

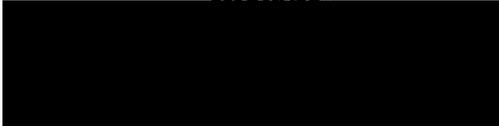
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U.S. Citizenship
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APR 14 2004

FILE:  Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: 
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, California Service Center. The director later determined that the petition was not properly filed, and thus should not have been approved. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on November 8, 2003. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The director denied the petition because an alien cannot self-petition under this classification.

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):

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if-

- (i) the alien is recognized internationally as outstanding in a specific academic area,
- (ii) the alien has at least 3 years of experience in teaching or research in the academic area,
and
- (iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(i)(1) state “[a]ny United States employer . . . may file an I-140 visa petition” to classify an alien worker as an outstanding professor or researcher. 8 C.F.R. § 204.5(c) lists some classifications under which an alien may self-petition, but it also specifies that only a United States employer may file a petition under section 203(b)(1)(B) of the Act. Similar language appears at section 204(a)(1)(F) of the Act.

On February 2, 1998, the petitioner filed his Form I-140 petition on his own behalf. Part 2 of the petition form lists seven different petition types, including “a member of the professions holding an advanced degree or an alien of exceptional ability” and “an outstanding professor or researcher.” The box beside the latter category was

checked. Furthermore, a letter accompanying the petition, which was signed by the petitioner and dated January 21, 1998, begins by stating: "I am filing this petition as an outstanding researcher..." The petitioner then adds that he is "seeking an exemption of the requirement of a job offer in the national interest..." However, nowhere in his letter or initial supporting documentation is there any mention of the "member of the professions holding an advanced degree" classification. It is apparent that the petitioner was under the mistaken impression that the national interest waiver was available to outstanding researchers. The petitioner appears to have misunderstood the relationship between sections 203(b)(1)(B) and 203(b)(2)(B) of the Act. These two sections do not pertain to the same immigrant classification and are governed by separate regulations, respectively at 8 C.F.R. § 204.5(i) and (k). In this case, the I-140 petition form does not indicate that the petitioner seeks classification as an advanced degree professional; rather, it indicates that he seeks the distinct and separate classification of outstanding professor or researcher.

The petitioner's January 21, 1998 letter further states that he has provided evidence of his "receipt of academic awards..., evidence that [he] review[s] the work of other scientists..., [and evidence that he has] published papers in journals with international distribution." Such evidence relates directly to three of the regulatory criteria at 8 C.F.R. § 204.5(i)(3)(i), the regulation pertaining to the outstanding professor or researcher classification. That regulation lists six criteria for establishing that a professor or researcher is recognized internationally as outstanding in the academic field.

In response to the director's request for further evidence, the petitioner submitted a letter, dated August 3, 1998, stating: "While at Northwestern I will continue to seek a tenured-track faculty position in the Department of Pathology where I will be working and elsewhere. With my publication record, I believe it will not be difficult to secure a tenured-track position after August of 2000.... I hope this adequately answers your query..." It is noted here that Section 203(b)(1)(B)(iii)(I) of the Act pertains to outstanding professors or researchers who seek to enter the United States "for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area."

The director approved the petition a few weeks later, on September 2, 1998, and the petitioner applied for adjustment to permanent resident status.¹

On June 26, 2003, the director issued a notice of intent to revoke the approval of petition, stating that the petition was filed by the petitioner himself, rather than by a qualifying United States employer, and therefore it should not have been approved.² The director cited Section 204(a)(1)(D) of the Act [since re-designated as section 204(a)(1)(F) of the Act] and 8 C.F.R. § 204.5(i)(3)(iii), which indicate that only a United States employer may file a petition seeking to classify an alien under section 203(b)(1)(B) of the Act.

In response to the notice, the petitioner submitted a letter, dated July 15, 2003, stating: "I petitioned in my I-140 application that the requirement of a job offer be waived because my area of expertise is in the national interest. The national interest waiver was also requested by all the outstanding scientists who wrote letters on my behalf."

¹ CIS records reflect that the approved petition was for that of an outstanding professor or researcher.

² An identical notice of intent to revoke was issued on October 2, 2003. The first notice was sent to the petitioner's old address at 3771 Park Boulevard and the second notice was sent to the petitioner's current address of record. The record reflects that the petitioner received both notices.

This statement is not adequately supported by documentation contained in the record. We note here that the petitioner's initial filing included four witness letters. One of the letters, from Dr. Robert Spencer, dated January 19, 1998, begins by stating: "This letter is offered on behalf of [the petitioner] in connection with the petition on his behalf to be submitted to the Immigration and Naturalization Service as an 'outstanding researcher,' defined as one who is 'recognized internationally as outstanding in a specific academic area.'" A second letter, from Dr. Bruce McEwen, dated January 15, 1998, begins the same way, stating: "This letter is offered on behalf of [the petitioner] in connection with [his] petition...as an 'outstanding researcher,' defined as one who is 'recognized internationally as outstanding in a specific academic area.'" It is again noted that the petitioner's Form I-140 specifically requested classification as "an outstanding professor or researcher." Neither of the two remaining letters initially submitted with the petition mentions that the petitioner seeks classification as "a member of the professions holding an advanced degree." We acknowledge that the two remaining letters from Dr. Kasturi Haldar and Dr. Randall Sakai cite the term "national interest." However, as we have already observed, the national interest waiver relates to a separate classification, described at section 203(b)(2) of the Act, for members of the professions holding an advanced degree or aliens of exceptional ability. The job offer requirement for outstanding professors and researchers is not subject to this waiver.

