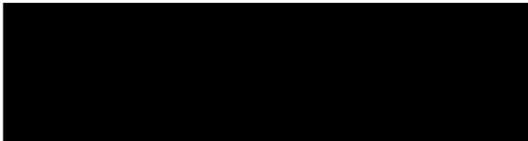


B5

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

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



File: WAC 01 246 52362

Office: CALIFORNIA SERVICE CENTER

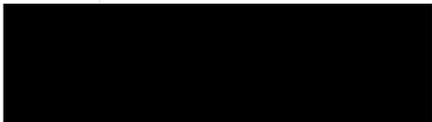
Date: **MAR 19 2003**

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)

ON 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 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. Wiermann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification of 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 as an alien of exceptional ability. The petitioner asserts that the beneficiary is eligible for designation under Group I of Schedule A. The director found that the beneficiary was ineligible for designation under Group II of Schedule A.

On appeal, counsel states that the director “obviously made a mistake” in adjudicating the petition according to the standards of Schedule A, Group II, when the petitioner has in fact sought to classify the beneficiary under Schedule A, Group I, which involves an entirely different set of regulatory standards.

The record confirms that the petitioner has, in fact, consistently sought to classify the beneficiary under Group I of Schedule A, as a physical therapist. The phrase “Schedule A Group I” appears on the Form I-140 petition, the Form ETA-750A application for labor certification, and in materials submitted with the petition. This claim, in other words, is not an entirely new claim that has been advanced as an appellate strategy. In denying the petition, the director stated that the petitioner has submitted “a brief, reiterating his [sic] belief that the beneficiary qualifies for the benefits sought under category of Schedule A Group I.” The remainder of the director’s decision deals with the very different, and far more stringent, standards regarding Schedule A, Group II. The director, in this decision, did not even acknowledge that any difference exists between Groups I and II of Schedule A. The director’s decision is, therefore, fatally flawed, and the director must render a new decision that follows the correct standards as set forth at 20 C.F.R. §§ 656.10(a)(1) and 656.22(c)(1).

We note that, at present, the Form ETA-750A application for labor certification appears to be incomplete. Block 14 of the form is reserved for information regarding “the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties” for the position sought. The petitioner has left this section blank except for the phrase “Schedule A group I case.” Subsequently, when the director asked whether the petitioner wanted to change the immigrant classification sought, counsel responded “it [is not] necessary for us to amend the petition to show a classification under section 203(b)(3)(i) or 203(b)(3)(ii) because section 203(b)(2) is in fact appropriate for Schedule A, Physical Therapist.”

The regulation at 8 C.F.R. § 204.5(k)(4), however, states in pertinent part “[t]he job offer portion of the . . . Schedule A application . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.” Because the petitioner has left the job offer portion of the application form blank, the petitioner has not complied with this requirement. The only job requirement listed on the form is that the individual must hold a license to practice physical therapy in California, or at least have “passed a licensure exam after graduating

from an accredited physical therapist educational program.” This requirement does not establish that the position requires an advanced degree or its equivalent, or exceptional ability.

Counsel's assertion that “section 203(b)(2) is in fact appropriate for Schedule A, Physical Therapist” fails to take into account that Schedule A, Group I designation is also available under the lesser classifications set forth in sections 203(b)(3)(i) and (ii) of the Act. References to Schedule A designation appear throughout the regulations at 8 C.F.R. § 204.5(1), which pertain to immigrant classifications under section 203(b)(3) of the Act. The significant distinctions between sections 203(b)(2) and (3) of the Act become meaningless if Schedule A designation automatically entitles an alien to classification under section 203(b)(2) of the Act.

As noted above, the director previously afforded the petitioner an opportunity to change the classification sought. Counsel expressly refused this opportunity, maintaining specifically that the petitioner seeks to classify the beneficiary under section 203(b)(2) of the Act. Given that the petitioner has repeatedly expressed its wishes regarding the classification sought, the director is under no obligation to afford the petitioner yet another opportunity to change the classification sought. Prior to rendering a new decision, however, the director must allow the petitioner the opportunity to demonstrate that (1) the position requires a member of the professions holding an advanced degree or the equivalent, or an alien of exceptional ability; and (2) the beneficiary qualifies for one of those classifications. If the petitioner is unable to show that the job requires, and/or that the petitioner is, an advanced degree professional or an alien of exceptional ability, then the petition cannot be approved under section 203(b)(2) of the Act. The fact that this proceeding involves Schedule A, Group I designation does not relieve the petitioner of the obligation to set forth the specific requirements of the job offered.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.