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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: [redacted] Office: Texas Service Center Date: JAN 2 1 2003

IN RE: Petitioner:
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)

IN 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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hayward

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded for further consideration.

The petition was filed on July 12, 2001. Under Part 2 of the Form I-140, the petitioner indicated that the petition was being filed for an alien of extraordinary ability. However, in a cover letter accompanying the initial filing, counsel for the petitioner stated that the beneficiary's petition was "being submitted under 8 CFR 203.5(k) for an alien holding an advance degree." It appears counsel's reference to "8 CFR 203.5(k)" was a typographical error. The proper citation should have been "8 CFR 204.5(k)."

On March 20, 2002, the Service Center sent counsel for the petitioner a notice stating the following:

> The I-140 petition you have filed indicates that you are seeking classification of the beneficiary as an alien of extraordinary ability. However, the cover letter indicates that you are seeking classification of the beneficiary as an alien with an advanced degree. Please clarify the classification you are seeking.

The Service Center's notice requested that counsel choose one of the following:

> ___ The petitioner is seeking classification of the beneficiary as an alien of extraordinary ability (E11).
>
> ___ The petitioner is seeking classification of the beneficiary as a member of the professions holding an advanced degree (E21).
>
> ___ The petitioner is seeking classification of the beneficiary for under the criteria for a national interest waiver (E21).

On April 9, 2002, the Service Center received counsel's response, which included the above checklist. Counsel placed an "XXX" mark in front of the extraordinary ability (E11) classification. As further clarification of counsel's choice, the response also included a separate letter from counsel dated April 2, 2002, stating:

> In response to your letter dated 3/20/02 we would confirm that the petitioner is seeking classification of the beneficiary as an alien of extraordinary ability. In further confirmation we would respectfully note that a copy of I-140 at Part 2 question 1(a) we have marked that the petition is being filed for an alien of extraordinary ability.

Therefore, on April 26, 2002, the Service Center requested that the petitioner submit evidence pertaining to the regulatory criteria set forth at 8 CFR 204.5(h)(3).

In a letter dated May 9, 2002, counsel for the petitioner responded to the Service Center's request for evidence, stating:

> I wish to apologize for the error committed by this office with regards to the petitioner and beneficiary. Form I-140, Part 2, Petition Type should be marked as "1d," a member of the professions holding an advanced degree or an alien of exceptional ability in accordance with 8 CFR 204.5(k). Enclosed please find... your form correctly noting that the petitioner is seeking classification under "E-21." The error is mine...

A corrected copy of the checklist was submitted reflecting that the petitioner sought classification of the beneficiary as a member of the professions holding an advanced degree.

On June 14, 2002, the director denied the petition, stating that the petitioner had not established that the beneficiary qualifies for classification as an alien of extraordinary ability. The director's decision stated:

> As the petitioner was given the opportunity to clarify the classification sought, the classification sought cannot now be changed.
>
> According to *Matter of Katigbak*, 14 I & N Dec. 45 (Reg. Comm. 1971), a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a later date after the beneficiary becomes eligible under a new set of facts.

In this case, counsel for the petitioner clearly committed errors and was allowed the opportunity to resolve the classification issue. However, that being said, counsel did request classification of the beneficiary as a member of the professions holding an advanced degree prior to the director's denial of the petition. Therefore, we disagree with the director's conclusion that "the classification sought cannot be changed." Service policy does permit a petitioner to change the classification of a petition prior to a decision being rendered. *Matter of Katigbak* would not apply here because counsel for the petitioner presented no new set of facts, only a request to change the classification sought. Furthermore, at the time of filing, the record did contain a cover letter requesting classification of the beneficiary as "an alien holding an advance degree."

The petitioner in this case, therefore, 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. The petitioner seeks to employ the beneficiary as a Division Manager. We note, however, that the record does not contain a labor certification issued by the Department of Labor prior to the filing of the I-140 petition.

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)(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.

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

> Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, [or] by an application for Schedule A designation (if applicable)... To apply for Schedule A designation... a fully executed uncertified Form ETA-750 in duplicate must accompany the petition... 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 record does contain a fully executed uncertified Form ETA-750 in duplicate, which is consistent with a request for blanket certification under Group II of Schedule A. We note, however, that the record contains no statements from counsel or the petitioner requesting blanket certification under Group II of Schedule A.

The regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part:

> The director may exempt the requirement of a job offer, and thus of a labor certification... if such exemption would be in the national interest. To apply for the exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate.

The record also contains duplicate copies of Form ETA-750B, Statement of Qualifications of Alien, which is consistent with a request for a national interest waiver. We note, however, that counsel for the petitioner, on two separate Service Center checklists, and on appeal, has not indicated that the petitioner is seeking a national interest waiver.

In this case, counsel has not been clear as to the specific classification sought for the beneficiary. Without a labor certification issued by the Department of Labor prior to the filing of the I-140 petition, and based on the petitioner's submission of the entire Form ETA-750, rather than just Form ETA-750B, the record remains ambiguous as to the classification actually sought by the petitioner. It is not clear whether the petitioner seeks pre-certification under Group II of Schedule A

or a national interest waiver.

In denying the petition, the director addressed only the beneficiary's eligibility under section 203(b)(1)(A) of the Act. The director determined that the petitioner had not established that the beneficiary qualified for classification as an alien of extraordinary ability. The director did not address the petitioner's request for classification pursuant to section 203(b)(2) of the Act.

On appeal, the petitioner does not contest the director's specific findings regarding the beneficiary's eligibility under section 203(b)(1)(A) of the Act. The issue in this matter, however, is whether the petitioner has established the beneficiary's eligibility pursuant to section 203(b)(2) of the Act. The director's new decision should address the absence of a labor certification from the Department of Labor, and whether the petitioner is seeking blanket certification under Group II of Schedule A or a national interest waiver.

The record of evidence as it is presently constituted has numerous deficiencies and falls well short of demonstrating the beneficiary's eligibility pursuant to section 203(b)(2) of the Act. Accordingly, we remand this matter for the purpose of a new decision regarding the beneficiary's eligibility pursuant to section 203(b)(2) of the Act. The director shall issue a request for evidence instructing the petitioner to submit evidence of a labor certification issued by the Department of Labor prior to the filing of the I-140 petition, or evidence of the beneficiary's eligibility for Schedule A, Group II pre-certification or a national interest waiver. The director should allow the petitioner to submit such evidence in support of the petition within a reasonable period of time. Due to the numerous opportunities granted to the petitioner to clarify the classification sought, the director shall not entertain any future requests to change classification. The director should review all evidence submitted by the petitioner prior to entering a new decision. 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 matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if favorable to the petitioner, is to be certified to the Associate Commissioner, Examinations, for review.