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FILE: [Redacted]
WAC 06 081 52004

Office: TEXAS SERVICE CENTER Date: JAN 23 2008

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.

Maura Deadrick
f 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 on appeal. The appeal will be dismissed.

We note that, in a message dated August 27, 2007, the petitioner states: "I had to return to the UK after my original visa expired." The petitioner does not provide a current UK address, but she does state: "There is, in fact, still someone receiving my post from you in the US for me." Given this information and the lack of a current overseas address, we have sent this decision to the petitioner's last known address of record.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts. The petitioner seeks employment as a "Media Worker (Singing and Acting)." The position, as the petitioner has described it, is most concisely termed "voice-over" work. 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 had not shown that she qualifies for classification as an alien of exceptional ability, 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 first issue under consideration is whether the petitioner qualifies for the immigrant visa classification sought. 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. 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.

The petitioner, prior to the denial of the petition, made the following claims about the six evidentiary 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 that she had won “The Lindley Prize, for ‘Outstanding Contribution to Music,’ presented by Bath University (One of the top universities in the UK).” The prize is an “award” in one sense of the word, but it is not similar to a degree or diploma. Awards of recognition are covered by a separate criterion, addressed further below.

The petitioner holds a Bachelor’s degree in Statistics, and a Post-Graduate Certificate in Education, but there is no evidence that either of these credentials relates to the performing arts. The petitioner claimed that the Post-Graduate Certificate is in “Music and Mathematics” Education, but nothing in the record supports this claim. The petitioner therefore has not satisfied 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.

The petitioner stated: “This requirement is not appropriate to my work since it is essentially self-employed and contract based work.” It is, nevertheless, possible for an actor/singer to produce documentation of past work, such as the contracts that the petitioner herself mentioned. The petitioner submitted a list of her claimed stage roles from 1992 to 2003, but this list is not sufficient on its own. 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 petitioner submitted no evidence, such as contracts or check stubs, to show that she has consistently received payment for her performances for at least ten years. The petitioner likewise submitted no documentation from theaters or acting companies to confirm, with any precision, the extent of her paid acting work. Some witnesses indicated that they had worked with her on particular projects, but the information provided does not establish at least ten years of full-time experience. We note that the petitioner herself stated:

[T]he industry I am in is a volatile one and that jobs are often erratic but very rewarding. . . .

I have the ability to support myself while pursuing this career in the USA as I now own 4 property lets in the UK in a wonderful beach location in North Devon on the west coast.

The petitioner did not state that she supports herself as a performer and supplements her income through rental properties. Rather, she stated that she supports herself through rental properties, which enables her to work in a “volatile” field with “often erratic” employment.

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

Evidence of membership in professional associations.

The petitioner claimed that her documented memberships in Equity (a stage actors’ union) and the Musicians Union (described as “The Largest Union of Musicians in the World since 1893”) satisfy both of the above two criteria. The petitioner did not explain how these memberships amount to a license or certification. With respect to membership in associations, if one *must* belong to these unions in order to work regularly, then membership is clearly not indicative of exceptional ability. The petitioner’s membership cards do not meet either of the claimed criteria.

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

The only evidence the petitioner cited under this criterion is a letter from producer Geoff Todd, who stated that he paid the petitioner “an hourly rate of £250” for a “European voice over job.” The record contains no documentary evidence to show how this hourly rate ranks against the average rate for voiceover work in the United Kingdom at the time (c. 1998). It cannot suffice simply to show that the petitioner received payment for her work. The petitioner did not satisfy this criterion.

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

Under this criterion, the petitioner listed various witness letters. Letters solicited especially to support the petition do not constitute recognition for achievements and significant contributions to the field. The only documentation that approaches evidence of recognition is a certificate showing that the University of Bath awarded the petitioner the Linley Prize in 1982. This evidence falls short for several reasons. The award does not recognize significant contributions *to the industry or field*, as the regulation requires. The award is considerably more limited, recognizing “an outstanding contribution to music at the University of Bath” while the petitioner was a graduate student at that institution. The award, therefore, does not compare the petitioner to professional singers, but rather to graduate students who sing as an extracurricular pursuit. Also, the petitioner has not shown that the University of Bath falls under the aegis of “peers, governmental entities, or professional or business associations,” which are the only sources of recognition that the regulation acknowledges.

