

PUBLIC COPY

Information deleted to
prevent disclosure of unwaranted
invasion of personal privacy

B5

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

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

JUL 03 2003

File: [REDACTED] LIN 0103551766 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

ON 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 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the decision of the director will be affirmed and the petition will be denied.

The petitioner sought to classify the beneficiary as an employment-based immigrant 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 an alien of exceptional ability. The petitioner sought 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 denied the petition. He determined that the petitioner failed to establish that the job offer portion of the labor certification required a professional holding an advanced degree or the equivalent or an alien of exceptional ability pursuant to 8 C.F.R. § 204.5(k)(4).¹

On appeal, the only issue that the petitioner's counsel presented was that the advanced degree professional classification was mistakenly checked. She requested that the petition be adjudicated as one which seeks to classify the beneficiary as a skilled worker under section 203(b)(3) of the Act.

On November 4, 2002, the AAO affirmed the director's decision, concluding that in light of the absence of any evidence in the record prior to the appeal requesting a change in classification, the director was not obliged to inquire as to whether the beneficiary might be eligible for a lesser classification. The AAO decision incidentally noted that "beyond the decision of the director," the evidence in the file raised questions about the petitioner's ability to pay the proffered wage.

Counsel's motion to reopen is accompanied by additional financial documentation, a request to reconsider and approve the petition, and a brief statement (containing no reference to the AAO's principal finding) that the petitioner "strongly believes that his company is well capable of sponsoring [the beneficiary], to confirm the following his is submitting extra evidence require by your office." [sic]

Counsel does not dispute that the position set forth on the labor certification does not require either an advanced degree professional or a person of exceptional ability as required by 8 C.F.R. 204.5(k)(4). The AAO properly concluded that the director need not inquire whether the beneficiary might be eligible for a lesser classification, where the petitioner has not established the beneficiary's eligibility under the classification designated on the petition and where the record contains no evidence of an intent to designate a different visa classification prior to adjudication. We concur with the director's finding that the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(2) of the Act. The petitioner's additional submission of financial documentation related to its ability to pay the proffered wage is irrelevant to the determination of whether the position requires an advanced degree professional or an alien of exceptional ability. Counsel does not address the central finding of

¹ The Labor Certification (Form ETA 750 Part A) indicates that two years of experience in a related occupation and no education are required for the position.

the previous AAO decision and presents no rationale on motion that specifically identifies why it should be reversed.

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 previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of November 4, 2002 is affirmed. The petition is denied.