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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

MAY 08 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:

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.

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, Nebraska 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, arts or business or as a member of the professions holding an advanced degree. The petitioner initially stated that he seeks employment as a biotechnology consultant. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner does not qualify for classification as a member of the professions holding 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 personal statement and receipts from auction houses.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director devoted most of the decision to the question of whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. We will address this question first.

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 U.S. Citizenship and Immigration Services (USCIS)] 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 regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption 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 director, however, did not note this omission in the denial notice. We will, therefore, review the matter on the merits.

On the Form I-140 petition, filed June 28, 2007, the petitioner described his occupation as “Biotechnology consultant / Scientist (former teacher & professor).” In a letter accompanying his initial submission, the petitioner stated:

My main researches have been focused on finding the mechanisms for cell expansion, cell division, cell differentiation and re-differentiation which are critically important to understand the developmental stages in cancer cell growth and/or stem cell cultures. . . .

My long-term goal in USA is to build up a global bio-network which connects both global academic resources and industrial resources together. As a first step for this project, I am currently devoting myself to build up a network between Pittsburgh and Far Eastern Asia: cooperation in Education, Technology, Health, Trade and Investment.

The petitioner’s résumé includes a section marked “SKILLS,” which reads as follows:

1. Business Consulting: Solving International Cultural Barrier Problems.
 - Acting as an Intercultural Vehicle for Local and Global Networking: Cooperation in Education, Technology, Cultures and Sales (USA vs S. Korea & Far Eastern Asia)
2. Biotechnology Consulting:
 - GMP / GLP / Technology Transfer.
 - Cell Culture Skills: somatic, suspension, tissue, re & de-differentiation, basic DNA skills, etc.
 - Microscopic Skills: TEM, SEM, AFM, Fluorescent, Computer based Image Analysis, etc.

The petitioner’s initial submission did not indicate the exact nature of the petitioner’s claimed consulting work, or any evidence of that work. The petitioner submitted copies of published research articles that he wrote between 1999 and 2003, but he did not indicate that he had engaged in such research since 2003, or that he intended to do so in the future.

The only supporting material initially submitted relating to the petitioner’s consulting work was a letter from [REDACTED], President of EOS Group, Inc., Pittsburgh, who stated:

EOS Group, Inc. is an electronic and optical systems integrator with mostly European customers. . . . As many components of our customs-built [*sic*] systems included items built by small U.S. manufacturers, who has no representation abroad, we increased the U.S. export. . . .

[The petitioner] feels that he is in debt to the American people for making a major investment into his education and the best way he could repay that debt is to become a productive citizen of the United States.

We have been discussing EOS Group, Inc.'s activities, as well as what are [the petitioner's] capabilities and business connections in South Korea, etc. and came to the conclusion that [the petitioner] could built [*sic*] up similar activities between the USA and South Korea, etc., however this requires a permanent U.S. residency for [the petitioner].

On April 1, 2008, the director issued a request for evidence (RFE), instructing the petitioner:

Please submit any available additional documentary evidence that, as of the petition priority date, you had a degree of influence on your field that distinguishes you from other scientists in your field with comparable academic/professional qualifications. The evidence may include, for example, copies of additional published articles that cite or otherwise recognize your research achievements.

In response to the RFE, the petitioner stated:

I am working as an intercultural vehicle between the United States of America and South Korea to build up a global network in both academic and cultural fields. As I am focusing on building social and cultural network at this moment, I am afraid that I cannot satisfy your request asking for additional academic achievement documents.

Instead, I am attaching parts of my efforts for developing social and cultural network in the last six months related to be being [*sic*] an intercultural vehicle.

The petitioner submitted copies of invoices and receipts from several auction houses, showing that he had purchased several thousand dollars' worth of antique tableware and artwork. The petitioner did not explain how his purchase of such items as "assorted table linens and placemats," a "curio cabinet" and dozens of "sterling silver spoons" amounted to "developing [a] social and cultural network."

