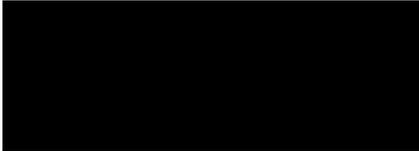


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U.S. Citizenship
and Immigration
Services



FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUN 4 2004

IN RE:

Petitioner:
Beneficiary:



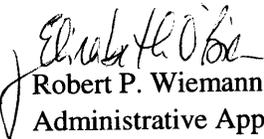
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


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 (AAO) on appeal. The appeal will be summarily 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 an alien of exceptional ability. As required by statute, the petition was accompanied by certification from the Department of Labor. The director found that the job offered did not require a professional holding an advanced degree.

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

(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.

The regulation at 8 C.F.R. § 204.5(k)(2) states:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states:

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The regulation at 8 C.F.R. § 204.5(k)(4)(i) states in pertinent part that:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor.... 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 Form I-140 petition was filed on March 25, 2003. Part 2 of the petition form lists seven different petition types, including “[a] skilled worker or professional” and “[a] member of the professions holding an advanced degree or an alien of exceptional ability.” Box “d” beside the latter category was checked. The record also contains a letter from the petitioner, dated March 13, 2003, stating: “We write this letter in support of our employment based Second Preference immigrant visa petition on behalf of [the beneficiary].” In addition, the record includes a letter from the law firm representing the petitioner and the beneficiary, dated March 21, 2003, with the bolded heading: “Concurrent filing of Second Preference Employment-Based Immigrant Visa Petition for Classification as a Professional with an Advanced Degree under Section 203(b)(2) of the Immigration and Nationality Act of 1990...” This letter was signed by [REDACTED]

The issue to be determined here is whether the position being offered requires a member of the professions holding an advanced degree or its equivalent. The key to this determination is found on Form ETA-750 Part A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered. Blocks 14 and 15 of the ETA-750 Part A must establish that the position requires an employee with either a master’s degree or 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)(4)(i).

Under Block 14, Form ETA-750 Part A indicates that the position requires a bachelor’s degree in Computer Science, Information Systems, or Engineering and three years of experience in the job offered or a related occupation. When read as a whole, the ETA-750 clearly does not require a bachelor’s degree with five years of progressive experience, which is the equivalent of a master’s degree. Therefore, this position, at a minimum, does not require a professional holding the equivalent of an advanced degree.

The director denied the petition, stating: “The labor certification fails to demonstrate that the position requires an individual with an advanced degree...”

On appeal, counsel states:

We are respectfully asking [Citizenship and Immigration Services] to reopen and reconsider this matter because the denial has resulted from innocent clerical errors made by the petitioner’s counsel. Specifically, the [director’s] August 20th decisions are premised on the notion that [the petitioner] is seeking to classify [the beneficiary] as an alien holding an advanced degree in the employment-based, second preference category. This is not the case. Rather, [the petitioner] seeks and has always sought to classify [the beneficiary] as a third preference immigrant. As a result of an administrative oversight, an incorrect box was checked off on the I-140 form and the wrong number was inserted in the corresponding preference classification lines of the company letter.

* * *

While the company letter regrettably contains the incorrect numerical reference (“second,” rather than “third”), the company letter does not in any way attempt to argue for second preference classification, as the petitioner and petitioner’s counsel are well aware that the second preference is not legally available in this case.

Nor does that same company letter request third preference classification or cite Section 203(b)(3) of the Act. Here, we refer back to the March 21, 2003 cover letter from [REDACTED]. That letter contains three separate references to a “Second Preference Employment-Based Immigrant Visa Petition for Classification as a Professional with an Advanced Degree under Section 203(b)(2) of the Immigration and Nationality Act.” The documentation before the director contained only references to Section 203(b)(2) of Act.

Counsel cites several prior AAO decisions and argues that the AAO has “recognize[d] that petitions should not be denied for harmless typographical errors contained in petition filings...” Counsel’s attempt to apply statements from previous AAO findings to the current case is flawed. There can be no meaningful analysis of the decisions to determine the applicability of the same reasoning to the present case. Furthermore, unpublished appellate decisions have no force as precedent and thus are not binding with regard to unrelated proceedings.

Counsel states:

In Matter of [name not provided], File No. A73 398 701, (AAO July 7, 1995), the AAO reversed the Northern Service Center’s denial of a third preference immigrant petition because, as in the instant case, the wrong box was checked off as the result of a clerical error. In granting the petition, the AAO held that the supporting documentation, taken as a whole, clearly supported classification in the third preference and that the petition should not be denied simply based on typographical errors.

In the instant case, however, the supporting letters accompanying the petition clearly and unambiguously requested second preference immigrant visa classification. It was not until the appellate stage that there was a request for classification pursuant to section 203(b)(3) of the Act. In contrast to the non-binding cases cited by counsel, the director in this case did not rely simply upon an incorrectly checked box and disregard other documentation accompanying the petition.

Rather than challenging the director’s findings cited in the August 20, 2003 decision, counsel is now requesting that the petition be considered under a separate immigrant classification. There is, however, 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. The petitioner and counsel’s failure to properly identify the classification sought does not allow the petitioner the opportunity to now change classifications at the appellate stage. If the petitioner seeks to classify the beneficiary as a skilled worker or professional, then it should file a new petition under that classification with the proper supporting evidence and fee.

In this matter, we find that the director properly adjudicated this petition under the classification requested on the Form I-140 petition, in counsel’s cover letter (multiple times), and in a letter from the petitioner. Consequently, any discussion in this matter may relate only to the petitioner’s eligibility pursuant to section 203(b)(2) of the Act.

On appeal, counsel for the petitioner has not addressed the beneficiary's eligibility under section 203(b)(2) of the Act. As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. Here, the petitioner has not specifically challenged the director's findings, nor provided any additional evidence that would overcome the grounds for denial. The appeal must therefore be summarily dismissed.

ORDER: The appeal is dismissed.