



U.S. Citizenship
and Immigration
Services

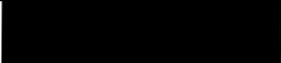
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FILE:



Office: TEXAS SERVICE CENTER

Date:

AUG 01 2008

SRC 06 240 52012

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:



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 arts. The petitioner is a musician. 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 for classification as an alien of exceptional ability or as a member of the professions holding an advanced degree, and therefore does not qualify for consideration for an exemption from the job offer requirement 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 director found that the petitioner did not claim to qualify as a member of the professions holding an advanced degree. The petitioner, on appeal, does not contest this finding.

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 (CIS)] 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.

In denying the petition, the director found that the petitioner had not established that he qualifies for classification as an alien of exceptional ability, and that therefore a detailed discussion relating to the national interest waiver would be moot. We shall examine, here, the director’s finding regarding exceptional ability. If the AAO concurs with the director’s finding in that regard, then the issue of the waiver remains moot. One cannot receive the waiver if one does not qualify for the underlying immigrant classification. If, on the other hand, the AAO reverses the director’s finding regarding exceptional ability, then the director must make an initial determination regarding the petitioner’s waiver claim.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(k)(3)(ii) state that a petition seeking to classify an alien as an alien of exceptional ability 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.

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).

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 regulatory criteria. 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.

Counsel's introductory letter did not address the regulatory criteria of exceptional ability set forth at 8 C.F.R. § 204.5(k)(3)(ii). Instead, counsel stated that the petitioner "meets seven of the criteria set forth to determine eligibility of an alien of extraordinary ability." Counsel then discusses regulatory criteria found at 8 C.F.R. § 204.5(h)(3) which, as counsel effectively acknowledged, address not exceptional ability but extraordinary ability, relating to a separate immigrant classification established by section 203(b)(1)(A) of the Act.¹

On January 3, 2007, the director issued a request for evidence. This request focused only on the petitioner's claim of eligibility for a national interest waiver. The petitioner responded to this request by submitting copies of previously submitted materials. Counsel, in the cover letter accompanying the petitioner's response to the notice, acknowledged that the petitioner sought a "National Interest Waiver," but then devoted the rest of the letter to the petitioner's claimed "extraordinary ability."

On May 9, 2007, the director issued a notice of intent to deny (NOID), in which the director quoted, in full, the list of six exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii). The director also requested "an evaluation of the beneficiary's education." In response to this notice, counsel repeatedly referred to the petition as though it were a petition for an alien of extraordinary ability, and once again couched his responses not in terms of the six exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii), but in terms of the ten extraordinary ability criteria at 8 C.F.R. § 204.5(h)(3) even though those criteria do not and cannot pertain to the proceeding at hand. Only in the appellate brief has counsel begun to address the regulatory criteria that pertain to the correct classification sought in this proceeding.

Because, in this proceeding, the petitioner seeks classification as an alien of exceptional ability under section 203(b)(2) of the Act, we will not consider counsel's discussion of the extraordinary ability criteria except insofar as we can correlate those claims to the relevant exceptional ability criteria. The director's decision, and counsel's subsequent arguments on appeal, focus on three of the six regulatory criteria. Because the petitioner, through counsel, claims to have satisfied only three criteria, which is the regulatory minimum, the petitioner's failure to satisfy any one of these criteria is, by itself, sufficient grounds for denial of the petition.

¹ CIS records show that the petitioner did, in fact, file another petition (receipt number SRC 06 240 51263) seeking to classify himself as an alien of extraordinary ability, concurrently with the instant petition. The other petition is a separate proceeding from the matter at hand and we shall not discuss its merits here. CIS records indicate that the petitioner's extraordinary ability petition was denied in October 2007, but there is no record of any appeal from that decision.

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.

A photocopied certificate in the record indicates that the petitioner “passed the Junior Diploma Examination from [REDACTED] held in the year 1990-1991 in the subject VOCAL.” The initial submission did not indicate whether [REDACTED] is an institution of learning as opposed to some other entity that tests qualifications without providing the training or education leading to those qualifications.

The director denied the petition on August 14, 2007. In the denial notice, the director acknowledged the petitioner’s diploma, but the director found this document to be inadequately explained because the petitioner has not established “that the institutions awarding these documents are a college, university, school or other institution of learning relating to the area of exceptional ability.”

