



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-D-I- INC.

DATE: NOV. 21, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an interior design firm, seeks to employ the Beneficiary as an artistic director, and classify him as a member of a profession holding an advanced degree or an individual of exceptional ability (EB-2 classification). *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). It has applied for the Beneficiary under a labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group II. Schedule A, Group I as well as Group II, is comprised of certain occupations for which the Department of Labor (DOL) has determined there are not sufficient United States workers who are able, willing, qualified, and available, and that the employment of these foreign nationals will not adversely affect the wages and working conditions of similarly employed United States workers. *Id.*

The Director of the Nebraska Service Center denied the petition. The sole basis for his denial was his determination that the Petitioner did not establish that the Beneficiary had ten years of work experience as an artistic director, and as such, he did not meet the experience requirements specified on DOL ETA Form 9089, Application for Permanent Employment Certification (labor certification).

On appeal, the Petitioner provides additional evidence, and asserts that the Beneficiary had the requisite work experience at the time of filing of the petition, April 13, 2015. We issued a request for evidence (RFE) regarding the Beneficiary's work experience and other eligibility issues under Schedule A, Group II. The Petitioner submitted a brief and additional evidence in response to our RFE.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national beneficiary must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255. A Schedule A, Group II petition, however, does not require the petitioning employer to first obtain an approved labor certification from the DOL.

Instead, it files both the ETA Form 9089 and an immigrant visa petition (Form I-140, Immigrant Petition for Alien Worker) with USCIS. *See* 8 C.F.R. § 204.5(a)(2), (k)(4); 20 C.F.R. § 656.15.

To establish eligibility for labor certification under Schedule A, Group II, a petitioner must first demonstrate the beneficiary's qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act. In addition, the petitioner seeking to classify the beneficiary as having "exceptional ability in the sciences or arts (excluding those in the performing arts)" must meet the regulatory requirements at 20 C.F.R. § 656.15(d)(1). Seven evidentiary criteria are set forth at 20 C.F.R. § 656.15(d)(1)(i)-(vii), and include such items as international awards, recognition in publications by others, and the display of artistic works at exhibitions in more than one country. The successful submission of evidence meeting at least two of the seven criteria must be provided. Additionally, the petitioner must document the beneficiary's "widespread acclaim and international recognition accorded [to him or her] by recognized experts" in the field of endeavor. Lastly, the beneficiary's work in that field during the year prior to filing the petition, and his or her intended work in the United States must require exceptional ability. *Id.*

II. ANALYSIS

The Director in denying the petition did not consider whether the Beneficiary was qualified for the underlying EB-2 visa classification. He also did not determine whether the Beneficiary was eligible for labor certification under Schedule A, Group II. We issued an RFE to provide an opportunity for the Petitioner to supplement the record with evidence demonstrating that the Beneficiary meets the Schedule A, Group II regulatory requirements at 20 C.F.R. § 656.15(d)(1). For the reasons discussed below, we find that the evidence in the aggregate is insufficient to show that the Beneficiary qualifies for the benefit sought on his behalf.

A. Exceptional Ability under 8 C.F.R. § 204.5(k)(2)

The regulation defines the term "exceptional ability" as referring only to those individuals who possess a degree of expertise significantly above that ordinarily encountered in the arts. *See* 8 C.F.R. § 204.5(k)(2). To meet this definition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(3) provides that a petitioner must submit sufficient evidence that meets at least three of the six criteria listed therein, that includes academic records showing that the beneficiary possesses a degree relating to the area of exceptional ability, possesses at least 10 years of full time experience for the occupation being sought, and evidence of achievements in and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The Petitioner wishes to permanently employ the Beneficiary as an artistic director. For the reasons discussed below, it has established that the Beneficiary qualifies as an individual of exceptional ability in the arts.

The Beneficiary graduated with honors while earning the foreign equivalent of a master of fine arts in visual arts from [REDACTED] Ireland, in 2008. The Beneficiary's educational credentials satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

To meet the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(B), the record contains letters from former employers indicating that he has at least 10 years of full-time work experience in the occupation sought. The Director noted that many of the letters seem to rely on very similar language and merely incorporate the duties listed in the labor certification to describe the duties of the proffered position. On appeal, the Petitioner does not address this concern, maintaining that the letters submitted in response to the Director's RFE itemize the specific roles performed by the Beneficiary for each employer. Despite the Director's concerns, the record, taken as a whole, contains sufficient evidence of the Beneficiary's activities as a fine artist over a period of many years to meet the 10 year experience requirement.