For the reasons set forth above, we find that the petitioner has not submitted sufficient evidence to meet the regulatory standards for exceptional ability in the arts.

The director denied the appeal on October 16, 2006, stating that the petitioner had failed to establish exceptional ability in the arts. On appeal, the petitioner repeats many of the claims already discussed above

but offers no new information or evidence to show how they should qualify the petitioner for classification as an alien of exceptional ability. For instance, the petitioner asserts that [REDACTED]'s letter establishes that she "commanded an extremely high salary" for her voice-over work on an unidentified film project, but the petitioner submits no documentary evidence to show that £250 per hour is, indeed, "an extremely high salary" for such work.

We acknowledge that £250 (approximately \$500 at current exchange rates) per hour would be, in general, a remarkable salary if consistently earned on a full-time basis; forty hours per week at that rate would yield over a million dollars per year. The petitioner, however, has not documented the number of hours she worked on the project. The petitioner has not disclosed her annual income from her admittedly "erratic" voice-over work, let alone provided any documentary evidence that would enable a meaningful comparison between her own earnings and those of other voice-over talents in the field.

Elsewhere in this decision we shall address the petitioner's new claim to be a member of the professions by virtue of her software engineering work. It is relevant to mention that work here, because the appeal includes a letter from [REDACTED], Managing Director of Information Processing Limited, who states that the petitioner worked for that company "in a number of software engineering roles" from November 1985 to August 1988 and again from March 1994 to May 2002. These periods overlap significantly with the time period previously claimed for the petitioner's performing career. If she was employed as a software engineer during the same period, then her voice-over work at the time would appear to be necessarily occasional and part-time rather than her primary full-time occupation. This information further militates against a finding that the petitioner had accumulated at least ten years of full-time experience in her originally claimed occupation.

Because the petitioner, on appeal, largely repeated the same claims, with the same evidence, that the director had already judged to be insufficient to establish exceptional ability, we affirm the director's finding.

The petitioner claims for the first time on appeal that she alternatively qualifies for classification as a member of the professions holding an advanced degree. Acting, singing and voice-over work do not fall under the regulatory definition of a "profession" at 8 C.F.R. § 204.5(k)(2), because they are not listed in section 101(a)(32) of the Act, nor is a United States baccalaureate degree or its foreign equivalent the minimum requirement for entry into the occupation.

The petitioner claims that she now qualifies as a member of the professions holding an advanced degree because her "job with Home Exchanged [*sic*] has developed, since [she] first submitted [her] application," and that job now involves professional computer skills. The petitioner indicates on appeal that she began working for Home Exchange in March 2006, after the petition's filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). A job that the petitioner did not hold until March 2006 cannot qualify her for a January 2006 priority date. Therefore, the petitioner cannot qualify as a member of the professions in the instant proceeding, initiated in January 2006.

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Because the petitioner has not established eligibility for the underlying immigrant classification, she cannot qualify for the national interest waiver (which is available only to aliens in that classification). Nevertheless, the director's decision focused on the waiver issue, which we shall discuss here in the interest of thoroughness.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now 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.

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 reiterate 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.

In a statement accompanying her initial submission, the petitioner stated:

I have for many years been performing on stage and in media within the UK, as a self-employed singer and actress. I have . . . made a substantial impact within this industry both nationally and internationally, and I have submitted letters of support from many internationally acclaimed experts who judge this field. . . .

I have also during my career made time to inspire many children into pursuing their [sic] own careers in music, stage and media through both my own performances and through lessons I have subsequently given to some of them. . . .

The USA would benefit greatly from what I have to offer both from my exceptional performances and from my inspirational teaching of their children in singing and acting.

The petitioner submitted a page marked "Reviews," showing enlargements of five undated clippings from unidentified publications. Most of the clippings consist of a single sentence, and two of the clippings do not show the petitioner's name.

The petitioner's initial submission included six witness letters. Attorney Thomas P. Allen III's letter dealt primarily with the petitioner's personal character. Richard Scudamore offered general praise for the petitioner's performing abilities, but he claimed no special expertise in the arts. He is, rather, the Chief Executive of the Football Association Premier League, who has known the petitioner "for her and my entire life."

