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20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 0 3 2009

LIN 07 162 52309

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. **§ 103.5(a)(1)(i).**

John F. Grissom, Acting Chief
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 dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a French-style cook.[1] The petition was accompanied by certification from the Department of Labor. The central issue in this proceeding involves the classification sought. On Part 2 of the Form I-140 petition, the petitioner checked box "a," indicating that it seeks to classify the beneficiary 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. The director determined that the petitioner had not established that the beneficiary qualifies for classification as an alien of extraordinary ability.

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

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
>
> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3):

> Initial evidence: A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include

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The petitioner was initially represented by [redacted]. In this decision, the term "previous counsel" shall refer to [redacted]

evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

(iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The Form I-140, Immigrant Petition for Alien Worker, was filed on May 16, 2007. Previous counsel checked box "a" under Part 2 of the Form I-140 petition requesting classification as an alien of extraordinary ability. The petition was accompanied by a November 30, 2006 employment reference letter, copies of the petitioner's tax Returns for 2001 through 2005, an April 9, 2007 Final Determination letter from the U.S. Department of Labor, and an Application for Alien Employment Certification, Form ETA-750, certified by the U.S. Department of Labor. The initial submission also included a May 8, 2007 letter from previous counsel listing the documentation submitted, but

previous counsel's letter did not specify the classification sought. On September 30, 2008, the director denied the petition finding that the petitioner had not established that the beneficiary meets the statutory and regulatory requirements for classification as an alien of extraordinary ability.

On appeal, counsel states:

> THE I-140 WAS DENIED BASED ON AN ERROR OF FACT. THE PETITIONER, THROUGH HIS REPRESENTATIVE AT THE TIME, MISTAKENLY CHECKED OFF THE WRONG BOX IN SECTION PART 2 OF THE I-140 FORM INDICATING THAT THE PETITION WAS FILED UNDER SUBSECTION A. (AN ALIEN OF EXTRAORDINARY ABILITY) INSTEAD OF SECTION E., (SKILLED WORKER). THE LABOR CERTIFICATION REVEALS THAT THE PETITIONER WAS SEEKING A BENEFICIARY TO FILL A SKILLED POSITION. THE PETITIONER WAS NEVER PROVIDED AN OPPORTUNITY TO EXPLAIN THIS DISCREPANCY EVEN THOUGH THE ERROR WAS OBVIOUS. THE USCIS HAS A POLICY OF AT LEAST REQUESTING ADDITIONAL EVIDENCE ONCE BEFORE DENYING A MATTER. HAD THE PETITIONER BEEN PROVIDED NOTICE OF THE ERROR, HE WOULD HAVE CORRECTED IT IMMEDIATELY. . . . WE ARE REQUESTING THAT THE SERVICE ACCEPT ADDITIONAL INFORMATION INCLUDING AN AMENDED I-140 AND PROOF THAT THE BENEFICIARY HAS THE NECESSARY EXPERIENCE. WE RESPECTFULLY REQUEST THAT THE APPEAL AND THE NEW EVIDENCE BE CONSIDERED SINCE THE PETITIONER WAS NOT PROVIDED THE MINIMUM STATUTORY AND DUE PROCESS FOR THE ADJUDICATION OF THE I-140 APPLICATION.

The petitioner's failure to properly identify the classification sought does not allow it the opportunity to later change classifications at the appellate stage. The burden is on the petitioner to select the appropriate classification rather than to rely on the director to infer or second-guess the petitioner's intended classification. In this case, the service center received an I-140 petition that was clearly marked under Part 2 as a petition filed for classification as "[a]n alien of extraordinary ability." The petitioner signed the Form I-140 under penalty of perjury, attesting that the information on the form was correct. As the petition was unaccompanied by instructions from previous counsel or the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(1)(A) of the Act.

With regard to counsel's comment that the petitioner was not afforded an opportunity to address the error, the regulation at 8 C.F.R. § 103.2(b)(8)(i) provides in pertinent part: "If the record evidence establishes ineligibility, the application or petition will be denied on that basis." Further, 8 C.F.R. § 103.2(b)(8)(ii) provides in pertinent part: "If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility . . . ." Thus, the director is not required to issue a request for evidence or notice of intent to deny in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the regulation at 8 C.F.R. § 103.2(b)(8) does not require solicitation of further documentation.

With regard to the petitioner's request for consideration as a skilled worker pursuant to section 203(b)(3) of the Act, a request for a change of classification will not be entertained for a petition that has already been adjudicated. A post-adjudication alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In addition, the Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the director's adjudication of the I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[2] If the petitioner now seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Act, then it must file a separate Form I-140 petition requesting the new classification. On appeal, counsel has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

In this matter, the petitioner's appellate submission did not address the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act. With regard to regulatory requirements at 8 C.F.R. § 204.5(h), the petitioner has not specifically challenged the reasons stated for denial and has not provided any additional evidence to overcome the director's decision. Counsel indicated that a brief and/or evidence would be submitted to the AAO within 30 days. The appeal was filed on October 27, 2008. As of this date, more than three months later, the AAO has received nothing further.

Review of the record does not establish that the beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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[2] *See* http://www.whitehouse.gov/omb/circulars/a025/a025.html, copy incorporated into the record of proceeding.