Furthermore, the invoices all date between December 2007 and May 2008, well after the petition's June 2007 filing date. Even if buying antiques at auction was a qualifying activity, which it is not, the petitioner has not shown that he engaged in this activity at the time he filed the petition. An application or petition shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the application or petition was filed. 8 C.F.R. § 103.2(b)(12).

The director denied the petition on September 28, 2008, stating that the petitioner had not established how his purchase of items at auction relates to his claimed efforts "to build up a network between Pittsburgh and Far Eastern Asia [for] cooperation in Education, Technology, Health, Trade and Investment." The director stated that the intrinsic merit of the petitioner's activities "is very unclear," and that the petitioner has not established that his work is national in scope. The director also found that the petitioner had failed to show that a waiver of the job offer requirement would be in the national interest.

On appeal, the petitioner submits copies of additional auction receipts, and states:

I found that every person qualified to engage in a profession in the USA can be exempt from the requirement of a job offer based on national interest. When I visited USCIS office in Pittsburgh to ask about this, an officer told me that I could be qualified for this case because I hold a USA Ph.D. degree in Biological Sciences. Thus I applied for the petitions for I-140, I-485 [adjustment application] and I-765 [employment authorization] in June 28, 2007.

Meanwhile, not as an educator any more, after deep thinking on what kind of business I can start and help developing and improving relationships between the USA and South Korea, I reached a conclusion that building a global networking business between American and Korean [*sic*] would be the best thing I can do because I can effectively use my analytical knowledge, researching experience, scientific approaching methods, and personal networks which were previously developed and accumulated through my academic and professional careers. Thus, to prepare and start this business in Pittsburgh, I focused on studying and collecting a variety of American arts and antiques in the last one year. That's why I sent copies in the previous letter as a evidence [*sic*] of my activities for this business. During those periods, I conducted a variety of market investigation and met many people, including private arts and antiques collectors, dealers and auctioneers who were interested in cultural-diversity exchange business.

In the same statement on appeal, the petitioner requests the "chance to start a cultural-diversity networking business in Pittsburgh." As explained earlier in this decision, the waiver is intended for individuals with a proven track record of achievement in a given field; the waiver cannot rest solely on future plans. Furthermore, a petitioner must establish eligibility at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Here, the petitioner appears to have filed his petition before he decided to buy and sell antiques. His initial filing contained no mention of antiques. Instead, he listed his occupation as "Biotechnology consultant" and "Scientist" on Form I-140. The record does not indicate that the petitioner purchased any antiques before December 2007, which is consistent with the petitioner's June 2008 reference to "the last six months."

Beyond the timing of the petitioner's venture in to buying antiques, we must also look at the nature of the intended work. While it is true that a particular immigrant classification exists for members of the professions holding advanced degrees, the petitioner must continue to engage in the profession that relates to his degree. His doctorate is not a permanent entitlement for him to enter the United States under any terms of his choosing.

Furthermore, the petitioner appears to be under the impression that every professional with an advanced degree qualifies for a waiver of the job offer requirement. A plain reading of section 203(b)(2) of the Act shows that this is not so. Such individuals are generally subject to the job offer requirement, but they may qualify for a waiver if it is in the national interest to grant the waiver.

In this instance, the petitioner has not claimed that his scientific career was particularly distinguished or influential, and he admits that he has not worked as a scientific researcher for several years. He filed the petition as a “Biotechnology consultant,” but the record contains no evidence that he has ever worked in this capacity. Instead, he claims that he will act as “an intercultural vehicle” by buying American antiques and selling them in Korea. The petitioner has not explained how this activity benefits the United States, much less why it is in the national interest for him, in particular, to be the one conducting the transactions. He claims no prior expertise regarding antiques. His future plans are very vague, and he has not explained how his sale of antiques will significantly improve relations or cultural understanding between the United States and South Korea.

For the reasons explained above, we agree with the director. The petitioner has not shown that he qualifies for the national interest waiver.

