



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B5

FILE:

WAC 04 205 51063

Office: CALIFORNIA SERVICE CENTER

Date: AUG 01 2006

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:

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.

Maui Johnson

2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) rejected an earlier appeal that had been submitted by a party not entitled to file an appeal. The director reissued the decision, and the petitioner has filed an appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a church expansion and community involvement officer for the Church of Scientology International (CSI). On the Form I-140 petition, the petitioner indicated that she seeks classification pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. Materials submitted with the petition, however, indicate that 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 an alien of exceptional ability who seeks an exemption from the requirement of a job offer, and thus of a labor certification, in the national interest of the United States.

The director found that the beneficiary does not qualify for classification as an alien of extraordinary ability.

We note that, on appeal, the petitioner requests that the adjudication of her appeal be held in abeyance pending her receipt of a copy of the record of proceeding under the Freedom of Information Act, in order “to determine if there is anything that the government has added to the record [of] proceedings which is extraneous or should not be there.” The processing of a request for a copy of the record, in order to determine whether the government has added unidentified documents to the record, is not good cause for an extension under 8 C.F.R. § 103.3(a)(2)(vii). Therefore, this request is denied.

Some documents in the record indicated that the CSI was the petitioner (although no church official had signed the Form I-140 petition). As a result, the director had mailed the request for evidence and the subsequent denial notice to the CSI rather than to the alien beneficiary (who signed the petition form and, therefore, is the *de facto* petitioner).

In its previous order in this proceeding, the AAO rejected the appeal filed by the CSI, pursuant to 8 C.F.R. § 103.3(a)(2)(v). The AAO, in its rejection notice, observed “the director has not properly served the petitioner with notice of the decision (or the prior request for evidence).” The AAO also stated: “Unless and until the affected party properly submits a timely appeal, we shall not discuss the merits of the director’s decision or the rebuttal arguments offered by the Church of Scientology International.”

Although the AAO observed that the director had never served the petitioner with a request for evidence (RFE), there is no indication that the director reissued this notice.

On March 7, 2006, the director reissued the denial notice. The substance of the notice is identical to that of the director’s previous decision of May 13, 2005. In both of those decisions, the director denied the petition based on the petitioner’s failure to establish extraordinary ability pursuant to regulations at 8 C.F.R. § 204.5(h).

Throughout the proceeding, the director has treated the matter as a petition for an alien of extraordinary ability under section 203(b)(1)(A) of the Act, apparently because the petitioner checked the corresponding

box on the Form I-140. The materials submitted with that form, however, consistently refer to the lesser classification of alien of exceptional ability under section 203(b)(2) of the Act. If the petitioner had intended to seek the latter classification, and simply checked the wrong box on the petition form, then the director adjudicated the petition under the wrong classification, and the director must adjudicate the petition under exceptional ability/national interest waiver criteria (including, if necessary, the issuance of an RFE relating to those standards).

We note, nevertheless, that the petitioner, on appeal, does not argue that the director adjudicated the petition under the wrong immigrant classification. The director must therefore ascertain, clearly and unambiguously, which classification the petitioner seeks: alien of exceptional ability or alien of extraordinary ability. The two classifications are entirely separate with different standards of eligibility.

If the director determines that the petitioner seeks classification as an alien of exceptional ability, with a national interest waiver, then the director must issue a new decision addressing the relevant criteria. If, on the other hand, the petitioner opts for consideration as an alien of extraordinary ability, the director must issue an RFE to the petitioner, which so far has not been done.

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, regardless of the outcome, is to be certified to the Administrative Appeals Office for review.