Lastly, as evidence that the Beneficiary has received recognition for his achievements and contributions to the field, the record contains letters from collaborators, professional artists, gallery trustees, directors, and curators with experience in the modern art field. The letters refer to the Beneficiary's artistic directorial skills, and describe his artistic work, gallery exhibitions, and art installations in international venues. The record documents that his work has been displayed in the [REDACTED] Ireland; the [REDACTED] Italy; the [REDACTED] the Netherlands; and the [REDACTED] in New York. Thus, the Petitioner has established that the Beneficiary's peers, mentors, employers, and other professional art administrators recognize the significance of the Beneficiary's achievements and contributions to the field. In light of the evidence described above, the Petitioner has demonstrated the Beneficiary has met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

The record includes sufficient documentary evidence that the Beneficiary meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner has shown the Beneficiary to be an individual of exceptional ability in the arts.

B. Qualifying Work Experience

The Director denied the petition solely on the ground that the Beneficiary lacked ten years of work experience as an artistic director, which is a specified requirement listed in part H of the labor certification. He noted that many of the letters of employment from the Beneficiary's previous employers and clients reiterated the description of the job duties provided in the form's addendum. Further, the Director also observed that the Beneficiary's work experience, attested to in part K of the labor certification, showed that he had been self-employed from August 1995 until the filing of the petition, contradicting many of the employer statements provided in the letters of support.¹ On

¹ The Beneficiary's personal statement provided in response to the Director's RFE states that he was "sometimes employed as an independent contractor and sometimes as a direct employee." The record does not contain sufficient corroborative evidence supporting this claim. While he provides a calendar outlining his work experience from 1993

appeal, the Petitioner has not sufficiently addressed these incongruities in the record by providing independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based on our review of the material submitted, we find that the Beneficiary did not possess the requisite work experience as an artistic director required under the labor certification.

The Director emphasized in his denial that none of the Beneficiary's previous positions carried the artistic director job title, and that the Petitioner had indicated in part H, question 10 of the labor certification that experience in an alternate occupation was not acceptable. In response to the Director and on appeal, the Petitioner has sought to submit an amended labor certification that indicates experience in an alternate occupation is acceptable for the proffered position. However, a petitioner may not modify a labor certification accepted for processing after July 16, 2007. *See* 20 C.F.R. § 656.11(b).

In analyzing the requirements for a position specified in an ETA Form 9089, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.² The addendum to part H of the labor certification provides a lengthy description of job duties for the proffered artistic director position. We note that many of the duties described involve the actual creation of artwork that a fine artist would routinely perform, such as “[u]se materials such as pens and ink, watercolors, charcoal, oil, or computer software to create artwork[,] . . . [r]ender drawings, illustrations, and sketches of buildings, manufactured products, or models, working from sketches, blueprints, memory, models, or reference materials.” Other duties involve tasks that are typically associated with work that a director would perform, like “[c]onfer with clients, editors, writers, art directors, and other interested parties regarding the nature and content of art work to be produced . . . [p]rovide creative and technical assistance and advice on all projects, as required.”

The work experience letters outline approximately 16 years of the Beneficiary's employment by individuals, commercial clients, and artistic institutions in positions with job titles such as fine artist, design team leader, artist in residence, design team director, and artist designer. However, some of the letters also indicate that he was engaged in duties unrelated to the artistic director occupation. For instance, [REDACTED] formerly with [REDACTED] indicates that the Beneficiary was the “artistic designer leader” for a number of venues, including restaurants and bars, from 1994 to 2011. [REDACTED] noted that the Beneficiary “had ongoing responsibility for the appearance of these and others of the company's venues, from the maintenance of the design to the creation and curation of artworks and the appearance of menus, websites, and promotional materials.” [REDACTED] also explains that the Beneficiary oversaw “the running of the restaurant” during this period. The letter does not identify whether the employment was full-time, and the number of hours that were

onward, the calendar indicates that he had multiple employers during certain time-periods, and does not describe the duties performed, whether he was self-employed or a direct employee, or if he was employed on a full-time or part-time basis while working for the employers named therein.

² USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

typically devoted to the Beneficiary's duties associated with hospitality management relative to the time that he spent involved in his duties as an artistic designer leader.