On appeal, counsel deems [REDACTED] “a world-renowned institution focusing on the popularization and education of India[n] Classical Music.” The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also observes that the petitioner has worked as a music teacher. In this context, we reiterate that 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. If it is counsel’s contention that the petitioner is an exceptional music teacher, the petitioner must show not only that he holds a degree, but that his educational credentials significantly exceed what is ordinarily encountered among music teachers. If counsel simply contends that the petitioner is an exceptional musician, then his teaching credentials are of diminished relevance.

The AAO affirms the director’s finding that the petitioner has not established that his educational background demonstrates 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.

A March 29, 2002 letter from [REDACTED], Production Manager at Radio HBC, Kathmandu, Nepal, indicated that the petitioner “has worked as a producer cum announcer in this Radio HBC 94 FM for a period of 15 months since January 2001.”

Officials of various schools in Nepal attested to the petitioner’s employment as a music teacher at Budhanilkantha Ashram School from February 1994 to January 1995; Galaxy Public School from February 1995 to May 1998; and The Elite’s Co-Ed May 1998 to March 2002. [REDACTED] Principal of Little Angels’ School in Hattiban, Nepal, stated that the petitioner “is an employee of this educational institution as a Music teacher in the capacity of lyricist, music composer and vocalist.” The official did not indicate how

long the petitioner had held this position, or that the petitioner worked full-time. The petitioner himself described this position and some others as “part time” in his own *curriculum vitae*. The letter bears the Nepali date Chaitra 4, 2061 (March 17, 2005).²

A letter from the principal of Budhanilkantha Ashram School (the signature is not fully legible) indicates that the petitioner “was an **English and Music** teacher in the capacity of lyricist/music director and vocalist in secondary level in this institution [from] Falgun 2050 till Magh 2051,” *i.e.*, from *circa* February 1994 to *circa* January 1995 (emphasis in original).

The record includes reproduced art work and credits from several cassettes and compact discs recorded by the petitioner, but this evidence by itself does not demonstrate full-time experience as a musician.

The director concluded that the letters and materials submitted did not establish at least ten years of full-time experience as a musician as of the petition’s filing date. On appeal, the petitioner resubmits the employer’s letters and his own *curriculum vitae*, but as explained above, these materials do not establish ten years of full-time employment. Furthermore, the record indicates that the petitioner has worked not in one occupation over the years, but in at least three somewhat related but nevertheless distinct occupations: musician, music teacher, and radio producer/announcer. Counsel asserts that the petitioner has more than 20 years of experience as a music teacher, but the petitioner admits that at least some of this experience was part-time, and the petitioner has offered only fragmentary documentation of that claimed experience.

The AAO affirms the director’s finding that the petitioner has not satisfactorily documented at least ten years of full-time experience in any relevant occupation.

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

In the initial submission, counsel stated: “Many well-known experts in the field . . . have recognized [the petitioner’s] individual contributions to and significant role in promoting Nepali and South Asian music.” We will give these letters due consideration, but they do not carry the same weight as objective evidence of formal, usually public, recognition.

A December 6, 2005 letter from Prof. [REDACTED] Vice Chancellor of the Royal Nepal Academy, reads in part:

[The petitioner] is a well known artist. He is a talented musician and he has been in the profession of teaching music. He is a versatile lyricist, vocalist & music composer.

He has the credit of realising many audio albums based on modern folk and classical songs and an audio album in Sanskrit ‘Archana’ which is supposed to be the first audio cassette album in Sanskrit from Nepal.

² All date conversions are according to <http://www.rajan.com/calendar> (visited July 11, 2008).

His audio cassette & CD Sri Mahaganapati Sahashranam Stotram & Shri Ganashayanama of hym[n]s & chants are well acclaimed. He has also published anthologies of poems & songs and has performed various musical programs at different functions.

