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FILE: [Redacted] SRC 07 023 52834

Office: TEXAS SERVICE CENTER Date: MAY 01 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:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


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 an aerial thermography interpreter at Stockton Infrared Thermographic Services, Inc., Randleman, North Carolina. 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 has 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:

(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.

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.

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 primary exhibit that the petitioner emphasized in the initial submission is a March 21, 2006 memorandum from [REDACTED], Project Manager for the Naval Sea Logistics Center, Mechanicsburg, Pennsylvania. The memorandum reads, in part:

[The petitioner] has used his exceptional expertise as a pilot, aerial thermographer, and imagery analyst. . . . [I]t is very difficult to find someone with [the petitioner's] level of expertise and broad capability to entrust with this important task.

[The petitioner] has provide his expertise for the benefit of the U.S. Navy, Air Force, NASA, and many other DoD [Department of Defense] and federal agencies in performing aerial infrared roof moisture surveys. The primary purpose of these surveys being to identify areas of entrained moisture contamination in building roofs, provide an accurate assessment of current roof condition, and prepare . . . color-coded base maps and detailed AutoCAD drawings of each roof to support planning and budgeting of roof repairs. . . .

In summary, the Navy relies on [the petitioner's] extraordinary expertise, broad capabilities, and prodigious experience in this field to help us prevent damage to our shore-based military systems and avoid detrimental risks to our national security.

In a letter dated August 1, 2006, [REDACTED] of Davis Aviation, Kent, Ohio, stated:

[The petitioner] was a noteworthy student of mine in Colombia when I taught aerial infrared operations to Columbian air force pilots and crew members during a U.S. State Department-funded training program in the late-1990's. . . .

[The petitioner] was an apt student in Colombia and when he came to the United States, I spent three months teaching him aerial infrared commercial applications. . . .

Since qualified and experienced aerial infrared thermography experts are few in number and the demand for our services is growing throughout the U.S., [the petitioner's] availability to travel widely and engage in a substantial variety of difficult infrared jobs . . . has been fortunate for our community.

The above letters address the intrinsic merit of aerial thermography, but offer little specific information as to why it is in the national interest to waive the job offer requirement for the petitioner in particular.

[REDACTED], CEO of Galileo Group, Inc., Melbourne, Florida, stated:

[The petitioner] is an employee of International Infrared Imaging, Inc., and through International Infrared Imaging, Inc., he works in collaboration as an integrated team member within our company, Galileo Group, Inc., on a counter-narcotics project with the U.S. Embassy, Lima, Peru, Narcotics Affairs Section (NAS). [The petitioner] is responsible for piloting missions over Latin American countries, and utilizing his knowledge in aerial remote sensing, to seek out and locate drug trafficking routes, as well as drug making facilities, which are hidden in the very dense jungles and forests found in these areas of the world. . . .

Galileo anticipates near-term work in the Middle East supporting US objectives in the war on terror. . . . [The petitioner] will be integrated within our team, performing as lead mission pilot in the execution of these operations as we employ unique detection technology at low altitudes in open desert and rugged mountain terrain to accomplish tactical goals for detection of insurgents and terrorists.

. . . . Although there are many pilots who possess the minimum qualifications for the job, less than 1% of the existing pilots flying today currently have the existing and exceptional expertise to perform [the petitioner's] job duties to a degree that would be very helpful to our counter-terrorism and drug control efforts in benefiting our country on a national scale.

[REDACTED] described the petitioner's work for International Infrared Imaging in the present tense, but he wrote his letter on November 12, 2004, nearly two years before the petitioner filed the petition. That company's former President, [REDACTED] has indicated that "the company closed down" and the petitioner's employment there ended in November 2005. There is no evidence that the petitioner has

continued working with Galileo Group, or that the “anticipate[d] near-term work in the Middle East” ever took place. Furthermore, there is no evidence that the petitioner’s intended employment at Stockton Infrared Thermographic Services will involve searching for insurgents, drug labs, or similar threats to the United States or its troops stationed abroad.