The director revoked the approval of the petition on November 8, 2003, because an alien cannot self-petition for classification as an outstanding professor or researcher.

On appeal, the petitioner maintains that his "immigrant petition for alien worker was filed as a national interest waiver petition." The petitioner further states: "The relevant statute for my appeal could be found in section 203(b) of the Act..." The petitioner adds:

I filed a form I-140 Immigrant Petition for Alien Worker with the California Service Center of the INS in February of 1998. I was the petitioner as well as the beneficiary of this petition. This was because I was requesting a national interest waiver.... This is because I hold an advance degree in the Sciences and my field of work, malaria research and my work in particular malaria drug discovery would benefit the national interest of the United States.

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.

As noted above, the petitioner, who prepared and signed the I-140 petition form, checked the box under Part 2 of the petition for “an outstanding professor or researcher” rather than for “a member of the professions holding an advanced degree.” Furthermore, the petitioner and two of his witnesses specifically referred to the “outstanding researcher” classification in their letters accompanying the petition. There is no provision in statute, regulation, or administrative case law that permits a petitioner to request that a single I-140 petition be adjudicated under two separate visa classifications. In this case, the director adjudicated the petition under the classification initially requested by the petitioner and therefore the beneficiary’s eligibility for a separate classification will not be considered. The petitioner’s subsequent request for a change of classification clearly contradicts express claims made in the initial filing. Therefore, we agree with the director’s decision to consider this petition and its accompanying evidence under section 203(b)(1)(B) of the Act.

We reject the petitioner’s assertion on appeal that “[t]he fact that the application was approved implies that it passed the labor certification waiver test.” Section 203(b)(1)(B) of the Act, the classification under which this petition has been adjudicated, requires no such “labor certification waiver test.” The issue in this case is limited to whether the petitioner meets the statutory and regulatory requirements for classification as an outstanding professor or researcher pursuant to Section 203(b)(1)(B) of Act.

It was not until after the Service Center had notified the petitioner of its intention to revoke the approval of the outstanding researcher petition that the petitioner then indicated that he had erroneously checked the wrong box on the I-140 petition form. The petitioner’s misunderstanding about the “outstanding professor or researcher” classification and his failure to file as a “member of the professions holding an advanced degree” (seeking a national interest waiver of the job offer requirement) does not allow the petitioner the opportunity to now change classifications. If the petitioner wishes to apply for a national interest waiver as a member of the professions holding an advanced degree, then he should file a new petition requesting such classification.

We cannot, at the appellate stage, arbitrarily change the classification of a petition wrongly approved under a different classification. The different classifications have different standards of eligibility. The petitioner, at the filing stage, never requested consideration as a member of the professions holding an advanced degree, and the director never adjudicated the petition under the standards of that classification. Therefore, there is no basis for reinstating the approval of the petition, under a new classification.

The director’s error in this case was improperly approving this petition under the outstanding professor or researcher classification. Revoking that erroneous approval is the proper remedy for that error. It should be emphasized that this revocation is not a “punishment” being visited upon the petitioner, because it is no punishment to be denied benefits to which one is not entitled. Revocation is a corrective measure, not a punitive measure. In *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), the Board found that approval of a visa petition vests no rights in the beneficiary of the petition but is only a preliminary step in the visa or adjustment of status application process, and the alien is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status. The board further found that because “there is no right or entitlement to be lost, the burden of proof in visa petition revocation proceedings properly rests with the petitioner, just as it does in visa petition proceedings.” The decision also notes that, pursuant to section 205 of the Act, CIS may revoke the approval of a petition “at any time for good cause shown.” We find that *Matter of Ho* supports the director’s decision.

We regret that more than five years has elapsed between the approval and the revocation (the record offers no explanation for this extraordinary delay). Nevertheless, the statute (cited above) specifically allows for revocation “at any time,” and the pertinent regulations are silent as to the issue of elapsed time. We have no statutory or regulatory basis to conclude that the passage of time mitigates, in any way, the clear grounds for revocation in this

matter. The AAO's appellate review in this proceeding is limited to whether the revocation was warranted. By law, an alien may not self-petition for classification as an outstanding professor or researcher. This petition should never have been approved, and the director, upon learning of this error, essentially had no choice but to revoke the erroneous approval. The director acted appropriately, albeit belatedly, and the appeal must be dismissed.

This decision is without prejudice to a new petition properly filed, with the appropriate fee and supporting evidence. Because this decision rests entirely on technical grounds, the AAO takes no position at this time regarding whether the alien possesses the international recognition required by law to qualify as an outstanding researcher or whether he is eligible for a national interest waiver as a member of the professions holding an advanced degree.

ORDER: The appeal is dismissed.