The petitioner submitted a copy of an August 31, 1987 letter on the letterhead of [REDACTED]
The reproduced signature is not clearly legible. The letter reads, in part:

[The petitioner] is founder of [REDACTED]

He has devoted himself for the development and betterment of Nepali culture as general Secretary. He produced many culture programs in various occasions. On behalf of the Sangha he performed Nepali cultural program in sister states all Assam Silpi Samaroh in 1985. Many songs composed by him in his own lyrics and directions functioned. He bears a good talent in many musical instruments in songs Folk, Modern, Bhajan and classical music. All the performances were satisfactory and attractive.

(*Sic.*) Bhagawah Shrestha, Managing Director of Ranjana Music Industries Pvt. Ltd., called the petitioner “a prominent figure in the field of music” but did not credit the petitioner with any specific accomplishments.

Counsel claimed that the petitioner “has been duly awarded for his musical prowess. In addition to being awarded positions as a music teacher by various impressive educational institutions, [the petitioner] . . . received a commendation from Her Royal Highness the Princess [REDACTED] as one of the founders and directors of the Sargam Art Centre.” The record contains no persuasive evidence that being hired as a music teacher constitutes “recognition” of the sort contemplated in the regulatory language. With respect to the “commendation,” the petitioner submitted a copy of an April 30, 1999 article from a Nepalese newspaper. The article does not show the name of the newspaper, but the title “The Rising Nepal” has been handwritten into the margin. The title of the article is “Princess Sruti opens folk dance contest.” Most of the article is devoted to descriptions of various awards and honors bestowed by the princess during the event “organised by Sargam Art Centre at Royal Nepal Academy.” The seven-paragraph article concludes with the following paragraph:

HRH the Princess also presented letters of commendation to founder and dance director of the Sargam Art Center [REDACTED] [the petitioner] [REDACTED]

From the context of the article, it is not clear that the petitioner is “one of the founders and directors of the Sargam Art Centre” as counsel claimed. The article seems to identify only one “founder and dance director” rather than use plural nouns to so designate the eleven people named in that paragraph. We note that the Vice Chancellor of the Royal Nepal Academy, in writing on the petitioner’s behalf, did not indicate that the beneficiary had served as a founder or director of the Sargam Art Centre. While the petitioner was one of several individuals (and schools) to receive recognition from the princess on that occasion, the record does not establish why the beneficiary received this honor. The record does not contain a translated copy of the “letter of commendation” itself.

A July 29, 2006 article from *Nepal Abroad* (described as “An Independent Newsletter” published weekly in the Washington, D.C. area) cited the petitioner’s “enormous contribution to the Nepalese classical literature.” This article, which appeared a matter of days before the petitioner filed the petition, is not first-hand evidence of the petitioner’s claimed contributions to the arts in Nepal.

Newspaper reviews dating back to 1995 express varying opinions on the petitioner’s recorded work. The record does not contain sufficient evidence to support the conclusion that the very appearance of such reviews is, itself, indicative of the petitioner’s exceptional ability as a recording artist.

The director concluded that “the petitioner’s achievements have been recognized in Nepal by peers and governmental entities.” Counsel, on appeal, asserts that the petitioner “is widely regarded as the pioneer of the Sanskrit language album in Nepal.” The AAO is not persuaded that the petitioner has, in fact, satisfied this criterion. Letters that refer to the petitioner as a well-known figure are not, themselves, recognition for achievements or contributions. The record does not demonstrate specific instances of recognition for specific achievements or contributions by the petitioner. At best, it shows that the petitioner gradually earned a reputation in his field. More than one newspaper article from 1995 refers to the petitioner as an obscure or unknown performer. By 1999, he was reported to have received a letter of commendation from a Nepalese princess, but without more information, we cannot conclude that this letter was in recognition for achievements and significant contributions to the field. This is not a definitive finding that the petitioner has not received such recognition. It is, rather, a finding that the petitioner has not met his burden of proof in this regard.

For the above reasons, the AAO withdraws the director’s limited finding that the petitioner had satisfied the “recognition” criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). Even if the AAO had let the director’s finding stand, this alone would not have warranted approval of the petition or otherwise changed the ultimate outcome of this appellate decision.

The petitioner has not submitted sufficient evidence to meet the evidentiary standards set forth in the regulations at 8 C.F.R. § 204.5(k)(3)(ii), and prior to the appeal the petitioner made no apparent attempt to meet them, focusing instead on the inapplicable standards pertaining to an entirely separate immigrant classification. 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.