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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



17 JUN 2002

File: WAC 01 218 51338 Office: California Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

A box on the Form I-140 petition was checked that indicated that the petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability as a tile setter. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if

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(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. 204.5(h)(2).

The initial submission consisted, in its entirety, of an uncertified Form ETA-750 application for labor certification; a copy of the beneficiary's birth certificate; and an English translation of that document. The director denied the petition on the grounds that the petitioner had submitted nothing to establish extraordinary ability.

On appeal [REDACTED] owner of the petitioning entity, states that the beneficiary had filled out the petition form, and had "inadvertently omitted checking the 'Petition Type' column." [REDACTED] indicates that the intended classification was as a skilled worker under section 203(b)(3)(A)(i) of the Act.

We cannot determine who checked the "extraordinary ability" box on the petition form. We note that the information on that form is, for the most part, typed, whereas the box has been checked by hand with a ballpoint pen. [REDACTED] name is also handwritten in ballpoint ink.

Ordinarily, there is no provision for the readjudication of a petition under a second classification. If the petitioner had been able to show clear Service error in adjudicating the petition under the wrong classification, a remand may have been in order. Looking at the record as a whole, however, we see that such a remand would serve no useful purpose because, regardless of who checked the wrong box on the petition form, the petition cannot be approved.

8 C.F.R. 204.5(1)(3) states, in pertinent part:

Every petition under this classification [i.e., skilled worker, professional, or other worker] must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor Market Information Pilot Program.

The petitioner did not submit any of the documentation required above. Without an approved labor certification from the Department of Labor, or other documentation listed above, the petition has not been properly filed and cannot be assigned a priority date. See Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner admittedly does not seek to classify the beneficiary as an alien of extraordinary ability, and the initial submission did not contain the bare minimum of documentation necessary for proper filing of a petition for a skilled worker.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.