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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: [redacted] Office: Nebraska Service Center Date: FEB 27 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

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 Administrative Appeals Office 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 a member of the professions holding an advanced degree or as an alien of exceptional ability. The petitioner, a travel agency, seeks to employ the beneficiary as a sales manager. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the position described in the labor certification did not require an advanced degree or the equivalent, or an alien of exceptional ability. The director also found that the beneficiary did not qualify as an alien of exceptional ability.

On appeal, counsel contends that the beneficiary has extraordinary abilities in relation to the work required by the position.

Section 203(b) of the Act states in pertinent part:

(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. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

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).

Additionally, the regulation at 8 C.F.R. § 204.5(k)(4)(i) provides in pertinent part:

> 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.

The job offer portion of the Department of Labor's "Application for Alien Employment Certification," Form ETA-750 Part A, is found in Blocks 14 and 15. The terms and conditions of the job offered must either require a member of the professions holding an advanced degree or its equivalent, or require an alien of exceptional ability as described in 8 C.F.R. § 204.5(k)(3)(ii).

Block 14 on the ETA-750 Part A in the instant petition contains the following information:

Education – Grade School – "8"
High School – "4"
College -"0"
Experience – "0"

Block 15 on the ETA-750 Part A shows: "Must be able to speak, read and write fluent Sinhalese, Tamil, English, Arabic, and Urdu."

No other information appears in either block.

In denying the petition, the director found that the ETA-750 did not require an advanced degree or the equivalent, or an alien of exceptional ability. Counsel does not specifically contest this determination on appeal and we concur with the director's decision. In the absence of a labor certification indicating that the position requires an advanced degree or an alien of exceptional ability, an alien's request for classification pursuant to section 203(b)(2) could rest upon the assertion that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The record in this case contains no evidence that the petitioner requested a national interest waiver on behalf of the beneficiary or that counsel raised it as an issue at any time. Therefore, further discussion of whether the beneficiary merits classification as an alien of exceptional ability is not required.

Counsel suggests on appeal that checking the wrong box on the I-140 petition should not mitigate against the petitioner. If counsel means that the Service should have adjudicated the petition by whatever visa classification the beneficiary met, such as under section 203(b)(3) of the Act, there is no provision in statute, regulation, or case law that permits a petitioner to change the classification of a petition once a decision has been rendered. Consequently, this decision is based on a consideration of the beneficiary's eligibility under section 203(b)(2).

Beyond the decision of the director, it is noted that documentation relating to the ability of the employer to pay the wages of the beneficiary is absent from the record. *See* 8 C.F.R. § 204.5 (g)(2). Further discussion of this matter is moot, as the record contains no evidence that the beneficiary qualifies for the visa classification sought.

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.