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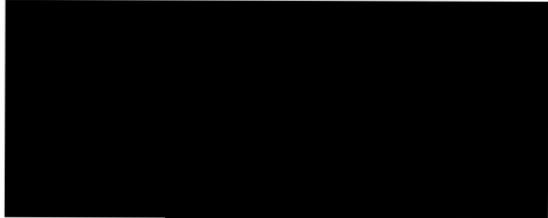
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U.S. Citizenship  
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Office: TEXAS SERVICE CENTER

Date: **MAY 01 2008**

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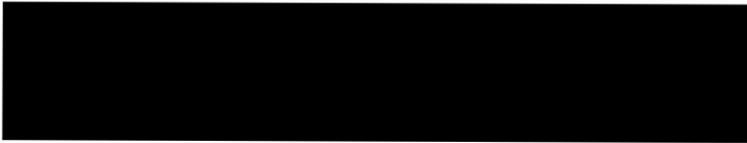
Petitioner:



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.

3 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 to classify the beneficiary 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 business or a member of the professions holding an advanced degree. The petitioner, a television/film/video production company, seeks to employ the beneficiary as a director of operations and marketing in charge of business development in Latin America and the Caribbean. 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 the beneficiary holds an advanced degree, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of various documents. We note that counsel, on appeal, repeatedly refers to the beneficiary as his “client” and rarely mentions the petitioner at all. Pursuant to 8 C.F.R. § 103.3(a)(1)(iii)(B), the beneficiary of a visa petition is not an affected party with legal standing in this proceeding. Counsel has standing only insofar as counsel represents the company that filed the petition.

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 petitioner filed the Form I-140 petition electronically on January 16, 2007. On May 3, 2007, the director issued a notice of intent to deny the petition, stating that the director had received no supporting evidence.

In response, counsel asserted that the supporting evidence arrived at the Texas Service Center on January 22, 2007. The petitioner apparently resubmitted that evidence in response to the director’s notice, although the petitioner did not specify which documents were part of the original submission and which were new materials intended to address the director’s concerns.

The first issue under consideration regards the beneficiary's eligibility for the immigrant classification sought. Section 203(b)(2) of the Act creates two distinct immigrant classifications, one for aliens of exceptional ability in the sciences, arts, or business, and one for members of the professions holding an advanced degree.

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, 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.

Counsel has not, in this proceeding, expressly claimed that the beneficiary qualifies for classification as an alien of exceptional ability in business; vague assertions that the beneficiary has earned distinction in his field do not constitute such a claim. Counsel has, likewise, not stated that the beneficiary satisfies at least three of the above six criteria. In the absence of any coherent claim of exceptional ability, we find that the petitioner has not met its burden of proof to show that the beneficiary qualifies for that classification.

The record indicates that the petitioner seeks to classify the beneficiary as a member of the professions holding an advanced degree. 8 C.F.R. § 204.5(k)(3)(i) states that, to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

- (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or

former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

We note that two findings are necessary to classify an alien as a member of the professions holding an advanced degree. The petitioner must establish that the beneficiary holds an advanced degree, but separately from that, the petitioner must also show that the beneficiary is a member of the professions. *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. 8 C.F.R. § 204.5(k)(2).

With regard to whether the beneficiary is a member of the professions, the beneficiary's position with the petitioner is not among the occupations listed in section 101(a)(32) of the Act, and the petitioner has not established that the position requires, at a minimum, a United States baccalaureate degree or its foreign equivalent. A given alien's *possession* of such a degree does not show or imply that the alien's position *requires* it. The record contains insufficient evidence to permit a finding that the beneficiary seeks employment in a profession.

In the first detailed discussion of the petition, counsel stated that the beneficiary "qualifies as a person with an advanced degree" but did not identify the degree or the university that granted it. The petitioner, prior to the denial, did not submit any documentation of the beneficiary's educational credentials.

The director, in the denial notice, only briefly mentioned the issue of the underlying classification, stating: "The letter from Counsel also states that the alien possesses an advanced degree, although no documentation of university degrees were [*sic*] submitted."

On appeal, counsel states that the beneficiary "holds a Bachelor of Arts in Business Administration from the University of Lima in Peru. He also has an extensive list of diplomas in Marketing and Strategic Planning and Economic Programs attained from several prestigious Peruvian institutions (*see Attachment 2*)" (emphasis in original). Attachment 2 includes a translated copy of a certificate from the University of Lima that indicates the beneficiary received the "professional title" of "Lawyer in Administration" in 1984. Exhibit 2 does not, however, include any documentation that could be construed as a subsequent degree from any educational institution. The petitioner did not submit any evaluation to show that his "professional title" is at least equivalent to a baccalaureate degree from a United States institution.

Certificates and letters in the record offer snapshots of the beneficiary's activities before he entered the United States, but the available evidence does not show that the beneficiary has either an advanced degree or at least five years of progressive post-baccalaureate experience in the specialty in which he now seeks employment.

For the reasons explained above, the petitioner has not established that the beneficiary qualifies for classification under section 203(b)(2) of the Act, either as an alien of exceptional ability in business or as a member of the professions holding an advanced degree.

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 shown that the beneficiary qualifies for the underlying immigrant classification, we cannot find the beneficiary eligible for the national interest waiver, which is available only to aliens in that classification. Nevertheless, the director devoted the bulk of the decision to the waiver issue, and therefore, in the interest of thoroughness, we shall discuss the petitioner's application for the national interest waiver.

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.

Beyond the director's decision, we note that 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 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). We will review the matter on the merits, as the director did previously.