In addition, several business owners and advertising executives also provide letters detailing the Beneficiary's work as an artistic design team lead or in some other position of responsibility for the development, implementation, and maintenance of décor and artwork for a variety of hospitality establishments from the late 1990s until his entry into the United States as an O-1 nonimmigrant in 2014.³ Likewise, the record contains evidence, such as client letters, art show press releases, and trade magazine advertisements, verifying the Beneficiary's engagement as a fine artist in the design and display of his contemporary artwork, as well as the development and marketing of a line of lighting fixtures based upon his art. The Beneficiary's employment history since 2014 is supported by a letter from [REDACTED] owner of [REDACTED] where the Beneficiary has exhibited his artwork since obtaining his O-1 nonimmigrant status. Additionally, [REDACTED] senior project manager for the [REDACTED] describes the Beneficiary's artistic design work on [REDACTED] a high-profile residential development in [REDACTED] in the year prior to the filing of the petition. While a number of the Beneficiary's previously held positions appeared to require the performance of some of the duties described for the proffered position, and could likely be categorized as alternate experience in part H of the ETA Form 9089, the labor certification expressly states that experience in an alternate occupation is not acceptable for entry into the position. As the Petitioner expressly limited the qualifying work experience in the labor certification accompanying the petition when filed to only work experience gained in the proffered position, we may not consider alternative work experience as evidence of the Beneficiary's eligibility for entry in to the artistic director position. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

In summary, to determine whether the Beneficiary meets the work experience requirements for an artistic director as specified on the labor certification, we have analyzed the actual duties that he performed prior to the filing of the petition⁴, which includes, but is not limited to, a review of the associated job titles of his prior employment.⁵ We find that his prior experience does not reflect his employment for at least ten years prior to the date of filing the petition, in the proffered position on the ETA Form 9089. Therefore, we conclude that the Beneficiary has not met the prior work experience requirements of the position. *See* 8 C.F.R. § 204.5(a)(2), (k)(4); 20 C.F.R. § 656.15.

³ *See* 101(a)(15)(O) of the Act; 8 C.F.R. § 214.2(o)(1)(i).

⁴ The beneficiary must meet all of the requirements of the offered position set forth on the labor certification at the time of filing. 8 C.F.R. § 103.2(b)(1), (12).

⁵ USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer exactly as it is completed by the prospective employer." *Rosedale and Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

C. Evidentiary Criteria for Schedule A, Group II

To establish the Beneficiary's eligibility for Schedule A, Group II labor certification, the Petitioner must demonstrate, among other things, that he qualifies as an individual of exceptional ability in the arts in accordance with the regulatory provisions found at 20 C.F.R. § 656.15(d)(1). We have reviewed all of the evidence in the record of proceedings, and find that the Beneficiary has met two of the seven evidentiary criteria found at 20 C.F.R. § 656.15(d)(1)(i)-(vii).⁶

Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought. 20 C.F.R. § 656.15(d)(1)(i)

The evidence provided does not demonstrate that the Beneficiary's awards meet this criterion. The record reflects that the Beneficiary received a travel award in 2015 from [REDACTED] to assist in paying for the transportation of his artistic works for an exhibit in [REDACTED] Germany. However, the Petitioner has provided insufficient documentation to show that this award is an internationally recognized award for excellence in the field.

The Beneficiary also received three bursary awards in 1998, 1999, and 2009, respectively, as well as a travel award in 2008, from the [REDACTED]. The material provided indicates that the [REDACTED] is an Irish government agency that "works in partnership with artists, art organisations, public policy makers and others to build a central place for the arts in Irish life." [REDACTED] a member of the [REDACTED] describes some of the criteria used for granting awards, and noted the "awarded artists have achieved international recognition, or have the recognised potential to do so." He further explains that the awards are open to Irish artists working nationally or internationally, as well as international artists living and working in Ireland.

The stated purpose for the [REDACTED] and the awards criteria identified by [REDACTED] suggests that the [REDACTED] limits the pool of candidates for the awards to Irish artists or those working in the arts in Ireland, which denotes that the awards are national, not international in scope. The [REDACTED] appears to grant the awards in furtherance of its mission to improve Irish aesthetic life rather than in recognition for the individual excellence of the recipients. Additionally, the Petitioner has not shown that the awards are internationally recognized awards for excellence in the arts.

Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields. 20 C.F.R. § 656.15(d)(1)(ii)

The Beneficiary was a member of [REDACTED] from 2002 to 2007, and then from 2010 to 2013. The evidence submitted about the association does not support the Petitioner's assertion that it

⁶ The Petitioner did not claim before the Director, or on appeal, that the Beneficiary met the regulatory criteria not discussed in our decision.

qualifies as an international association. Furthermore, the criteria used to grant individual membership in the organization relies on candidates meeting factors such as obtaining a degree or diploma from a recognized college, participating in a juried visual arts event, and having previously sold artistic works to local authorities or government, museums, or corporate clients. These qualifying factors for membership do not encompass a showing that the candidate has had outstanding achievements, as judged by recognized international experts in the field. Therefore, the Petitioner has not shown that the Beneficiary has met this criterion.

Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material. 20 C.F.R. § 656.15(d)(1)(iii)

At least two of the submitted articles about the Beneficiary appeared in professional publications that meet the regulatory requirements, and focus on his work in the field. A 2009 article reviewing the Beneficiary's video installation entitled [REDACTED] appeared in [REDACTED] a periodical dedicated to contemporary visual culture in Ireland. Also, [REDACTED] a publication devoted to reporting on trends in the field, published an article in [REDACTED] 2001, detailing the Beneficiary's interior lighting artwork. The artwork covered in the article was exhibited in design studios, and was utilized in various interior design projects for commercial clients in which he was involved. Based on these articles, the Beneficiary has met this criterion.

Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country. 20 C.F.R. § 656.15(d)(1)(vii)

The Beneficiary has displayed his creative works at artistic exhibitions in several countries, including the United States, the Netherlands, Ireland, Italy, and France. Some of the exhibitions of his artistic works documented in the record occurred at the following venues: the [REDACTED] in [REDACTED] New York (2014); the [REDACTED] New York (2013); the [REDACTED] the Netherlands (2011); the [REDACTED] Ireland (2007); and the [REDACTED] Italy (2005). The Petitioner has established that the Beneficiary has met this criterion.

D. Widespread Acclaim and Recognition

In addition to meeting the criteria discussed above, the regulation at 20 C.F.R. § 656.15(d)(1) also provides that the Petitioner must file "documentary evidence showing the widespread acclaim and international recognition accorded [to the Beneficiary] by recognized experts in the field."

The record contains letters of support from a wide range of individuals with expertise in the field of contemporary art, who strongly support the Petitioner's claim that the Beneficiary enjoys widespread

acclaim and international recognition for his work in the field.⁷ Though some letters seem to rely on very similar language and merely incorporate the duties that are listed in the labor certification to describe the Beneficiary's contributions, others provide specific analysis of his contributions to the field in terms that reflect his claimed widespread acclaim and international recognition. For example, [REDACTED] Chair of the [REDACTED] program at the [REDACTED] in New York writes "[the Beneficiary] has developed his practice as a video and installation artist, and has distinguished himself as a serious artist who creates kinetic sculptures, videos, and hybrids that explore movement and chance." He further notes that the Beneficiary has exhibited his artwork at a wide variety of prestigious institutions and venues.

Moreover, [REDACTED] lifetime trustee at the [REDACTED] in [REDACTED] Connecticut, indicates "[the Beneficiary] is known to me as an artist of extraordinary talent. . . ." She maintains that he plays a critical role in current contemporary art dialogue internationally, through his "significant contributions to the development of installation art through his innovative approach to lens-based media and ingenious mechanized installations." Likewise, [REDACTED] senior faculty member of the [REDACTED] in New York, states that the Beneficiary has "achieved international recognition with his installations . . . over his long career in consistently producing beautiful, consequential, cutting-edge works of fine art for inclusion in public and private spaces." The letters in the record describing the Beneficiary's employment as an artist, designer, and team lead are supported by contemporaneous evidence, such as art gallery announcements, press releases, and trade magazine advertisements, that also describe the significance of the various venues and relating artistic design work in which he has been involved.

The documentation provided shows that the Beneficiary has established his position as an internationally recognized fine artist, design team leader, and creator of contemporary art installations since 1993. He has created kinetic sculpture within architectural interior design and product development projects, as well as completed artistic works for exhibition at art galleries and commercial venues. Favorable material about his art work in interior design installations has been published in professional publications, such as [REDACTED] and [REDACTED]

Additionally, articles in national and international news media, to include the [REDACTED] [REDACTED] and the [REDACTED] have provided favorable reviews of the Beneficiary, his work, and his exhibitions in commercial and artistic venues. Also, as previously discussed, he has displayed his creative works at artistic exhibitions internationally, including Ireland, the United States, Belgium, Italy, France, and the Netherlands. For instance, [REDACTED] director of the [REDACTED] writes that the Beneficiary's 2014 video work, entitled [REDACTED], was "innovative, cutting edge art work by a uniquely gifted artist of international acclaim." The [REDACTED] is an annual international arts festival held in [REDACTED] Ireland, with a 39 year track record of displaying curated art works by international artists

⁷ While we discuss only a sampling of these letters, we have reviewed and considered each letter present in the record.

and performers.⁸ Considering the evidence in its totality, we find that the Petitioner has established that the Beneficiary has garnered widespread international acclaim for his work in the field of endeavor.

