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. 8 C.F.R. § 204.5(k)(3)(iii).

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" in a given area of endeavor. 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 all or most workers in a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every qualified physician has a college degree and a license or certification, but it defies logic to claim that every physician therefore shows "exceptional" traits.

In her initial submission, the petitioner did not specifically discuss the above regulatory standards; her initial submission consisted of a personal statement and a copy of a paper she presented at a symposium in 2002. On December 28, 2006, the director issued a request for evidence (RFE), in which the director listed the six evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii) and instructed the petitioner to submit evidence to satisfy at least three of them. The petitioner's initial submission and her RFE response address 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.*

The petitioner stated: "From 1987 to 1991 I studied in Nutritional [sic] Department of Jilin Medical College." The petitioner submitted a translated copy of a "Certificate of Graduation" to corroborate this claim. The petitioner did not explain how this study imparted a degree of expertise significantly above that ordinarily encountered among nutritionists. The petitioner did not, for instance, establish that few nutritionists hold a four-year degree in the specialty. A degree that is required for entry-level employment in a given field cannot reasonably be considered evidence of exceptional ability in that field. The petitioner did not establish that her degree is commensurate with exceptional ability.

*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.*

The petitioner offered this summary of her work experience:

In September 1991 I was assigned to work as a nutritionist in Wangfujing Hotel of Beijing, China. . . .

It is due to my achievement that I was invited by many hospitals and grand hotels to give lectures for the training of their technical staff. I was also given opportunity to carry out cooperative research with other research organs.

. . . In December 2001 my work unit assigned me to visit Malaysia, Singapore, in order to extend the variety of menu and the scope of food therapy.

In April 2002 I was once again assigned by my work unit and our cooperative units to visit the US and Korea, in order to introduce American and Korean foodstuffs for a purpose similar to the one that I mentioned above.

The petitioner submitted a copy of an employee identification card issued September 20, 1991, referring to the petitioner's position at Wangfujing Hotel. The card attests to her employment as of its date of issuance, but it is not evidence of subsequent full-time employment. The card cannot serve as evidence of events that took place after the card was issued.

A copy of a "Payment Sheet" from Wangfujing Hotel appears to be an accounting of annual salary and benefits for tax purposes, roughly analogous to an Internal Revenue Service Form W-2. This document is a snapshot of the petitioner's employment, but it does not establish ten years of full-time experience.

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

A translated "Qualification Certificate" from China's Ministry of Personnel indicated that the petitioner "passed the national examination" and earned the "Advanced" qualification level as a nutritionist. This appears to be one of the stronger documents in the petitioner's submission prior to the denial of the petition. The evidence indicates that the petitioner holds certification for a particular occupation, at an "Advanced" level that places her above others in the field.

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

As noted above, the petitioner has submitted documentation relating to her compensation. She has not, however, submitted any evidence that would establish how her remuneration compares with that received by other nutritionists. The petitioner has, therefore, not satisfied this criterion.

*Evidence of membership in professional associations.*

A photocopied certificate attests to the petitioner's membership in the Capital City Nutrition and Table Delicacies Society. The record does not indicate the society's membership requirements or otherwise indicate that membership denotes a degree of expertise significantly above that ordinarily encountered in the petitioner's field. Therefore, the membership certificate, devoid of context, is not sufficient evidence to meet the pertinent regulatory standard.

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

A 2002 certificate indicates that the petitioner received the State Prize for Scientific and Technological Progress, 2<sup>nd</sup> Grade, for “The Application of Nutrition and Table Delicacies to Human Health-Keeping.” This document appears to suffice as evidence of recognition from a governmental entity.

The director denied the petition on April 18, 2007, stating that the petitioner “has not proven she has exceptional ability in the field of nutrition.” On appeal, the petitioner argues that her experience and qualifications establish her exceptional ability in nutrition research.

