

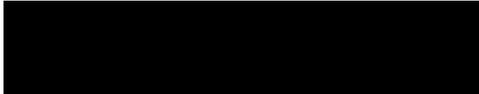


135

U.S. Department of Justice  
Immigration and Naturalization Service

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

identifying data deleted to  
prevent clearly foreseeable  
invasion of personal privacy



04 NOV 2002

File: [Redacted] Office: Nebraska Service Center

Date:

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:



**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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary Pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability or as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a bilingual administrative assistant. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the proffered position requires either a professional holding an advanced degree or its equivalent or a person of exceptional ability.

On appeal, counsel asserts that the wrong classification was mistakenly checked on the petition and requests that the petition be adjudicated in a lesser classification.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. 204.5(k)(4) states, "the job offer portion of an 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."

The Labor Certification, Form ETA 750, indicates that only two years of experience in a related occupation and no education, is required for the position. In light of this information, the director concluded that the job did not require an advanced degree professional or alien of exceptional ability.

As stated above, on appeal counsel asserts that the advanced degree professional classification was checked by mistake and requests that the petition be adjudicated as a petition seeking to classify the beneficiary as a skilled worker under section 203(b)(3) of the Act.

The cover page submitted with the petition does not specify the classification sought. In light of the absence of any evidence in the record prior to the appeal reflecting an intent to seek a lesser classification, we cannot conclude that the director committed reversible error by considering the petition under the classification checked on the petition. Where the director determines that the petitioner has not established a beneficiary's eligibility under the classification sought, the director need not inquire as to whether the beneficiary might be eligible for a lesser classification.

Beyond the decision of the director, 8 C.F.R. 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's tax return reflects a net loss during 1998, raising questions as to whether the petitioner had the ability to pay the beneficiary the proffered wage at that time.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.