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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **SEP 09 2008**  
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IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:



**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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO initially withdrew the director's decision and remanded the petition for further action and consideration. Subsequently, the AAO reopened the proceeding on its own motion. The appeal will be dismissed and the petition will remain denied.

The petitioner is a Catholic school. It seeks to employ the beneficiary permanently in the United States as a physical education and health teacher. 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.

In its first decision, dated February 20, 2008, the AAO erroneously remanded the petition for further action and consideration pursuant to section 203(b)(3) of the Act. On June 20, 2008, the AAO reopened the matter for purposes of entering a new decision. The AAO proposed to withdraw its initial decision, affirm the director's denial pursuant to section 203(b)(1)(A) of the Act, and dismiss the appeal. The petitioner was provided a period of 30 days in which to respond to the AAO's motion. The AAO received the petitioner's response and it was incorporated into the record of proceeding.

Upon review, the director's decision was proper under the law and regulations. As will be discussed in detail, a petitioner may not make material changes to a petition after adjudication in order to establish eligibility. Additionally, the Act prohibits Citizenship and Immigration Services (CIS) from providing a petitioner with multiple adjudications for a single petition with a single fee. Finally, although counsel claims that he "erroneously" requested classification of a physical education and health teacher as an alien "extraordinary ability in the sciences, arts, education, business, or athletics," the AAO notes that the error conveniently allowed the alien to concurrently file for adjustment of status and gave her the opportunity for work authorization when she would have been otherwise barred.

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 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 concurrently with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, on August 28, 2006. The petitioner checked box "a" under Part 2 of the Form I-140 petition requesting classification as an alien of extraordinary ability. The petitioner also signed the Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct." The petition was accompanied by a May 23, 2006 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 an August 16, 2006 cover letter from counsel listing the Form ETA-750 and the Final Determination letter, but counsel's letter did not specify the classification sought. On November 7, 2006, 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, the petitioner submitted a November 27, 2006 letter from counsel stating: "The selection in Part 2 a. was made erroneously and we respectfully ask that the selection of 'An Alien of Extraordinary Ability' in Part 2 Section a. be changed to Section e. 'A professional (at a minimum, possessing a bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience).'" Thus, counsel requested on appeal that the petition now be adjudicated pursuant to section 203(b)(3) of the Act. As discussed, the AAO erroneously issued a February 20, 2008 decision remanding the petition to the director for consideration under section 203(b)(3) of the Act. On June 20, 2008, the AAO reopened these proceedings on its own motion and proposed to withdraw its initial decision, affirm the director's denial pursuant to section 203(b)(1)(A) of the Act, and dismiss the appeal.

In response, the petitioner submitted a brief from counsel and an April 17, 2007 Request for Evidence (RFE) issued by the Nebraska Service Center in a separate matter unrelated to the instant petition.<sup>1</sup> Counsel argues that the petitioner should be permitted to change classifications stating:

It is our understanding that Director's decision was not in error, however it was already demonstrated in previous cases that the Petitioner was allowed to make corrections when Director would notice that based on submission of an approved labor certification a petitioner may have in fact inadvertently checked the incorrect classification on Part 2 of Form I-140. Consequently, a petitioner would be asked to verify and inform the Service of Petitioner's correct intended classification.

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. As discussed, the Form I-140 petition 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. Further, as counsel acknowledged that the "director's decision was not in error," the petitioner is precluded from requesting a change of classification on appeal. 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

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<sup>1</sup> The RFE states: "[T]he submission of an approved labor certification indicates that you may have inadvertently checked the incorrect classification on Part 2 of the I-140. Please verify this and inform this Service of your correct intended 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 CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In addition, the Ninth Circuit has determined that once CIS 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 (9<sup>th</sup> Cir. July 10, 2008).

Furthermore, CIS 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, CIS 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 CIS recover all direct and indirect costs of providing a good, resource, or service.<sup>2</sup> 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 and in response to the AAO's motion, 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.

Counsel argues that the April 17, 2007 RFE submitted in response to the AAO's motion "verifies that a petitioner is able to make material changes to a petition when the classification was checked by error, not by making 'a deficient petition conform to CIS requirements.'" Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those of the case in which the director issued the April 17, 2007 RFE. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. With regard to the separate matter in which the April 17, 2007 RFE was issued, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On page 5 of his brief, counsel cites to a rule promulgated by CIS relating to the issuance of requests for evidence and notices of intent to deny. The final rule at 72 Fed. Reg. 19100 (April 17, 2007)<sup>3</sup> states:

This rule . . . describes the circumstances under which U.S. Citizenship and Immigration Services will issue a Request for Evidence or Notice of Intent to Deny before denying an application or petition, but United States Citizenship and Immigration Services will continue generally to provide petitioners and applicants with the opportunity to review and rebut derogatory information of which he or she is unaware.

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A Notice of Intent to Deny (NOID) is a written notice issued by USCIS to an applicant or petitioner that USCIS has made a preliminary decision to deny the application or petition. A NOID may be

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<sup>2</sup> See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>.

<sup>3</sup> This rule became effective on June 18, 2007, *after* the filing and adjudication of this petition

based on evidence of ineligibility or on derogatory information known to USCIS, but not known to the petitioner or applicant. USCIS cannot, however, issue a NOID based on missing initial evidence if an RFE has not first been issued. The NOID provides the applicant or petitioner with an opportunity to inspect and rebut the evidence forming the basis of the decision to deny the petition or application.

