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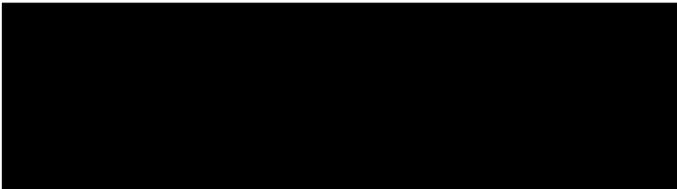
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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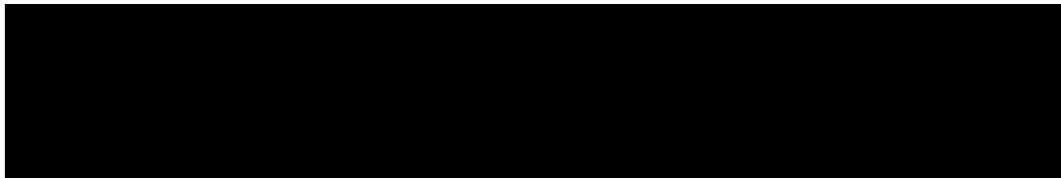
Office: NEBRASKA SERVICE CENTER

Date: FEB 25 2008

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.

*Mari Jensen*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 construction company. It seeks to employ the beneficiary permanently in the United States as a mason. The petition was accompanied 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 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 that the beneficiary qualifies 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 August 28, 2006, the petitioner submitted a July 7, 2006 letter confirming its job offer to the beneficiary, copies of the beneficiary's U.S. Individual Income Tax Returns from 2003 through 2005, an April 27, 2006 Final Determination letter from the U.S. Department of Labor, and an Application for Alien Employment Certification, Form ETA-750, certified by the U.S. Department of Labor. The initial submission also included an August 16, 2006 letter from counsel listing the Form ETA-750 and the Final Determination letter.

The preceding documentation is consistent with a request for classification pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), as a skilled worker, 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:

3) Skilled workers, professionals, and other workers.-

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The specific requirements for supporting documents to establish that an alien qualifies for classification pursuant to section 203(b)(3) of the Act are set forth in the regulation at 8 C.F.R. § 204.5(l).

On November 7, 2006, the director denied the petition finding that the petitioner had not established eligibility as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. Pursuant to the regulation then in effect at 8 C.F.R. § 103.2(b)(8) (2006),<sup>1</sup> in instances where initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit

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<sup>1</sup> The regulation at 8 C.F.R. § 103.2(b)(8) was later revised effective June 18, 2007.

or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence. In this instance, the director should have issued a request for evidence notice affording the petitioner an opportunity to address the deficiencies in the record prior to denial of the petition.

On appeal, the petitioner submits an November 27, 2006 letter from counsel stating: "The selection in Part 2 a. was made erroneously and we respectfully ask that the selection of 'An Alien of Extraordinary Ability' in Part 2 Section a. be changed to Section e. 'A professional (at a minimum, possessing a bachelor's degree . . . ) or a skilled worker (requiring at least two years of specialized training or experience).'" Thus, counsel requests that the petition now be adjudicated pursuant to section 203(b)(3) of the Act.

Although counsel incorrectly checked box "a" under Part 2 of the Form I-140 petition requesting extraordinary ability classification, the petitioner's accompanying documentation included no specific reference to section 203(b)(1)(A) of the Act or the implementing regulation at 8 C.F.R. § 204.5(h). In general, 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, aside from an incorrectly checked box on the Form I-140 itself, the documentation submitted by the petitioner was consistent with a request for classification as a skilled worker pursuant to section 203(b)(3) of the Act. Further, if the director had issued a request for evidence notice prior to denying the petition, the petitioner would have been afforded an opportunity to address the deficiencies in the record.

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)(3) of the Act. The director may request any additional evidence deemed warranted and should allow the petitioner a proper opportunity to respond. 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.