The director, in the notice of May 3, 2007, instructed the petitioner to "submit persuasive documentary evidence" to establish the beneficiary's eligibility for the national interest waiver.

Counsel stated that the beneficiary's "expertise and exceptional knowledge and experience working, teaching and researching in Latin American Markets, plus experience in the U.S. markets are outstanding and will benefit the U.S. economy and national interest as well as cross cultural understanding between Latin, Central American and the United States [*sic*]." Counsel continued:

[The beneficiary] established a past record of achievements which justifies projections of future benefit to the national interest through benefits for American companies. [The petitioner] is now not only planning but beginning to open Caribbean and Latin American Markets. Including his first comedy movie "Gringo Wedding" an American-Colombian production is ready. He was responsible for DHL Central and Latin American Division training videos [that] were produced in English, Spanish, Portuguese and French. These are used in the United States and worldwide to train DHL service providers. He brings his experience in teaching and training to benefit workers throughout the United States and the world.

The petitioner's initial submission contained no evidence regarding the movie and videos named above. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). Apart from the lack of evidence, if the training videos were commissioned and produced specifically for DHL, then it is unremarkable that the materials "are used . . . to train DHL service providers" because that is their intended purpose. Furthermore, it is not clear what counsel means in stating that the beneficiary "was responsible" for those training videos. There is no indication of the beneficiary's specific role in the above projects, or that he will have a comparable role with the petitioner.

If the beneficiary works in the film and video industry, it is expected that he would have participated in film and video productions. Simply identifying those productions does not establish that the beneficiary would serve the national interest to a greater extent than another qualified individual working in the same industry.

Counsel stated: “the alien is already the beneficiary of a pending Labor Certification . . . . The underlying fact that there were no respondents to the recruitment effort shows that the alien will not take the position from a U.S. worker.” Counsel’s reasoning appears to be that, because “the Labor Certification process exists to protect job opportunities of U.S. workers,” and no qualified U.S. workers evidently sought the position, there is no need to continue to pursue labor certification. If “there were no respondents to the recruitment effort,” then this clears one potential obstacle to approval of the labor certification; it certainly does not nullify the process. This demonstrates not that labor certification is superfluous, but rather that it serves its purpose. It does not follow that the beneficiary should receive the waiver because he could conceivably receive a labor certification anyway.

In an attempt to demonstrate national scope, counsel discusses the potential benefits of free trade agreements between the United States and several other nations in the Americas, and states that the beneficiary “has huge experience and dedicated several years as [a] University professor to research economic conditions for small business development.” Counsel failed to explain how the beneficiary’s work on behalf of the petitioner with individual clients in Latin America and the Caribbean would have national scope in the United States.

Counsel asserted that the beneficiary “has unique experience as a professor and researcher in the area of economics and business,” and “more and more companies will need persons and other companies with more and better knowledge” of Latin American markets. The beneficiary, however, seeks employment not as “a professor and researcher” but as a marketing executive for a film and video company. Once again, there is no nexus between the proposed benefits and the beneficiary’s actual duties for the petitioning company, and the petitioner did not explain why the beneficiary’s past experience as a professor should mean that he will serve the national interest as a marketing director.

The petitioner submitted translated copies of letters and certificates, mostly dated in the early 1990s, showing the beneficiary’s involvement at various business schools and chambers of commerce. None of the evidence concerned the beneficiary’s activities in the United States following his 2003 entry. The submitted materials establish that the beneficiary had been active in the business community, but they do not distinguish him from others in the same field. The petitioner also submitted copies of published articles that the beneficiary wrote. The only English-language article, from *Ciudad Doral Newspaper*, is entitled “Sound advice to improve your Business Profitability.” It consists of various recommendations addressed to “Small and Middle size Enterprises.” As with the other evidence, the petitioner did not explain how these materials relate to the proffered position of director of operations and marketing for a video/film production company.

The director denied the petition on September 24, 2007, stating that the petitioner had offered only “quite general” descriptions of the beneficiary’s work, and that the petitioner had not credited the beneficiary with any “innovative business methods or specific contributions.” The director concluded that the available evidence “does not sufficiently set the alien apart from his peers” to an extent that would justify a waiver.

On appeal, counsel states:

[The beneficiary's] experience includes responsibility for planning and coordinating projects in the Business Administration Program for the University of Lima. . . . Through his experience, he has developed a comprehensive understanding of the global economy and use of the international trades to small and medium industries. . . .

[The beneficiary's] current job at [the petitioning company] involves the development and negotiation of strategic global alliances with selected industrial world-class companies worldwide. He was responsible for DHL Central and Latin American Division training videos. . . . Given his background, he brings his experience in the areas of teaching and training to benefit workers throughout the United States and the World.

Much of the evidence submitted on appeal duplicates prior submissions, showing that the beneficiary participated in lectures and other educational activities a decade or more in the past. The record offers no clear picture of what the beneficiary has done since the late 1990s or what, exactly, he intends to do in the United States.

The petitioner also submits background information about international trade in the Americas, and counsel offers general assertions such as the following: "The United States, Canada and Latin America have the ability to become the world's next great trading bloc, but only if nations improve their transportation infrastructures and simplify customs requirements." These general assertions do not show that the beneficiary has played, or is likely to play, an unusually significant role in international trade or in agreements leading to such trade. The AAO does not dispute the importance of international trade, but it does not follow that an alien qualifies for the special benefit of a national interest waiver simply by means of participating, in some ill-defined way, in such trade. The record contains no evidence to show that the fate of international trade in the western hemisphere rests, to any discernible degree, in the petitioner's choice of management staff.

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 sustained that burden.

**ORDER:** The appeal is dismissed.