

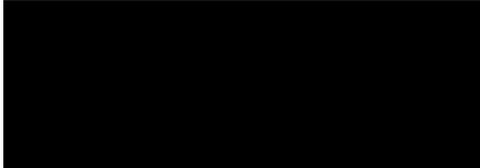
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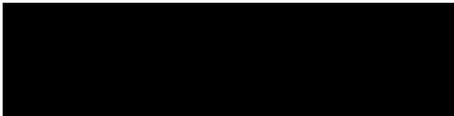
U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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



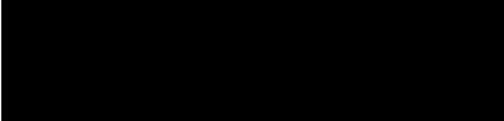
File: WAC 97 123 54927 Office: CALIFORNIA SERVICE CENTER Date: **MAR 24 2004**

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 § 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 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 preference visa petition was denied by the Director, California Service Center. An appeal was filed which appears not have been received within the prescribed period. The director treated the late appeal as a motion, and reopened the case. Before entering a new decision, the director forwarded the case to the Associate Commissioner for Examinations on appeal. The Associate Commissioner dismissed the appeal. The matter is now before the Administrative Appeals Office (AAO) on motion. The motion will be granted, the previous decision of the Associate Commissioner will be withdrawn, and the petition will be remanded to the director for further action and consideration.

The petitioner is a full support computer system firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The petitioner seeks to classify the beneficiary as a member of the professions holding an advanced degree or its equivalent or as an alien of exceptional ability in the sciences, arts, or business pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The director determined that the position did not require an advanced degree or its equivalent. The director also determined that the petitioner had not established that the beneficiary qualified as an alien of the exceptional ability. Accordingly, the director denied the petition on May 12, 1997.

On appeal, filed June 16, 1997, counsel contended that the petition was submitted under the wrong classification, that the wrong block was checked on the front of the petition, and that the petitioner had meant for the petition to be filed for classification of the beneficiary as a skilled worker under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).¹

It appears the appeal was not filed within the prescribed time period; however, on July 7, 1997, the director treated the appeal as a motion, withdrew her prior decision, and requested additional evidence from the petitioner. The petitioner, through counsel, responded to the director's request on August 5, 1997. The record does not contain a new decision by the director.

The director forwarded the record to the Associate Commissioner as an appeal. On January 27, 2000, the Associate Commissioner dismissed the appeal. On February 28, 2000, counsel filed the instant motion.

The action of the Associate Commissioner in dismissing the appeal was incorrect as jurisdiction in the case still resided with the director. The director had never made a new decision in accordance with her action of July 7, 1997, to withdraw her initial decision and reopen the case.

Accordingly, the matter is remanded to the director for the entry of a new decision in accordance with the foregoing.

¹ The AAO notes that on June 13, 2001, the director approved a petition filed by the same petitioner for classification of the same beneficiary under Section 203(b)(3)(A)(i).

ORDER: The decision of the Associate Commissioner is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and the entry of a new decision.