E. Qualifying Work Experience and Prospective Position for Schedule A, Group II

The regulation at 20 C.F.R. § 656.15(d)(1) further requires that the Petitioner must submit “documentation showing [the Beneficiary’s work in his field] during the past year did, and [his] intended work in the United States will, require exceptional ability.” The Beneficiary was employed in the United States as an O-1 nonimmigrant during the year preceding the filing of the petition. During that time, he designed and exhibited artwork at the [redacted] in [redacted] Ireland, and at the [redacted] in [redacted] New York. [redacted] owner and director of the eponymous gallery, notes that the its exhibitions have been reviewed by major media and art publications, such as the [redacted] and [redacted] (cover story). She explains that the Beneficiary has “been a good fit for both the high level of ability represented by our artists, and by the creative and challenging nature of his work.” He was also commissioned, through his employment with the Petitioner, to design and implement sculptures and a lighting installation for [redacted] a high-profile residential development in [redacted]. This interior redesign project was featured in [redacted] in 2014. In light of the above, we find that the record contains sufficient evidence that the Beneficiary has the requisite work experience denoting exceptional ability in his field in the year prior to the filing of the petition.

Lastly, we requested additional evidence in our RFE about the Petitioning entity, along with documentation that shows the significance of the work that he will be performing, should this petition be approved. In its response, the Petitioner documents that it is an award-winning international interior design firm, and states that it employs over 25 individuals in interior design and administrative positions.⁹ The record also reflects that the Petitioner has engaged in interior design projects over a succession of years.¹⁰ However, without specific material that explains how the Beneficiary’s prospective position requires exceptional ability, the past projects and accolades received by the Petitioning entity are insufficient evidence to establish the Beneficiary’s eligibility for the benefit sought.

The firm has employed the Beneficiary since September 2015 as an artistic director, and it states that he has been using his “experience in fine art methodologies and techniques to lead the process of differentiating [the Petitioner] from its competitors.” Towards that end, the Petitioner notes that he will “focus on the creation of new art and products exclusive to [the Petitioner], and the incorporation of art elements and modes of creation into [its] projects.” It has also provided a generic timeline for the next three years that outlines the general duties that the Beneficiary will

⁸ [https://\[redacted\]](https://[redacted]) viewed November 8, 2017, and incorporated into the record.

⁹ We note that the Beneficiary’s mother owns the Petitioner, and that the relationship was disclosed in part C., question 9, of Form ETA-9089.

¹⁰ See [http://\[redacted\]](http://[redacted]) viewed November 14, 2017, and incorporated into the record of proceedings.

perform as its artistic director. While the duties denote that the incumbent in the position will need to be competent in the creation and management of interior design projects, the generic duties as described do not establish that the position requires someone with exceptional ability. *Id.* In light of the evidence provided, we conclude that the Petitioner has not shown that the Beneficiary's prospective employment with the Petitioner requires exceptional ability. *See* 20 C.F.R. § 656.15(d)(1).

III. CONCLUSION

In considering the totality of the Petitioner's evidence, the documentation submitted establishes the Beneficiary's widespread acclaim and international recognition accorded to him by recognized experts in his field. Furthermore, his previous work employment requires exceptional ability in accordance with 20 C.F.R. § 656.15(d)(1). The evidence also shows that the Beneficiary meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii)(3). We conclude that the Beneficiary qualifies an individual possessing exceptional ability under both section 203(b)(2) of the Act and 20 C.F.R. § 656.15(d)(1). However, the Petitioner has not demonstrated that the Beneficiary possesses the requisite work experience for the position specified in Form ETA 9089. *See* 8 C.F.R. § 204.5(a)(2), (k)(4); 20 C.F.R. § 656.15. Lastly, it has not established his prospective employment meets the exceptional ability requirements for the Schedule A, Group II designation. *See* 20 C.F.R. § 656.15(d)(1).

ORDER: The appeal is dismissed.

Cite as *Matter of C-D-I- Inc.*, ID# 447490 (AAO Nov. 21, 2017)