



U.S. Citizenship  
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FILE:

SRC 07 237 53076

Office: TEXAS SERVICE CENTER

Date:

**AUG 13 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom  
Acting 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 AAO will dismiss the appeal.

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 the arts. The petitioner, a designer and seller of jewelry, seeks to employ the beneficiary as a master engraver. 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 qualifies for classification as an alien of exceptional ability in the arts.

On appeal, the petitioner submits witness letters and a printout from the Social Security Administration.

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 sole stated basis for denial was that the petitioner has not adequately established that the beneficiary qualifies for classification as an alien of exceptional ability in the arts.

The petitioner filed the petition on August 3, 2007. [REDACTED] President of the petitioning entity, described his company as "a corporate designer and creator of high-end, hand fabricated buckles. We craft specially engraved buckles from the finest silver, gold, and precious stones available."

The U.S. Citizenship and Immigration Services regulation at 8 C.F.R. § 204.5(k)(3)(ii) states that, to show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition 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 first submission focused largely on the petitioner's reputation and clientele, with some witness letters offering general praise for the beneficiary's skill as an engraver. The petitioner also submitted photographs said to show examples of the beneficiary's work. The petitioner did not specify which of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii) the evidence was intended to fulfill. The petitioner may have been unclear as to the classification sought; a cover letter from [REDACTED] indicated that the petitioner sought to classify the beneficiary "under the National Interest Waiver program as an alien with extraordinary ability in the arts." "Alien of extraordinary ability" is a separate classification at section 203(b)(1)(A) of the Act. The national interest waiver relates only to petitions filed under section 203(b)(2) of the Act.

An exhibit list identified exhibit 4 as "Letters of Recognition and Appreciation from Clint Orms Engravers & Silversmiths." The materials in exhibit 4 (a magazine article, print advertisements, and a web page printout) all relate to [REDACTED] but none of these materials show that [REDACTED] employed the beneficiary. In a March 22, 2002 letter, engraver [REDACTED] stated that the beneficiary "worked for [REDACTED] for many years." [REDACTED] provided no further details, and did not explain how he was in a position to attest to this employment.

The director issued a request for evidence on May 12, 2008, stating: "To establish exceptional ability, submit a letter from [REDACTED] with employment dates to confirm the beneficiary's 10 years of full-time experience in engraving." This request corresponds to the regulation at 8 C.F.R.

§ 204.5(k)(3)(ii)(B). In response, the beneficiary asserted that he had worked for [REDACTED] from January 1997 to September 2001, and for the petitioner from January 2001 onward. The beneficiary indicated that both of these positions were full-time, including, presumably, the approximately eight-month period in 2001 when the beneficiary was purportedly working for both employers. Counsel stated that the petitioner could not submit the requested letter from [REDACTED] because "[REDACTED] is no longer in business in the Houston, Texas area, and neither the Petitioner nor the Beneficiary has any knowledge of his whereabouts." The petitioner submitted what counsel called "the only evidence available of [the beneficiary's] employment with [REDACTED]".

The absence of a letter from [REDACTED] or an authorized official of his company, is not automatically fatal to the petition. While 8 C.F.R. § 103.2(b)(2)(i) indicates that the non-existence or other unavailability of required evidence creates a presumption of ineligibility, that same regulation permits the submission of secondary evidence if primary evidence is not available. Therefore, credible, verifiable evidence of the beneficiary's employment at [REDACTED] company can establish the beneficiary's prior employment if no letter can be obtained.

Documentation in the record indicates that [REDACTED] company filed a petition on December 23, 1997, to obtain an O-1 nonimmigrant visa for the beneficiary, valid from January 21, 1998 to January 21, 2001; the same employer later obtained a one-year extension on this status. A document identified as an "Employment Contract between Beneficiary and [REDACTED]" is, in fact, an unsigned, one-page "outline for the employment contract" dated May 7, 1998. These materials refer to an employment arrangement, but are not direct evidence that the employment took place.

More persuasive are payroll documents from Clint Orms Engravers & Silversmiths, Inc., indicating that the beneficiary worked there full time. The payroll documents in the record, however, only cover the period between April 2001 and August 2001. The earliest pay receipt, dated April 12, 2001, includes a "YTD" (year-to-date) figure indicating that the petitioner had earned \$1,978.39 at the regular (non-overtime) rate of \$9.00 per hour, meaning that the petitioner had worked approximately 220 non-overtime hours – equivalent to about five and a half weeks of full-time employment - during approximately the first 14 weeks of 2001. These figures do not indicate that the petitioner worked full-time throughout the earliest months of 2001.

Even ignoring the deficiencies in the petitioner's evidence, the visa documentation indicates that the beneficiary was not authorized to work for [REDACTED] until January 1998. The record contains no evidence to support the January 1997 date (which may be a typographical error) stated by the beneficiary

The director denied the petition on December 31, 2008, stating: "The petitioner has submitted sufficient evidence for criterion C [relating to licensure or certification] and F [relating to recognition for achievements]. However, three criteria must be met." The director found that the petitioner did not establish that the beneficiary had at least ten years of full-time experience, because the fragmentary documentation from [REDACTED]' company did not establish the extent of the petitioner's employment there.