Another issue in this proceeding relates to the petitioner’s eligibility for the visa classification he seeks. The director addressed this point briefly in the denial notice, stating: “The Service does not accept that the petitioner’s current employment, or the described proposed employment require an advanced degree or exceptional ability as required under Service law.” The director appears, here, to rely on 8 C.F.R. § 204.5(k)(4)(i), which states, in part: “The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.” That regulation, however, applies only to petitions that include a specific job offer. The petitioner seeks a waiver of the job offer requirement under 8 C.F.R. § 204.5(k)(4)(ii). Whether he qualifies for that waiver is a separate point, addressed elsewhere in this decision. Here, it is important to note that there is no job offer, and therefore no specific job requirements. The only requirement that the director can reasonably impose is that the position qualify as a profession – and even then, this applies only if the petitioner claims to be a member of the professions holding an advanced degree.

The director has not addressed the more relevant question of whether the petitioner qualifies for classification under section 203(b)(2) of the Act as either a member of the professions holding an advanced degree, or as an alien of exceptional ability in the sciences, arts or business. We shall address this question 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).

First, we shall consider whether the petitioner qualifies for classification as a member of the professions holding an advanced degree. USCIS regulations at 8 C.F.R. § 204.5(k)(2) provide the following relevant definitions:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate

degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

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.

The petitioner established that he earned a Ph.D. in Biological Sciences at the University of Rhode Island, which qualifies as an advanced degree. At issue is whether the petitioner qualifies as a member of the professions, which depends on the nature of the petitioner's work rather than his educational background.

The petitioner submitted a letter from [REDACTED], Principal of Northside Urban Pathways Charter School in Pittsburgh, Pennsylvania, indicating that the petitioner "is a full-time employee at our school" who "began his employment on July 5, 2005." The letter is dated July 14, 2005, only nine days after the petitioner began working at the school. On his résumé, the petitioner claimed that he taught chemistry at that school from July 2005 to March 2006. On appeal, the petitioner asserts that he "was laid off" from that position. The record contains no evidence or claim that the petitioner was a teacher after 2006. The record provides no basis for the director's assertion that the petitioner is "currently" a science teacher.

At the same time, we must point out that elementary and secondary school teachers are included in the definition of "profession" at section 101(a)(32) of the Act. Therefore, if the petitioner were actively teaching, and intended to continue teaching, then he would clearly qualify as a member of the professions holding an advanced degree. Because the petitioner admits that he is no longer teaching, his past teaching work cannot qualify him as a member of the professions. Similarly, because the petitioner does not appear to have worked as a scientific researcher since 2003, we cannot find that the petitioner is, or intends to be, engaged in that profession either. A biotechnology consultant would appear to be a member of the professions, but the petitioner has not shown that he has ever worked as such a consultant, or that he has made any effort to do so.

Regarding the petitioner's claimed work as a "consultant," he has not provided any evidence, or even an adequate description, of that consulting work. Instead, he has shown that he buys art and antiques at auction, and he claims that he intends to sell them. The petitioner has not shown that buying and selling antiques is a profession, *i.e.*, an occupation that requires at least a bachelor's degree. Therefore, the petitioner has not shown that he works, or intends to work, in a profession. As such, he does not qualify as a member of the professions holding an advanced degree.

The other classification under section 203(b)(2) of the Act relates to aliens of exceptional ability in the sciences, arts or business. USCIS regulations at 8 C.F.R. § 204.5(k)(3)(ii) set forth the requirements for that classification:

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.

Because the petitioner has not discussed the above regulatory standards, it is not clear which (if any) he claims to have met. The only evidence that directly relates to any of the regulatory requirements is the documentation of the petitioner's doctoral degree, in a field that has no relation to antique sales. The petitioner's résumé lists less than ten years of employment experience of any kind, and his only submitted letter from an employer documents ten days of employment as a teacher. The petitioner has not shown that he qualifies as an alien of exceptional ability in the sciences, arts or business.

For the reasons explained above, we find that the petitioner has not shown that he qualifies for classification under section 203(b)(2) of the Act. Also, he has not shown that he qualifies for the national interest waiver. Either of these two factors would, alone, be enough to justify denial of the petition.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.