On March 29, 2007, the director issued a request for evidence, instructing the petitioner to show that he “will have an impact that is national in scope to a greater degree tha[n] other pilots, thermographers, and imagery analysts” and explain how he will “serve the national interest to a substantially greater degree tha[n] other individuals in the field.” The director also requested information about the petitioner’s achievements since he entered the United States in 2003.

In response, the petitioner submitted a letter from [REDACTED], President of Stockton Infrared Thermographic Services, who listed various projects that the petitioner has undertaken at that company. The projects mainly fall into four categories: “Infrared steam system analysis,” “Infrared surveys of waterways to find pollution,” “Infrared roof moisture surveys” and “Infrared surveys of landfills, thermal mapping and other applications.” This information speaks to the intrinsic merit of the petitioner’s occupation, without showing why it is in the national interest for the petitioner to be the individual performing the work. Mr. Stockton claimed that there are “perhaps less than 10 or 15” individuals in the United States “who are able to perform these sophisticated aerial infrared remote sensing operations . . . and none are available.” Even if the petitioner had offered evidence to corroborate this claim, which the petitioner has not done, a shortage of qualified workers is generally an argument for obtaining, rather than waiving, a labor certification.¹ See *Matter of New York State Dept. of Transportation* at 218. The asserted scarcity of workers in a given field does not justify a blanket waiver for qualified workers in that field.

[REDACTED] indicated that the petitioner’s work has involved innovation. For example, “he had to develop some remarkable techniques in order to stitch together the thousands of infrared images” captured during a “Steam Leak Survey for the Radford Ammunition Plant,” and the petitioner “is developing a thermal mapping system to generate high resolution ortho-rectified, geo-referenced infrared thermal images as the data is collected, real time,” in an “Aerial Infrared Survey of Unexploded Ordinance [*sic*] . . . at Camp Lejeune, NC.” The record, however, offers no objective benchmark by which to compare the petitioner’s innovations with the work of other qualified aerial thermography interpreters.

Counsel asserted that the petitioner’s “past accomplishments . . . have changed aerial thermography,” but there is no evidence that others in the petitioner’s field have adopted his finding, or that the petitioner’s innovation significantly exceed, in quantity or significance, those of others in that field.

The director denied the petition on September 5, 2007, stating: “The record contains very little evidence demonstrating that [the] significant impact of the alien’s accomplishments extends beyond a particular circle of co-workers and colleagues.” The director also noted that a waiver is warranted neither by claims of a small pool of workers, nor by assertions that the petitioner is well-trained in his occupation.

¹ The petitioner has, in fact, obtained an approved labor certification in another proceeding. See A89 548 821, I-140 receipt number LIN 07 176 52938. That petition is still pending as of the date of this decision.

On appeal, counsel states:

I respectfully submit that the NIW [national interest waiver] is not requested on the basis that the alien . . . is playing an important role in a project(s), nor is the NIW requested “solely for the purpose of ameliorating a local labor shortage.” Rather, I would submit that the NIW is sought to protect the national security.

Counsel justifies this claim by noting that the petitioner has conducted roof moisture surveys on military buildings, thereby enabling timely repairs. While certainly it is more efficient, in terms of resources invested, to make repairs early than to wait for catastrophic damage, the AAO is not persuaded that this is a significant national security issue. Furthermore, while this may be an argument for conducting roof moisture surveys, it does not show that it is in the national interest to ensure that the petitioner is the one conducting the surveys.

Counsel’s arguments on appeal regarding the significance of the petitioner’s work all derive from a previously submitted letter from the petitioner’s employer. Counsel does not overcome the director’s finding that the record lacks objective documentary evidence to distinguish the petitioner from other qualified workers in his field. Simply identifying the petitioner’s projects and accomplishments does not establish that those achievements are inherently superior to those of others in the same occupation.

