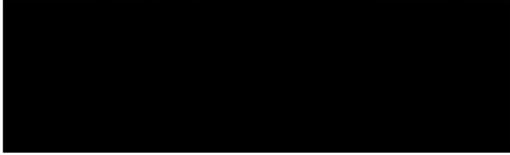


U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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invasion of personal privacy



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

APR 18 2003

File:  Office: TEXAS 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)

PUBLIC COPY

ON BEHALF OF PETITIONER:



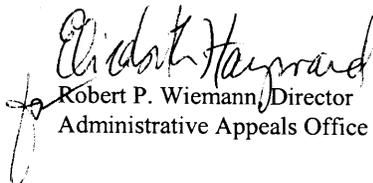
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner, which describes its business as “adjusters – marine – surveyors – recoveries,” seeks to employ the beneficiary as its vice president of worldwide adjusting operations. On the I-140 petition form, the petitioner indicated that it seeks to classify the beneficiary 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 (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the position does not require an advanced degree, and that the beneficiary does not hold an advanced degree. The director did not address the issue of exceptional ability.

On appeal, counsel does not dispute the director’s finding. Instead, counsel states that the petitioner checked the wrong box on the petition form, and had meant to seek a lower classification on the beneficiary’s behalf. Counsel argues that the petition should be approved under section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), because the job offer requires a member of the professions and the beneficiary qualifies for that 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. The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

The Form ETA-750A labor certification application indicates that the position requires a four-year bachelor’s degree and four years of experience as a senior claims examiner. Thus, the job does not require an advanced degree or five years of progressive post-baccalaureate experience. Counsel indicates that, from this job description, the director ought to have deduced that the petitioner had claimed the wrong classification on the petition form. Thus, counsel states, the petitioner’s “technical error” on the petition form “should not have resulted in the denial of the . . . petition.” Nevertheless, the initial submission contained no indication (for instance, in a cover letter) that the petitioner sought to classify the beneficiary as a professional rather than as an advanced degree professional. The only immigrant classification that was specified anywhere in the initial filing was the advanced degree professional classification specified on the Form I-140 itself. If the position described does not meet the minimum requirements of the classification specified on the Form I-140, the director is under no obligation to review those requirements (and the beneficiary’s qualifications) and then select a classification under which the petition would be approvable. It is the petitioner’s responsibility, not the director’s, to specify the classification sought. Counsel’s after-the-fact declaration that the petitioner “did not intend to seek classification” under section 203(b)(2) of the Act does not create a presumption in the petitioner’s favor; that intention was not clear from the petitioner’s initial submission.

While the director may, as a courtesy, invite the petitioner to confirm which classification it seeks on the beneficiary's behalf, the director is not required to do so. Failure to extend a courtesy of this kind does not constitute an error of fact or law. 8 C.F.R. § 103.2(b)(8) requires the director to request additional information when initial evidence is missing, or the evidence submitted does not fully establish eligibility. The director need not issue such a notice if the record contains evidence of ineligibility. A job offer which, on its face, plainly does not meet the requirements of the classification specified on the petition form, is evidence of ineligibility.

Counsel states that the intended classification should have been clear merely from the submission of a labor certification, because "Section 203(b)(2) of the INA does not place a labor certification requirement like that of Section 203(b)(3) of the INA." This assertion is erroneous. Section 203(b)(2)(A) requires that the alien's "services . . . are sought by an employer in the United States." While section 203(b)(2)(B) of the Act provides for a waiver of the job offer requirement, this waiver is a special exemption. In general, classification under section 203(b)(2) of the Act requires a job offer and, therefore, labor certification.

Counsel states that "technical errors made through no fault of the alien or applicant" should not prejudice the outcome of the proceeding. Counsel cites 8 C.F.R. § 245.1(d)(2), which defines the term "no fault of the applicant or for technical reasons." This regulation applies to applications for adjustment of status and is not binding on immigrant petitions. Given the information made available to the director at the time of adjudication, the director did not err in finding that the petition could not be approved under the classification specified on the petition form. The director also did not err in failing to presume that the petitioner must have meant some other classification, or in failing to guess which classification the petitioner had intended to seek.

Counsel protests that an amendment to the petition, to specify the correct classification, "would not make any material changes to the petition" and therefore ought to be allowed. There is, however, no provision in statute, regulation, or case law which permits a petitioner to change the classification of a petition once a decision has been rendered. Beyond the above, we note that the beneficiary does not meet the requirements listed on the labor certification. Thus, no matter what the classification sought, the petition could not be approved and a change of classification would serve no useful purpose even if it were permitted at this point.

As stated above, the labor certification indicates that the position requires four years of college education, culminating in a bachelor's degree. The beneficiary's Form ETA-750B Statement of Qualifications indicates that the beneficiary earned a "Bachelor's Degree in Insurance" at the Chartered Insurance Institute, London, between September 1984 and July 1993. The record does not contain an official academic record indicating that the Chartered Insurance Institute is a college or university that has conferred a bachelor's degree upon the beneficiary. Documentation from the Chartered Insurance Institute indicates that the beneficiary became "an Associate of the Institute" in 1993, and that her "application to use a Chartered title" was approved in 1995.

The petitioner has submitted an independent evaluation of the beneficiary's credentials. The evaluator states that the beneficiary "has achieved the functional equivalent of a Bachelor's

degree in Insurance.” While the Chartered Insurance Institute offers vocational courses, there is no indication that it is a degree-granting institution, or that the beneficiary has received any actual degree (as opposed to the “functional equivalent” thereof). The labor certification itself states only that the position requires a four-year bachelor’s degree. There is no indication that the employer will accept, in lieu of that degree, nine years of vocational training. Thus, the beneficiary does not meet the minimum qualifications set forth in the labor certification. Any change to the petition form would not remove this deficiency or reduce its effect.

Counsel states on appeal that the petitioner is filing a new petition, seeking the correct classification. Counsel requests “that the Petitioner retains their original priority date of August 9, 2000.” Pursuant to 8 C.F.R. § 204.5(e), no priority date will be assigned to a denied petition. In classifications requiring a labor certification, the filing date (and thus, if approved, the priority date) is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The labor certification in this proceeding was filed on July 17, 1997. Any subsequent immigrant petition filed using the same labor certification would have the same effective filing date, but there would remain the discrepancy between the job requirements and the beneficiary’s actual qualifications.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.