The remaining four letters are from witnesses in the stage, film or television industries who discussed the petitioner's work in the arts. Producer and director [REDACTED], President of Rich Animation Studios, stated:

I wish to acknowledge the importance of [the petitioner] remain in the U.S. and in particular with reference to the animation film industry. Her talent, accomplishments and impact in the U.K. and in the U.S. in the musical and acting fields mean that she has the potential to create memorable performances in the animation film industry here in the U.S. . . .

[The petitioner] has already proven her worth in our company during her training with us on the IT side of animation production. . . . However, we have now also realized, after reading her portfolio and listening to her demo, her quite outstanding talent and accomplishments in singing and acting within the U.K. and it has become clear to us that she would be an exceptional talent to be used here in the U.S. animation film industry, if she were to remain here.

It is rare indeed to find someone who has this unique singing and acting talent and also creative computer skills which she is able to use to help develop her media career.

██████████ indicated that he knew of the petitioner not from her reputation as a performer, but because she was working for his company “on the IT side of animation production.” Another witness whose knowledge of the petitioner does not stem from her work is ██████████, a Senior Producer for the British Broadcasting Corporation, who “first met [the petitioner] through family connections.” He stated that he “would rate [the petitioner] very highly in terms of her artistic talents, her social skills and her truthfulness and honesty. . . . I have no hesitation [sic] in recommending [the petitioner] as a suitable candidate for remaining in the United States.”

██████████, Managing Director and Senior Producer of BVC (Bath) Ltd., hired the petitioner for a “European voice over job I was working on [in 1998]. . . . [The petitioner’s] initial work for this project was extraordinary and my customers and I were delighted with the results. . . . I believe [the petitioner] to be an ideal candidate for pursuing this type of immigration visa and residency in the United States.”

██████████ Director of M4 Theatre Company, stated:

I first met [the petitioner] in 1982 when she was in an original Musical of “A Christmas Carol” that I was directing. . . .

I had much pleasure in directing [the petitioner] during her early performing years. . . .

She is a very dedicated performer who is talented in both singing and acting. She has a singing voice of high quality ranging through soft ballads, jazz, rock and belted numbers. Her acting skills resulted in her playing many leading roles in straight plays also during this time. . . . I know that [the petitioner’s] extensive stage experience also enabled her to move her career, very successfully, into media and voiceover work.

The director issued a request for evidence on July 27, 2006, stating: “The lack of evidence in your file indicates that you may not understand the NIW process and that you may not be eligible to file as an E-21 NIW.” The director instructed the petitioner to submit additional evidence to establish eligibility for the national interest waiver.

In response to the request for evidence, the petitioner stated that she serves the national interest by serving as the “Signature Voice” for Home Exchange and as a voiceover artist for Crest Animation. To describe this work, the petitioner submitted a total of five new letters from two witnesses. ██████████, President of HomeExchange.com, provided three letters. His first letter did not mention the petitioner at all, instead describing Home Exchange:

The Home Exchange site has grown from 4,000 to almost 12,000 international Listings in 110 countries since 2002. . . .

We believe, and our feeling has been confirmed by our Members, that HomeExchange.com is making a significant contribution to cultural understanding and even international world peace through helping to establish inter-personal connections and understanding between individual persons and families.

In his second letter [REDACTED] stated:

[W]e plan to continue using [the petitioner's] English accent voice as the "Signature Voice" provided on our website for both our International Customer Service and for the Home Exchange Radio Marketing detailed below. . . .

After testing a number of candidates, we concluded that [the petitioner's] clear, mellow and rich natural speaking voice projects the professionalism, warmth and kindness that is necessary to provide information and encourage visitors from around the world to use the site and join HomeExchange.com. . . .

We have already begun using [the petitioner's] "Signature Voice" for the Customer Service feature on our website and we also plan to record her "Signature Voice" for our Radio Marketing. It is essential to us that we continue to have [the petitioner's] voice available to make modifications and additions as required, often at short notice. . . . The option of having to have [the petitioner] record at a studio outside the US would be very expensive, and the inconvenience would put us at a competitive disadvantage to our foreign competitors.