The director, in the denial decision, addressed only the issue of the national interest waiver; the director did not address the petitioner’s eligibility for the underlying immigrant classification. We shall address that issue here. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

As set forth in the statutory language quoted elsewhere in this decision, section 203(b)(2)(A) of the Act establishes two immigrant classifications: one for members of the professions holding an advanced degree, and one for aliens of exceptional ability in the sciences, arts or business. The petitioner does not claim to hold an advanced degree or its defined equivalent. The petitioner claims exceptional ability in the sciences.

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. In order to determine what constitutes an “exceptional” aerial thermography interpreter, the petitioner must first establish a

baseline showing what is ordinarily encountered in the occupation. The petitioner has not done so in this proceeding.

The petitioner claimed to have met the following four regulatory 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.

Counsel stated that the petitioner “has the equivalent of a degree in Aeronautics Science.” An evaluation in the record indicates that the petitioner’s three years of study at Marco Fidel Suarez Military School of Aviation is equivalent to “[t]hree years of undergraduate study in Aeronautics Science from a regionally accredited educational institution in the United States.” The evaluator stated that this study, combined with the petitioner’s subsequent work experience, amounts to “the equivalent of a Bachelor’s Degree in Aeronautics Science from a regionally accredited institution of higher education in the United States.”

8 C.F.R. § 204.5(k)(3)(ii)(A) calls for “[a]n official academic record” of “a degree”; it makes no provision for “the equivalent of a degree.” Work experience is not an academic degree. Such experience is covered by a separate criterion, below. To allow this experience to count twice, once as experience and once as part of a “degree,” would defeat the regulatory purpose of requiring several different lines of evidence to converge toward a finding of exceptional ability. While the petitioner’s three years of education appears to have culminated in a degree, this degree is below the level of a United States baccalaureate degree. Therefore, if most aerial thermography interpreters in the United States have a four-year bachelor’s degree, then the petitioner possesses a lesser degree in comparison to them. The record, however, is silent as to the usual academic credentials of workers in the petitioner’s field.

Furthermore, we note that translated documents from the school the petitioner attended indicate that the petitioner studied “the Aeronautic Administration Program,” not “Aeronautics Science.” His transcript shows “flight instruction” and the following courses:

| | |
|---------------------------------|----------------------------|
| Administration I and II | Mathematics I and II |
| Psychology and Human Relations | Communication Methodology |
| Research Methodology I and III | English I through V |
| Physics I and II | Statistics I and II |
| Introduction to Law | Instruction Methodology |
| Economics I and II | Accounting I through III |
| Systems I through III | Financial Analysis |
| Ethics | Geopolitics I |
| Economics I and II | Administrative Contracting |
| Air Law | Human Rights |
| Social and Economic Development | Financial Mathematics |

The above course titles, and detailed course descriptions in the record, do not indicate an emphasis on science, and there is no indication that the petitioner possesses any academic training specific to aerial thermography interpretation.

The petitioner has not shown that three years of college-level education exceeds the usual educational background of aerial thermography interpreters, and thereby conveys a degree of expertise significantly above that ordinarily encountered in that occupation. The petitioner has not met 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.

On ETA Form 9089, submitted with the petition, the petitioner claimed the following employment experience:

| | | |
|---------------------------------|---------------------------------------|-------------------------|
| Pilot | Colombian Air Force | 12/26/1994 – 11/15/2001 |
| Aerial Thermography Interpreter | International Infrared Imaging, Inc. | 1/2/2003 – 12/1/2005 |
| Aerial Thermography Interpreter | Stockton Infrared Thermographic Svcs. | 12/1/2005 – present |

As of the petition's filing date, October 31, 2006, the three periods of employment listed above added up to more than ten years and eight months of experience.² Only one employer (International Infrared Imaging), however, provided a letter to verify the petitioner's employment. The petitioner's initial submission contains no letters or secondary evidence of the petitioner's claimed employment before 2003 or after 2005. A subsequent submission from the petitioner includes a letter from [REDACTED] affirming the petitioner's employment at Stockton Infrared Thermographic Services; CIS records confirm that the petitioner held an H-1B visa permitting him to work for that company beginning in late 2005.