Some of her assertions proceed directly from the evidence, such as her comments about her State Prize for Scientific and Technological Progress, and we have concluded that such evidence constitutes governmental recognition of achievements or significant contributions to the field. Other claims have no evidentiary support, such as her contention that her “salary is . . . as high as the average salary of a professor in China.” Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

The director, in the RFE, had set forth the exact wording of 8 C.F.R. § 204.5(k)(3)(ii)(B), which indicates that evidence of experience should come in the form of letters from employers. Elsewhere in the RFE, the director repeated the request for “letters from former employer(s) who attest to your experience.” The petitioner’s response did not include such letters, or even acknowledge the director’s request for such letters. On appeal, the petitioner submits a letter attributed to the Catering Department at Wangfujing Hotel (no individual author is named), indicating that the petitioner “has been working as a nutritionist for ten years from 1991 to 2001 in this department.” The petitioner does not explain why she did not provide such a letter previously, when the director directly requested such a letter.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director’s request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The AAO will consider other assertions in the employer’s letter, in the context of the national interest waiver, but given the specificity of the director’s request regarding the petitioner’s past employment experience, the petitioner’s opportunity for her employer to attest to her experience had passed prior to the appeal.

Based on the above discussion, the AAO finds that the petitioner has not met her burden of proof to establish that she qualifies as an alien of exceptional ability in the science of nutrition research.

The remaining issue in this proceeding concerns the desired exemption, in the national interest, from the statutory job offer/labor certification requirement. Because the petitioner has not established eligibility for the underlying visa classification, she cannot qualify for that exemption, but we address the issue here in the interest of thoroughness.

8 C.F.R. § 204.5(k)(4)(ii) states that, to apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not note this omission in the denial notice, and never issued a request for evidence to allow the petitioner to remedy the omission. We will, therefore, review the issue on the merits.

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 (Commr. 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 also 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” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner’s initial submission includes this introductory statement:

Although the importance of nutrition is a common sense, the majority of persons do not know how to obtain proper nutrition in a best compromise of corporal needs and our financial capability of affording for it, as well as enjoyment of taste and smell; to the end purpose of health-keeping and happiness of life. For about 15 years I have been researching on nutritional theory in combination with botany, biomedicine and culinary arts. My comprehensive and interesting way of research made the science of nutrition more easily for nonprofessionals to study and use, thus contributing to people’s health-keeping in a more pleasant and economical way. . . .

Nutriology can directly serve health-keeping, treatment and rehabilitation, so it always in need in the US. Although the US has comparatively more researchers of medicine, the majority of its nutritional researchers carry out their research in negligence of far-eastern experience. But scientific experiments and clinical practice have constantly proved that far-east experience is very useful.

[*Sic.*] The petitioner submitted no documentary evidence to establish the contributions of “far-eastern experience” to nutritional research. Even if the petitioner had provided such evidence, as well as a definition of “far-eastern experience,” this would not in itself single out the petitioner for the special benefit of the national interest waiver. National origin and cultural background do not qualify whole categories of alien workers for the waiver. *Cf. Matter of New York State Dept. of Transportation* at 221 (finding that an alien’s exposure to methods or training already in use does not qualify that alien for a waiver).

The AAO does not contest the intrinsic merit of nutrition science. In terms of national scope, a nutritionist can have widespread impact if he or she disseminates the results of original research. Work conducted privately on behalf of a single institution lacks national scope. The burden is on the petitioner to establish the national scope of her work, and to show that she, in particular, will benefit the United States to an extent that outweighs the national interest inherent in the labor certification process.

The petitioner offered this description of her future plans:

After my arrival in the US I have closely observed medical practice, hospital catering, and restaurant menus, as well as people's habit of food and drink. I found that even the menus designed by nutritional expert for hospitalized patients are nutritionally improper to various extents. Therefore, I shall keep on doing my nutriological research, and promote the more scientific and enjoyable way of food choice and food therapy based on the integration of nutriology and culinary arts. If condition allows, I shall establish my own studio or research institute. I will also carry out cooperative research with American scientists, so as to further develop the science of nutriology.

