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**U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: AUG 09 2007
EAC 06 046 50594

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)

ON BEHALF OF PETITIONER:



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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a public school system. It seeks to employ the beneficiary permanently in the United States as a mathematics teacher. The petition was unaccompanied by certification from the Department of Labor. The central issue in this proceeding involves the classification sought. On Part 2 of the Form I-140 petition, counsel checked box "a," indicating that the petitioner seeks to classify the beneficiary to 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. 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. The cover page of this appellate decision reflects the classification discussed in the director's decision.

In support of the petition, which was filed on November 28, 2005, the petitioner submitted a letter from its Director of Human Resources/Personnel stating that the beneficiary "qualifies for the shortage occupation according to the Department of Labor's Market Information Pilot Program."

The petitioner also submitted a November 14, 2005 affidavit from the beneficiary stating:

At the present time I am filing the . . . I-140 under the classification of having exceptional ability in the science [sic]:

- I have degree form [sic] a University in Mathematic [sic].
- I have letters and documents showing a full-time experience.
- I have the proper license to practice my profession.
- I am receiving the proper salary according to my ability.
- I am member of the proper professional association.
- I have a high recommendation in my field, and
- I have an invention been [sic] evaluated for educational purposes.

The statements contained in the preceding documents are consistent with a request for classification pursuant to section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability, rather than classification as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act.

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) Subject to clause (ii), 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 specific requirements for supporting documents to establish that an alien qualifies for classification pursuant to section 203(b)(2) of the Act are set forth in the regulation at 8 C.F.R. § 204.5(k).

The regulation at 8 C.F.R. 204.5(k)(3)(ii) states:

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.

The regulation at 8 C.F.R. § 204.5(k)(4) states:

Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program --

(i) General. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. 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.

(ii) *Exemption from job offer.* The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest. To apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest.

On February 21, 2006, despite the initial supporting documentation indicating otherwise, the director issued a request for evidence notice stating: "This petition has been filed under Section 203(b)(1)(A) Alien of Extraordinary Ability." The director instructed the petitioner to submit evidence pertaining to the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3).¹

The petitioner responded by submitting a May 13, 2006 letter from counsel stating: "Please . . . note that our office is requesting this case be handled under the waiver basis regarding the approval of his labor certification."

The petitioner also submitted a May 9, 2006 letter from its Director of Human Resources/Personnel stating, in pertinent part:

Our Institution, wish [sic] to advise as follows:

1. We are requesting a waiver of a job offer because the employment deemed to be in the Ne[w] Jersey Education system[']s interest.
2. We strongly believe that [the beneficiary] is a person with an exceptional ability in the Sciences field; his expertise, dedication and vision are beyond the regular Math Teacher.
3. [The beneficiary] has the proper license, and certification to practice his profession in the State of New Jersey.
4. [The beneficiary] has the proper credentials, and awards from the proper institutions, and [i]n the area of exceptional ability.
5. [The beneficiary] is holding a foreign degree in the Mathematics field, he has also more [t]han 10 years of experience in his specialist [sic].
6. We are providing the proper recommendation letters from our institution, and also [f]ormer employers proving that [the beneficiary] has at least ten years of full-time experience in the Mathematics field.

¹ These regulatory criteria relate to classification pursuant to section 203(b)(1)(A) of the Act, as an alien of extraordinary ability.

7. Our institution is sending the evidence that [the beneficiary] has commanded salary for his service.
8. Our institution is providing evidence of membership in professional associations related to the field of expertise.

The petitioner's response included evidence pertaining to the six regulatory criteria at 8 C.F.R. 204.5(k)(3)(ii).

On July 19, 2006, the director denied the petition finding that the petitioner had not established that the beneficiary meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3). The director's decision stated: "The record does not establish that the beneficiary qualifies as an alien of extraordinary ability. Therefore, the beneficiary is ineligible pursuant to section 203(b)(1)(A) of the Act."

On appeal, the petitioner submits an April 4, 2007 letter from the beneficiary stating: "When my lawyer was filing my I-140, he made a mistake by marking a wrong box so that he put me under incorrect classification, which is EB-1 an alien with extraordinary ability"

Although counsel incorrectly checked box "a" under Part 2 of the Form I-140 petition, requesting classification as an alien of extraordinary ability, a review of the supporting documentation contained in the record indicates that the petitioner actually sought to classify the beneficiary as an alien of exceptional ability pursuant to section 203(b)(2) of the Act. The information provided by the petitioner is not clear, however, as to whether it seeks exceptional ability classification for the beneficiary through one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program or through an exemption of the job offer in the national interest. Counsel and the petitioner have provided conflicting information in that regard. To establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. 8 C.F.R. § 204.5(k)(4)(i). To apply for the exemption from a job offer, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest. 8 C.F.R. § 204.5(k)(4)(ii). The record includes no such documentation.

The AAO has consistently concluded that a request for a change of classification will not be entertained for a petition that has already been denied, because a petitioner is not entitled to multiple adjudications and decisions for a single petition with a single fee. However, since the filing date of this petition, the petitioner's correspondence and supporting evidence were consistent with a request for exceptional ability classification pursuant to section 203(b)(2) of the Act. Aside from an incorrectly checked box on the Form I-140 itself, the petitioner's remaining documentation includes no indication that it sought to classify the beneficiary as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. On the other hand, the petitioner's documentation includes multiple references to "exceptional ability" classification. Therefore, the director must consider this petition and its accompanying evidence under section 203(b)(2) of the Act.

The April 4, 2007 letter from the beneficiary submitted on appeal further states: "I know that I could be under EB-3, which is experienced teacher. My lawyer has realized his fault and he is trying to fix it. . . . My Academy has filed labor certification for me[.]" A complete review of the record reveals no documentation to indicate that the petitioner ever sought to classify the beneficiary pursuant to 203(b)(3) of the Act prior to the director's decision. Regardless of the box checked under Part 2 of the Form I-140, the supporting documentation submitted

by the petitioner (on two separate dates) clearly specified that it sought to classify the beneficiary as an alien of "exceptional ability" pursuant to section 203(b)(2) of the Act. At this point, any request by the petitioner for a change of classification to section 203(b)(3) of the Act would contradict the express claims made in the initial filing and in response to the director's request for evidence. Therefore, the director's consideration of the instant petition on remand shall be limited to the beneficiary's eligibility pursuant to section 203(b)(2) of the Act. A petitioner cannot simply "fish" for an acceptable visa classification or ask the director to select an appropriate classification. If the petitioner now seeks to classify the beneficiary pursuant section 203(b)(3) of the Act, then it should file a new I-140 petition accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence, and fee.

In light of the above, this matter will be remanded to the director for consideration of the petition and its accompanying evidence under section 203(b)(2) of the Act. The director may request any additional evidence deemed warranted and should allow the petitioner a proper opportunity to respond. Pursuant to 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), any evidence submitted in response to the director's request for evidence must demonstrate eligibility at the time of filing (November 28, 2005). As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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