The petitioner claimed that his duties with the Colombian Air Force included flights in which he gathered thermographic data, but he did not claim that thermographic interpretation was among his primary duties. [REDACTED] indicated that he gave the petitioner instruction in "aerial infrared operations . . . in the late-1990's." [REDACTED] later concurred that the petitioner received this training in the late 1990s. The record does not indicate that the petitioner had any prior training, let alone experience, in such operations, before [REDACTED] provided such training. Other descriptions of the petitioner's past work appear to emphasize his work as a pilot, rather than his interpretation of data gathered during his flights. Because the petitioner seeks employment as an aerial thermography interpreter, experience as anything else (such as a pilot) is not "experience in the occupation" as the regulation requires.

Simply claiming ten or more years of experience is not sufficient to meet the petitioner's burden of proof. 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*

² The petitioner did not claim any employment in late 2001 or 2002. CIS records indicate that the petitioner held an H-1B visa, I-129 receipt number SRC 02 215 50182, permitting him to work at an import-export company in Florida during part of 2002. His "major field of study" was identified as business administration and management.

of Treasure Craft of California, 14 I&N Dec. 190 (Regl. Commr. 1972)). Furthermore, letters from third parties attesting to the petitioner's past employment cannot take the place of the required letters from employers unless the petitioner can demonstrate the unavailability of the required primary evidence. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has not satisfied this regulatory criterion.

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

The only license documented in the record is the petitioner's commercial pilot's license. The record is vague as to the basic job requirements for aerial thermography interpreters. If one must be a pilot in order to be an aerial thermography interpreter, then by definition all aerial thermography interpreters have pilot's licenses (unless they fly unlicensed, in violation of federal aviation law). A license that is common to everyone in a given occupation cannot demonstrate a degree of expertise significantly above that ordinarily encountered in that occupation.

The petitioner has not established that he holds a license or certification that demonstrates a degree of expertise significantly above that ordinarily encountered in the field. Therefore, the petitioner has not met this criterion.

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

Counsel states that "several letters of recommendation from peers and from the U.S. Naval Sea Logistics Center" (already discussed above in the context of the national interest waiver) fall under this regulatory criterion. The construction of the regulation, however, indicates that the various regulatory standards generally refer to evidence generated by or resulting from the alien's work, rather than materials solicited by the alien and created specifically to support the petition. Only 8 C.F.R. § 204.5(k)(3)(ii)(B), which pertains to employment experience, indicates that the evidence can take the form of letters, and even then, those letters serve to verify length of employment, and as such are typically amenable to corroboration in the form of personnel and payroll records. While letters written for submission to immigration authorities will receive due consideration, such letters do not themselves constitute evidence of recognition as contemplated in the regulatory language.

The assertions of individual witnesses that the petitioner "has acquired a level of expertise not ordinarily encountered" in his field may echo the regulatory definition of exceptional ability, but this does not mean that such letters can take the place of the objective, documentary evidence that the regulations so plainly require. The record contains no evidence of formal, official recognition for achievements and significant contributions to the field from peers, governmental entities, or professional or business organizations. Therefore, the petitioner has not satisfied this criterion.

Pursuant to the above discussion, the petitioner has not established that he qualifies for classification under section 203(b)(2) of the Act as an alien of exceptional ability in the sciences.

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. We affirm the director's finding

in this regard. Also, we find that the petitioner has not established that he qualifies for classification as an alien of exceptional ability in the sciences. Either finding would, entirely by itself, not only justify but require the denial of the petition and the dismissal of the appeal. 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 sustained that burden.

This denial is without prejudice to the Form I-140 petition pending at the Nebraska Service Center, receipt number LIN 07 176 52938, filed with an approved labor certification and seeking a different classification on the alien's behalf.

ORDER: The appeal is dismissed.