identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 07 2010
LIN 08 084 51017

IN RE: Petitioner: [redacted]
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:

[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.

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).

Marie Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which 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. The petitioner seeks to employ the beneficiary as its president. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the beneficiary does not qualify for classification as an alien of exceptional ability and that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional exhibits. For the reasons discussed below, we uphold the director's ultimate finding that the petitioner has not established the beneficiary's eligibility for either the classification sought or the waiver of the job offer in the national interest.

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

> (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.

As stated above, the petitioner seeks classification as an alien of exceptional ability. 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. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." 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 every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The director concluded that the beneficiary meets two of the criteria; specifically the petitioner demonstrated the beneficiary's more than ten years of experience and remuneration consistent with exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(B), (D). Thus, at issue is whether the beneficiary meets a third criterion.

The only other criterion the petitioner claims that the beneficiary meets is the criterion set forth at 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." Counsel asserts that reference letters from the beneficiary's "peers" serve to meet this criterion because the regulation uses the conjunction "or" between the types of recognition that can serve to meet this criterion. Counsel further notes that the court in *Muni v. INS,* 891 F. Supp. 440, 441-42 (N.D. Ill. 1995), which dealt with the higher classification for aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, relied heavily on reference letters. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.[1]

While we concur with counsel that recognition from "peers" alone can serve to meet this criterion, we are not persuaded that the type of "recognition" contemplated by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) includes informal reference letters from the alien's immediate circle of colleagues and clients prepared in support of the petition. While the recognition obviously need not rise to the level of a lesser nationally or internationally recognized award or prize as required for classification as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, *see* 8 C.F.R. § 204.5(h)(3)(i), the petitioner must demonstrate some type of *formal* recognition issued independently of the preparation of the petition in order to meet the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

On appeal, counsel notes the claim by the petitioner's [redacted], that the beneficiary and the branding firm Proverb won "a national award of excellence for the branding work on [the petitioner's] identity and the company web presence." This award, however, is not in the record. 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

[1] While admittedly involving a higher classification (the same classification involved in *Muni*, on which counsel relies), the Ninth Circuit recently found that vague, solicited letters from local colleagues or letters that do not specifically identify contributions or how those contributions have influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009).

(Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Similarly, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 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). Thus, the petitioner has not established that the beneficiary personally received any award or even the identity of the alleged award.

In light of the above, the petitioner has not established that the beneficiary meets this third criterion. In response to the director's request for additional evidence, counsel asserted in the alternative that the reference letters constitute "comparable" evidence pursuant to 8 C.F.R. § 204.5(k)(3)(iii). This regulation, however, only permits the submission of comparable evidence where the criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii) do not "readily apply" to the beneficiary's occupation. The petitioner has not explained why the remaining criteria do not "readily apply" to company executives. Moreover, we are not persuaded that the necessarily subjective opinions of the beneficiary's close circle of colleagues and clients are "comparable" to the type of objective evidence required under the regulation at 8 C.F.R. § 204.5(k)(3)(ii).

As the petitioner has not demonstrated that the beneficiary is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue in the interest of thoroughness, as did the director.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service 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 Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998)[2] (hereinafter "NYSDOT"), 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. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* 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. *Id.* at 217-18.

Significantly, even if the petitioner had demonstrated that the beneficiary qualifies as an alien of exceptional ability, it would not resolve the question of whether the job offer should be waived in the national interest. By statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver. *Id.* at 218. Thus, the *benefit* which the alien presents to her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id; see also id.* at 222.

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. *Id.* at 219. 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. *Id.*

We concur with the director that the beneficiary's occupation, business executive in the railroad industry, involves an area of substantial intrinsic merit. The director then concluded, however, that the proposed benefits of the beneficiary's work would accrue primarily to the petitioner and its customers and, thus, would not be national in scope. Throughout the proceeding, counsel has asserted that the petitioner's company provides unique services to the railroad industry in a location through which almost all transcontinental trains pass and has clients all over the United States.

NYSDOT, 22 I&N Dec. at 217, n.3, addresses the issue of national scope as follows:

> [T]he analysis we follow in "national interest" cases under section 203(b)(2)(B) of the Act differs from that for standard "exceptional ability" cases under section 203(b)(2)(A) of the Act. In the latter type of case, the local labor market is considered through the labor certification process and the activity performed by the alien need not have a national effect. For instance, pro bono legal services as a whole serve the national

[2] On appeal, counsel states that *NYSDOT* is a Board of Immigration Appeals (BIA) decision that the AAO has chosen to follow. In fact, this decision is an AAO decision certified as a precedent pursuant to 8 C.F.R. § 103.4(c). Pursuant to that regulation, *NYSDOT* is binding on all USCIS employees in the administration of the Act.

> interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, n.3

The body of the decision, however, notes that the alien in that matter worked on New York's bridges and roads which connect the state to the national transportation system. Acknowledging that the maintenance of New York's transportation infrastructure serves the interest of other regions, the AAO concluded that the proposed benefits of the alien's work would be national in scope. Given the beneficiary's *significant* involvement with the national transportation system in this matter, we are persuaded that the proposed benefits of his work would also be national in scope.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

At the outset, we acknowledge that the alien employment certification process may be unavailable to the beneficiary, who is the owner of the petitioning company. U.S. Citizenship and Immigration Services (USCIS) acknowledges that there are certain positions wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for an alien employment certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of an alien employment certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5.

The record establishes that the beneficiary is a successful entrepreneur who has acquired several railroad related businesses and operated them successfully. [redacted] a Canadian businessman in the railroad industry and a family friend of the beneficiary, attests to the growth of petitioner under the beneficiary's management. The record also contains the petitioner's compiled financial statements. It is the position of USCIS to grant national interest waivers on a case-by-case

basis, rather than to establish blanket waivers for entire fields of specialization. *Id.* at 217. We are not persuaded that every successful entrepreneur who contributes to the economy and preserves or creates jobs warrants a waiver of the job offer in the national interest. While counsel cites an unpublished decision from 1992 issued by this office stating that improving the economy is a factor in national interest waiver cases, that decision is not a designated precedent and predates *NYSDOT*, which is a precedent decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

[redacted] of the Young Entrepreneur's Organization, asserts that while other businesses have been laying off employees, the beneficiary is creating new jobs. The existence of a separate classification for employment creation pursuant to section 203(b)(5) of the Act reveals that Congress considers an investment of at least $500,000 and the creation of at least ten jobs to merit its own classification. While the existence of a separate employment creation classification does not preclude an entrepreneur from establishing eligibility for a national interest waiver, we are not persuaded that every successful entrepreneur who either is unable to meet the requirements set forth at section 203(b)(5) of the Act or chooses not to pursue that classification presumptively qualifies for a national interest waiver pursuant to section 203(b)(2) of the Act. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223. Similarly, we are not persuaded that the national interest waiver was intended as a means for entrepreneurs claiming to be creating jobs to avoid the petition requirements of section 203(b)(5) of the Act.

The beneficiary is the president of the petitioning company, which has four wholly owned subsidiaries consisting of previously operational businesses acquired by the petitioner. One of the subsidiaries, [redacted] is the sole representative of Holden America's Grate Lock Chock system to secure automobiles in two-level railway cars. According to the beneficiary's references, this system has led to an increase of these railway cars because the system does less damage to newer cars than the previous system, which was designed for older cars. [redacted] of [redacted], asserts that Ramptech is the sole distributor based on its performance, reliability, ingenuity and outstanding customer focus and is now performing services Holden America used to perform in Canada. [redacted] concludes that the beneficiary's unique business philosophy allows him to fill specific demands that were otherwise unfulfilled. While a good product must be distributed if it is to have an impact, it remains that Holden America designed the Grate Lock Chock system. [redacted] provides no examples of the influence of the beneficiary's business philosophy such that other companies have been able to improve their own customer service in the railroad or any other industry.

A second subsidiary is Railway Program Services, Inc. (RPSI), a specialized railcar retrofit entity that is able to provide uniquely quick turn around times based on its specialization. [redacted] of the Belt Railway Company of Chicago, which leases space to RPSI, explains that RPSI must constantly justify its use of the space to continue the lease. [redacted] praises RPSI but does not suggest that its specialization philosophy has spread to other railcar repair facilities or served as a

business model in any other industry. [redacted] a successful dentist and Canadian business leader, notes that the beneficiary has streamlined the services provided by the petitioner and its subsidiaries, which previously operated individually. [redacted] does not explain how this model is unique in the business world or influential in the industry.

Despite the director's request for evidence of the beneficiary's influence such as articles in trade journals, industry publications or other media recognizing the beneficiary's achievements, the petitioner's response included only new letters from [redacted] and [redacted] and business invoices. In addition, the petitioner has also failed to provide evidence that the beneficiary is an invited speaker at business or railroad conferences nationwide or that he has published articles on his business model in any trade publication or other media or comparable evidence that the beneficiary's business is a recognized business model in the railroad industry or any other industry.

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 alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely 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 filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.