On appeal, the petitioner submits further letters from third-party witnesses who attested that the beneficiary “worked several years for [REDACTED]” This assertion is too vague to be of use, and the witnesses do not claim detailed, direct knowledge of the beneficiary’s full-time employment activities.

The petitioner submits a copy of the beneficiary’s Social Security Statement, dated March 21, 2008. This government-issued document does not identify the beneficiary’s employers, but it does provide a year-by-year breakdown of the beneficiary’s reported earnings, as follows:

1998	\$8,412
1999	11,363
2000	10,881
2001	10,587
2002	18,546
2003	31,668
2004	35,931
2005	38,657
2006	38,611
2007	Not yet recorded

The “outline for the employment contract” submitted previously indicated that the beneficiary “will be paid \$8.00 per hour” and that “[e]mployees are expected to work at least 40 hours per week.” At that rate of pay, the beneficiary should have earned \$320 per week, or roughly \$16,640 per year. The Social Security Statement, however, shows substantially lower totals for each of the years that the beneficiary was authorized to work for [REDACTED] This is consistent with the previously submitted pay records, which showed that the beneficiary’s work with [REDACTED] was only intermittently full-time. The Social Security Statement, therefore, supports the conclusion that the beneficiary did not consistently work full-time from 1998 to 2001.

Furthermore, it cannot suffice for the petitioner to document the beneficiary’s full-time employment from January 1998 onward. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The petitioner filed the petition on August 3, 2007, and therefore the beneficiary must have worked at least ten years full-time as of that date. Even if the beneficiary continuously worked full-time from January 1998 through the filing date, which he apparently did not do, this would not constitute the minimum of ten years of experience.

For the reasons discussed above, we agree with the director's stated basis for denial. The petitioner did not submit sufficient evidence to establish that the beneficiary qualifies as an alien of exceptional ability in the arts.

Beyond the director's decision, we find additional issues of concern. 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 noted above, the director determined that the petitioner had satisfied two of the regulatory criteria, discussed below. We do not agree with the director, however, that the petitioner had met those requirements. 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 meet the regulatory requirements. 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 director found that the beneficiary holds a license to practice the profession or certification for a particular profession or occupation, under 8 C.F.R. § 204.5(k)(3)(ii)(C). The director did not identify any evidence to support this conclusion. The only evidence in the record that appears to relate to this finding is a certificate from the Union of Silversmiths & Jewelry Craftsmen of Jalisco, Mexico, indicating that the beneficiary completed a ten-week course in hand engraving from January 5, 1998 to March 13, 1998. This document appears to relate more to 8 C.F.R. § 204.5(k)(3)(ii)(A), relating to education, than to licensure or certification. Either way, the petitioner did not show or even claim that most engravers lack even ten weeks of formal training.

Furthermore, it is not at all clear how the beneficiary could have been working for [REDACTED] in Houston in early 1998 if, at the same time, he was taking an engraving course some 800 miles away in Guadalajara. This discrepancy further weakens the claim that the beneficiary began working full-time for [REDACTED] in January 1998, and demonstrates that the beneficiary's possession of a nonimmigrant visa is not, by itself, evidence that the beneficiary actually worked throughout the entire validity period of that visa.

The director also found that the petitioner had satisfied 8 C.F.R. § 204.5(k)(3)(ii)(F), which requires evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. The record contains a handful of letters from engravers and from retailers who sell the petitioner's products. These letters were privately solicited in order to support this petition or earlier petitions on the beneficiary's behalf; they would not exist without the petition. As such, they do not compare closely to awards,

declarations, or other forms of recognition that are made publicly, and which exist because of a given person's achievements whether or not that person goes on to seek immigration benefits. Even then, the witness letters do little more than report the witnesses' subjective opinions regarding the beneficiary's skill and the quality of his work. The factors listed at 8 C.F.R. § 204.5(k)(3)(ii) are intended to provide an objective, evidentiary basis for a finding of exceptional ability, rather than relying on the opinions of witnesses selected by the parties seeking benefits.

Beyond the issue of whether the beneficiary qualifies for classification as an alien of exceptional ability in the arts, the petitioner has also sought to exempt the beneficiary from the job offer/labor certification requirement. This issue is moot, because the petitioner has not established the beneficiary's eligibility for the underlying immigrant classification. Therefore, we will not discuss the issue at great length here. We will note only that, apart from the initial assertion that the petitioner sought the waiver on the beneficiary's behalf, the petitioner has made no organized effort to explain how the beneficiary qualifies for the waiver.

*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.

We do not question the intrinsic merit of the beneficiary's engraving work as a fine art, but the petitioner has not explained how the beneficiary's occupation is national in scope. The record consistently indicates that the ornamental belt buckles that the beneficiary designs are a local tradition. There is no evidence that the fashion, and hence demand for the beneficiary's work, extends significantly outside of Texas. All of the witnesses are in Texas (all but one are in Houston). Furthermore, the petitioner has not established that the beneficiary stands apart from his peers to such an extent that it is in the national interest to waive the labor certification process rather than permit a United States worker the opportunity to seek the same position.

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.