(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 01 2014 OFFICE: NEBRASKA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before us at the Administrative Appeals Office on appeal. We will withdraw the director's decision and remand the petition for further consideration and action.

The petitioner seeks to classify the beneficiary under 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. The petitioner describes itself as an environmental services company that seeks to employ the beneficiary as vice president of its oil and sales divisions. 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 business. The director reached no conclusion regarding the exemption from the requirement of a job offer, because the beneficiary cannot qualify for the exemption without first qualifying for the underlying immigrant classification.

On appeal, the petitioner submits a legal brief.

Section 203(b)(2)(A) of the Act makes immigrant visas available to qualified immigrants 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. Section 203(b)(2)(B) of the Act permits a waiver of the job offer requirement when the Attorney General deems it to be in the national interest.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on May 3, 2012. To establish exceptional ability in the sciences, the arts, or business, the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(3)(ii) requires the petitioner to submit evidence that qualifies under at least three of the following categories:

> (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; and

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

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (a decision pertaining to section 203(b)(1)(A) of the Act but containing legal reasoning pertinent to the classification in the current proceeding). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); *see also Kazarian* at 1121, 1122, *aff'd Rijal v. USCIS*, 683 F.3d 1030 (9th Cir. 2012). Only aliens who have demonstrated "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); *see also Kazarian* at 1120.

The petitioner does not contest the procedural use of the final merits determination. The petitioner asserts, however, that the director did not follow the procedure properly. Upon review of the director's decision, we agree with the petitioner that the director erred, and that this error warrants withdrawal of the decision and the issuance of a new decision.

The petitioner claims that the beneficiary satisfies all six of the above regulatory standards listed at 8 C.F.R. § 204.5(k)(3)(ii). When the director denied the petition on July 10, 2013, the director stated that the petitioner met criteria (A), (B) and (E). In the final merits determination, the director took back criterion (E), stating that, while the beneficiary belongs to professional associations, the petitioner did not show that those memberships required a level of expertise consistent with the regulatory definition of "exceptional ability" at 8 C.F.R. § 204.5(k)(2). On this basis, the director concluded that the petitioner had not established that the beneficiary qualifies for classification as an alien of exceptional ability.

On appeal, the petitioner asserts that the director addressed only three of the six regulatory criteria that the petitioner claims to have met, and that the director cannot render a proper finding regarding the exceptional ability claim without addressing the petitioner's evidence regarding all six criteria. We find the petitioner's assertion to be procedurally correct. The USCIS regulation at 8 C.F.R. § 103.3(a)(1)(i) requires the director to explain in writing the specific reasons for denial. Here, the director did not do so. The director did not explain why the petitioner had not met criteria (C), (D), and (F) as claimed. The petitioner cannot render a complete decision on the petitioner's exceptional ability claim without addressing those factors.

This is not a finding that the petitioner has, in fact, satisfied those regulatory criteria. Rather, it is a finding that the director did not make a proper initial determination regarding those criteria, which would then be subject to our later appellate review.

The petitioner, on appeal, also asserts that much of the director's final merits determination revolved around language taken from *In re New York State Dep't of Transportation* (*NYSDOT*), 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998), a precedent decision concerning the national interest waiver. For instance, page 3 of the decision includes this passage: "Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained or experienced workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor." This passage is a direct quotation from page 221 of *NYSDOT*.

The petitioner states: "Inclusion of the citation from NYSDOT is logically inappropriate in the context of determining whether the beneficiary is an alien of exceptional ability." The petitioner notes that, as stated in *NYSDOT*, the threshold for exceptional ability is lower than the threshold for the national interest waiver. *Id.* at 218-19. We agree with the petitioner that the appropriate context to discuss and quote *NYSDOT* is in discussing the national interest waiver, not the underlying immigrant classification. The petitioner need not satisfy the *NYSDOT* national interest test in order for the beneficiary to qualify for classification as an alien of exceptional ability (although the petitioner must then satisfy the *NYSDOT* test for the beneficiary to qualify for the waiver).

Because the director's decision contains an incomplete discussion of the regulatory standards for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii), and relied improperly on the *NYSDOT* standards for the initial determination regarding exceptional ability, the director's decision cannot stand as written. Nevertheless, the petition is not approvable in its present state. We will withdraw the director's decision and remand the petition for a new decision that more thoroughly sets forth the grounds for denial, as required by the regulation at 8 C.F.R. § 103.3(a)(1)(i). The burden remains on the petitioner to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.