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

PUBLIC COPY

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

[REDACTED]

File: [REDACTED] Office: TEXAS SERVICE CENTER

Date:

MAR 24 2003

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)

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

ON BEHALF OF PETITIONER:

[REDACTED]

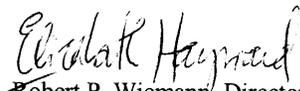
INSTRUCTIONS:

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, 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 is a pharmacy that seeks to employ the beneficiary as a pharmacist. The I-140 petition form indicates that the petitioner seeks to classify the beneficiary under 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 that the beneficiary does not qualify for the classification sought, and that the job offered to the beneficiary does not fit within the classification.

On appeal, counsel asserts that the petition form contains a typographical error, and that the petitioner had actually intended to seek a lesser classification under section 203(b)(3) of the Act.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or the equivalent, and to aliens of exceptional ability, as those terms are defined at 8 C.F.R. § 204.5(k)(2).

Part A (“Offer of Employment”) of the labor certification application, Form ETA-750, indicates that the position requires only a bachelor’s degree in Pharmacy, with no additional training or experience. The labor certification does not show that the position requires an advanced degree, its equivalent, or exceptional ability. Therefore, the director denied the petition. The director issued no request for additional evidence, because on its face the petition contained evidence of ineligibility (i.e., the job requirements that fall short of regulatory requirements). Pursuant to 8 C.F.R. § 103(b)(8), when the record contains evidence of ineligibility, the director need not request further evidence from the petitioner.

On appeal, the petitioner does not dispute the director’s findings. Instead, counsel asserts that the petition form contained a typographical error, and that the petitioner had intended to seek the beneficiary’s classification under one of the lower classifications defined by section 203(b)(3) of the Act. Counsel states that this should have been clear from the nature of the job requirements outlined in the labor certification. The initial filing, however, did not contain any notations or other indication that explicitly specified the classification that the petitioner sought on the beneficiary’s behalf. The only specific mention of the classification sought was on the Form I-140. In the absence of some other clear mention of the classification sought, the director did not err in failing to presume that the petition form contained an error.

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. Furthermore, Bureau records reveal that a readjudication of the petition at this point would be redundant. After the January 2001 filing of the appeal, the petitioner filed a new Form I-140 petition on the beneficiary’s behalf (receipt number SRC 01 134 51883) in March 2001. This second petition used the same approved labor certification and thus retained the same effective filing date, March 5, 1998. The second petition was approved in January 2002. The petitioner has thus already obtained the relief



sought in the present appeal, i.e. an approved immigrant petition under section 203(b)(3) of the Act, with a priority date of March 5, 1998. The dismissal of this appeal has no effect on the approval of the subsequent petition, or on adjustment proceedings arising from the approved petition.

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.

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