



U.S. Citizenship
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Services

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FILE: [Redacted]

Office: TEXAS SERVICE CENTER Date: MAY 07 2004

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be summarily dismissed.

The petitioner seeks classification 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. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

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.

(B) Waiver of job offer.

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

On November 5, 2001, the petitioner filed the Form I-140 petition on his own behalf. Part 2 of the petition form listed eight different petition types, including “[a]n alien of extraordinary ability” and “[a] member of the professions holding an advanced degree or an alien of exceptional ability.” Box “d” beside the latter category was checked. However, a letter accompanying the petition, which was signed by the petitioner and dated October 8, 2001, indicates that the petitioner was filing as “an Alien of Extraordinary Ability in the Sciences in Technology.”

On March 14, 2002, the director issued a request for evidence stating: “Please clarify the [classification sought]. On the petition you indicate you are filing as a member of the professions holding an advanced degree or an alien of exceptional ability. Your letter indicates you are filing for an alien of extraordinary ability in the sciences and technology.”

The petitioner responded by submitting a letter, dated April 13, 2002, stating: “My application is based on category “d” – a member of the professions holding an advanced degree or an alien of exceptional ability. The heading of my letter was probably wrong.”

The director then proceeded to adjudicate the petition pursuant to section 203(b)(2) of the Act, as requested by the petitioner. On May 8, 2002, the director issued a second request for evidence, attempting to ascertain further information about the petitioner's eligibility under section 203(b)(2) of the Act (such as whether the petitioner sought to qualify as a member of the professions holding an advanced degree or as an alien of exceptional ability, or whether the petitioner was seeking a national interest waiver). The request for evidence stated:

Please read the regulations for the classification you intend and submit the required documents. See Title 8, Code of Federal Regulations, at § 204.5(k).

For example, most advanced degree persons still have a labor certification and are petitioned for by their employer. Here, clearly you are self-petitioning and have presented no certified individual labor certificate.

The director's notice then outlined the eligibility factors for a national interest waiver under section 203(b)(2)(B)(i) of the Act as set forth in *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998).

The petitioner responded with a letter, dated July 4, 2002, with the following ambiguous heading: "Further information...for classification under section 203(b)(1)(A) of the Act as an alien of extraordinary ability with a **National Interest Waiver**." The petitioner appears to have been confused regarding the relationship between two different sections of law. Section 203(b)(2)(B) of the Act relates to a "national interest waiver" of the job offer requirement for advanced-degree professionals or aliens of exceptional ability, while section 203(b)(1)(A) relates to the "alien of extraordinary ability" classification. These two immigrant visa classifications are governed by separate regulations, respectively at 8 C.F.R. §§ 204.5 (k) and (h).

In this case, the I-140 petition form does not indicate that the petitioner seeks classification as an alien of extraordinary ability; rather, it indicates that he seeks the distinct and separate classification of "[a] member of the professions holding an advanced degree or an alien of exceptional ability." Furthermore, when given a direct opportunity to clarify the classification sought, the petitioner's first response unambiguously stated that his "application is based on category "d" – a member of the professions holding an advanced degree or an alien of exceptional ability." And finally, the petitioner's second response, citing a "national interest waiver," is still consistent with classification pursuant to 203(b)(2) of the Act. Therefore, we find no error in the director's decision to consider this petition under the regulations at 8 C.F.R. § 204.5(k).

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States.

On appeal, the petitioner states:

I appeal this decision because I was considered for [the] wrong category.... I wish to be considered for category "a" on the form I-140, i.e. 8 C.F.R. § 204.5(h) under section 203(b)(1)(A) as an "Alien of Extraordinary Ability" as a Civil Engineer. I probably misunderstood and misrepresented the term

“national interest waiver” in my letter dated July 4, 2002. Therefore, I wish to appeal the unfavorable decision because it was based on a different category than what I intended to apply for.

Rather than challenging the director’s findings cited in the October 15, 2002 decision, the petitioner is now requesting that his 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’s misunderstanding about the “national interest waiver” and his failure to file as an “alien of extraordinary ability” does not allow the petitioner the opportunity to now change classifications at the appellate stage. If the petitioner seeks classification as an alien of extraordinary ability, then he should file a new petition under that classification with the proper supporting evidence and fee.

In this matter, we find that the director adjudicated this petition under the proper classification. 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, the petitioner has failed to address his 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. The appeal must therefore be summarily dismissed.

ORDER: The appeal is dismissed.