Counsel argues that the director should not have denied the petition without first issuing a RFE or a NOID stating:

Based on the above, a Notice of Intent to Deny was never submitted with the Petitioner that USCIS has made a preliminary decision to deny the Petition that would be based on evidence of ineligibility or on derogatory information known to USCIS, but not known to the Petitioner. And as per the rule the U.S. Citizenship and Immigration Service cannot, however, issue a Notice of Intent to Deny based on missing initial evidence if a Request for Initial Evidence has not first been issued. Consequently, the Director should not deny the Petition if even the Request for Initial Evidence has not been issued at all and would have been provided the Petitioner with an opportunity to inspect and rebut the evidence forming the basis of the decision to deny the Petition.

Counsel does not specify the “derogatory information known to USCIS, but not known to the petitioner.” We note that the director’s denial of the petition was based solely on the documentation submitted by the petitioner. Further, with regard to “evidence of ineligibility,” the regulation then in effect at 8 C.F.R. § 103.2(b)(8) (2006), provided in pertinent part: “If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence.”

The current 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 RFE or a NOID 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.

Finally, the concurrent filing of the Form I-140 and the Form I-485 raises an additional issue regarding the petitioner’s request for a change of classification to skilled worker pursuant to section 203(b)(3) of the Act, and further supports a conclusion that the petitioner sought to classify the beneficiary under section 203(b)(1)(A) of the Act.

The regulation at 8 C.F.R. § 245.1(g)(1) states, in pertinent part: “An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed.”

The regulation at 8 C.F.R. § 245.2(a)(2) states, in pertinent part:

Proper filing of application --

(i) Under section 245. (A) An immigrant visa must be immediately available in order for an alien to properly file an adjustment application under section 245 of the Act See § 245.1(g)(1) to determine whether an immigrant visa is immediately available.

(B) If, at the time of filing, approval of a visa petition filed for classification under section 201(b)(2)(A)(i), section 203(a) or section 203(b)(1), (2) or (3) of the Act would make a visa immediately available to the alien beneficiary, the alien beneficiary's adjustment application will be considered properly filed whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 and 245. For any other classification, the alien beneficiary may file the adjustment application only after the Service has approved the visa petition.

(C) A visa petition and an adjustment application are concurrently filed only if:

(1) The visa petitioner and adjustment applicant each file their respective form at the same time, bundled together within a single mailer or delivery packet, with the proper filing fees on the same day and at the same Service office, . . . .

The above regulations require that an immigrant visa be immediately available for concurrent filings of Form I-140s and Form I-485s submitted for those seeking classification pursuant to section 203(b)(1), (2) or (3) of the Act. The Form I-140 petition was filed concurrently with the beneficiary's Form I-485 on August 28, 2006. The beneficiary checked box "a" under Part 2 of the Form I-485 application to indicate that she was filing the petition on the basis of "an immediately available immigrant visa number."<sup>4</sup> However, at that time, no immigrant visas were immediately available for third-preference skilled workers with priority dates after October 1, 2001.<sup>5</sup> Therefore, based on a priority date of November 21, 2002, the petitioner and the beneficiary were ineligible to concurrently file the Form I-485 application for adjustment with the Form I-140 petition for classification pursuant to section 203(b)(3) of the Act. If the Form I-140 and Form I-485 are filed together with separate fees (as in the present case) and there is no visa currently available, the Form I-140 and fee shall be accepted, but all relating Form I-485s and ancillary applications shall be rejected.<sup>6</sup> Thus, if counsel had initially checked box "e" for classification as a skilled worker, the beneficiary's Form I-485 would have been rejected by the service center. However, as counsel for the petitioner checked box "a" for classification as an alien of extraordinary ability, the service center accepted the beneficiary's I-485 on

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<sup>4</sup> The beneficiary also submitted a Supplement A to Form I-485 in order to adjust her status under section 245(i) of the Act because she is the beneficiary of an application for a labor certification filed on or before January 14, 1998. However, the only labor certification in the A-file record of proceeding has a priority date of November 21, 2002.

<sup>5</sup> See [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_2978.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_2978.html). The priority date for the I-140 petition in this case is November 21, 2002.

<sup>6</sup> See Interoffice Memorandum from William Yates, Associate Director of Operations, *Regression of E31 and E32 Visa Numbers for Applicants from Mainland China and Rescission of March 31, 2004 Policy Memo re: Concurrent Adjudication of Concurrently Filed Form I-140s and Form I-485s* (December 29, 2004). With regard to remittance of a single check for multiple filings, if the alien's priority date is not current at the time of those filings, then all filings shall be rejected.

August 28, 2006 because at that time immigrant visas for section 203(b)(1)(A) of the Act were current for all countries but India.<sup>7</sup> Counsel offers no rebuttal to the preceding observations that were discussed in the AAO's motion.

In this matter, the petitioner's appellate submission and response to the AAO's motion do 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.

Review of the record does not establish that the beneficiary has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence is not persuasive that the beneficiary's achievements set her significantly above almost all others in her 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 these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**Order:** The appeal is dismissed. The petition remains denied.

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<sup>7</sup> See [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_2978.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_2978.html).