In his third letter, [REDACTED] stated: "I plan to use [the petitioner's] voice . . . and her outstanding singing voice on the DVD extras of the new blockbuster film 'The Holiday,'" a motion picture premised a home exchange between characters portrayed by acclaimed actors Cameron Diaz and Kate Winslet. Mr. [REDACTED] asserted that the petitioner's "international customer service 'Signature Voice' as well as using her unique singing talent will be used to create the inviting ambience for Home Exchange Country destinations and exchange stories."

[REDACTED] (now identified as President of Crest Animation), in a September 22, 2006 letter, stated:

I wish to use [the petitioner's] singing voice for the title song and some of the pebble narrative story music in the forthcoming film production of "**Sylvester and the Magic Pebble**." . . .

Children's animation films frequently contain a moral story which is a powerful message to be sending out to the young adults and children around the world. These films, through their moral messages, create their own contribution to maintaining world piece [sic] through influencing the children who ultimately become the young adults of the world.

[The petitioner's] rich and powerful singing voice is the exquisite quality I require for the magic and mystery contained in this film.

To be able to compete the recording of [the petitioner's] voice within the US, using US recording studios and facilities, is crucial. To be forced to record this in another country would not only be logistically more difficult but would mean lost US work, company business and jobs that would have been created in recording, editing and mixing her singing in the US.

(Emphasis in original.) In a second letter, bearing the same date, ██████ stated: "I wish to use the singing and acting voices of [the petitioner] in the forthcoming film production of **Alpha and Omega**. . . . [The petitioner's] rich, mellow speaking and singing voice is just right for 'Molly,' the Irish sheep, in this production." (Emphasis in original.) ██████ repeated his assertion that to record the petitioner's voice overseas "would mean lost US work." ██████ did not specify how many "jobs . . . would have been created," and over how long a term, by having the petitioner record her performances in the United States. He also failed to explain why the raw session tapes of a voice-over recorded overseas could not be edited and mixed in the United States.

The above letters show that the petitioner has lined up offers for voice-over and performing work, but they do not put forth a strong case for granting a national interest waiver. The projects are inherently short-term, and therefore it is not clear why the petitioner could not perform as required under the appropriate nonimmigrant classification.

Furthermore, the arguments presented as to how this work serves the national interest are weak. Whatever the merits of the argument that children's films can contribute to "world p[ea]ce," this is a general argument about the merits of children's films; there has been no showing that the salubrious impact of *Sylvester and the Magic Pebble* would be dulled by recording the petitioner's voice overseas or by recording, in the United States, an actor already authorized to work in this country. With respect to Home Exchange, the record contains no documentary evidence to show the extent to which Home Exchange benefits the United States as a whole (as opposed to its clients and corporate shareholders), or that such benefits will accrue only for as long as the petitioner records Home Exchange voice-overs in the United States.

Finally, we note that the petitioner's initial submission contained no mention of Home Exchange or the *Sylvester and the Magic Pebble* or *Alpha and Omega* film projects. Pursuant to *Matter of Katigbak* and *Matter of Izummi*, if these projects were not underway at the time the petition was filed, then the specifics of those projects cannot retroactively show that the petitioner was eligible for the waiver as of the filing date.

In denying the petition, the director concluded that the petitioner had failed to establish that her "past record justifies projections of future benefit to the national interest." On appeal, the petitioner submits additional information about her work at Home Exchange, which, for reasons already explained, began too late to qualify her for the waiver in this proceeding, even if the national interest claims relating to that work had been persuasive (which they are not). We affirm the director's finding that the petitioner has not established eligibility for the national interest waiver.

The petitioner has, in this proceeding, established that she is an experienced and respected voice-over artist, and that she has been able to line up projects of an artistic and business-related nature. In doing so, however, the petitioner has not established a degree of expertise significantly above that ordinarily encountered among voice-over artists, or that her individual contributions (beyond the usual contributions of qualified voice-over artists) have and will continue to be in the national interest.

The petitioner has not established eligibility for the underlying immigrant classification. Even if she had, a plain reading of the statute shows it was not the intent of Congress that every alien of exceptional ability 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 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 appeal is dismissed.