In the December 28, 2006 RFE, the director instructed the petitioner to submit "further evidence that demonstrates your specific prior achievements which would justify the projected future benefit to the national interest," along with "documentation that shows your skills or background are unique or innovative." In response, the petitioner submitted basic documentation of her credentials. The AAO has already discussed this evidence above, in the context of the petitioner's claim of exceptional ability. The evidence submitted offered some support for the claim of exceptional ability, but evidence of exceptional ability is not presumptive evidence of eligibility for the waiver. The petitioner's RFE response offered little to distinguish the petitioner from other well-qualified nutritionists.

The director, in denying the petition, stated: "The record as constituted does not establish that the petitioner's qualifications are of such a nature that a waiver of the labor certification process is justified." On appeal, the petitioner states: "To my knowledge, there is no research post available in the US which matches the nature and category of my research. It is, therefore, necessary for me to establish my own research center." The petitioner entered the United States in July 2002, more than four years before she filed the petition in October 2006. The petitioner did not indicate what steps she had taken during that time in furtherance of her stated plans. The record is silent as to precisely what the petitioner has done, and how she has supported herself, in the years since her entry on a three-month tourist visa.

The petitioner's assertion that there are no existing jobs for individuals with her particular expertise is not a compelling argument in favor of approving the waiver. The petitioner claims that no one in the United States is performing research of the type the petitioner claims to intend to perform. The petitioner attributes this to the unique novelty of her research, but just as easily it could be interpreted as a lack of interest among United States research institutions. We cannot rely solely or primarily on the petitioner's own assessment of the value of her work.

The unnamed author of the letter attributed to the Catering Department at Wangfujing Hotel offers general praise for the petitioner's abilities and her field of endeavor, but the letter contains no details about specific accomplishments that set the petitioner apart from others in her field.

A March 8, 2007 letter attributed to Korean World Catering Co., Ltd., Beijing, China, reads in part:

We provide catering service for both Korean and Chinese peoples in Beijing. To improve the quality of our quality of service, we had sought advice from Korean-Chinese bilingual nutritionist. As a professional nutritionist, as well as a native Korean speaker in China, [the

petitioner] has given us great help. Her biochemical explanation of nutrition, and her familiarity with traditional Chinese culture, including culinary arts, made our regular training of technical staff profound and vivid.

The letter's unnamed author adds that "Korean recipes are too salty and contain too much cholesterol and nitrates," necessitating "inventive thinking" to make the recipes healthier without sacrificing flavor. The author implies that the petitioner performed some work in this area, but provides no details, instead offering general praise for the petitioner's "expertise" and "broad range of knowledge."

Another letter with a collective rather than individual attribution is from the Editorial Department of Xiamen Broadcast & TV Forum, stating that the petitioner's "article 'Women's Health and Equilibrium of Diet' . . . bears new conception. After review, it is decided to publish [the] article on our forthcoming issue in November of this year." The letter is dated April 26, 2007, over six months after the petition's filing date and more than a week after the denial of the petition. The record contains no other information about the publication or the petitioner's article. The petitioner does not explain how publication of her work in a local periodical in China would benefit the United States (where the publication has not been shown to circulate), nor does she demonstrate that any United States publications have shown similar interest in her work. The petitioner has not shown that researchers in her field rarely publish or otherwise disseminate their work. Absent such evidence, publication of the petitioner's work is not strong evidence of eligibility for the waiver.

The petitioner appears to have strong opinions about how traditional Chinese medicine and other cultural traditions can be incorporated into nutrition science, and she has established some degree of experience implementing these ideas, at least in China. The petitioner has not, however, demonstrated any work of note in that area that would distinguish her from others in her specialty, nor has she even shown that she stands a realistic chance of gainful employment in that area in the United States. The petitioner has not demonstrated that her past impact in her field, or the likelihood of significant future contributions, justify the approval of a national interest waiver on her behalf.

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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.