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

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

[REDACTED]

File: [REDACTED] LIN 02 175 56606 Office: Nebraska Service Center

Date: **JUN 25 2003**

IN RE: Petitioner:
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, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn. The case will be remanded for consideration under section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

The petitioner originally sought classification of the beneficiary pursuant to section 203(b)(2) of 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 petition was accompanied by a fully executed Department of Labor Form ETA-750, Application for Alien Employment Certification (Parts A and B). The director found that the petitioner had not established that the beneficiary qualifies for classification as a member of the professions holding an advanced degree or an alien of exceptional ability.

On appeal, counsel asserts that the classification designated on the petition was an error and that the petition should have been adjudicated under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), providing for the issuance of employment-based visas to "skilled workers, professionals and other workers." We concur.

A review of the record indicates that the petition was filed on May 2, 2002. The box checked under Part 2 was "d," designating that the petition was being filed for "a member of the professions holding an advanced degree or an alien of exceptional ability."

On November 6, 2002, the Service Center sent the petitioner's counsel a request for further evidence in support of the petition. On November 26, 2002, the Service Center sent the petitioner (in care of counsel) a second request for evidence, stating that the response must be received by February 18, 2003.

On December 6, 2002, counsel for the petitioner responded that the petition should be considered under section 203(b)(3) of the Act rather than 203(b)(2). Counsel stated that [the petitioner] "is seeking an I-140 for [the beneficiary] as a Nursing Supervisor which requires a skilled worker with at least two years of training. In other words, [the beneficiary's] category under Part 2 should be 'e' not 'a' or 'd.'"

On January 28, 2003, the director denied the petition citing the pertinent regulatory criteria relevant to a member of the professions holding an advanced degree or an alien of exceptional ability. The director stated that the beneficiary's eligibility under a separate classification would not be considered.

In this case, petitioner's counsel notified the director prior to the final decision that the original visa classification designated on the petition was an error. No substantial adjudicative delay would have occurred if the director had considered the petition under the amended designation. When the request to change the classification is made in response to a request for evidence and prior to a decision on the petition, fairness dictates that the Bureau consider the petition under the amended classification requested by the petitioner.



We find that in this case, in the interests of justice and administrative efficiency, the director should have addressed the beneficiary's eligibility under section 203(b)(3) of the Act. Accordingly, the director's decision is withdrawn and the petition is remanded to the director for proceedings consistent with this opinion.

ORDER: The decision of the director is withdrawn, and the petition is remanded to the Nebraska Service Center for further consideration under section 203(b)(3) of the Act. ¶