

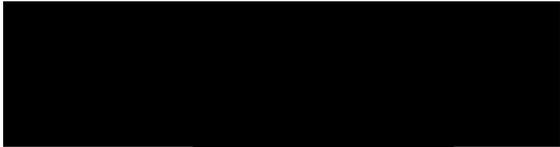


U.S. Citizenship
and Immigration
Services

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PUBLIC

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FILE:

[Redacted]
LIN 07 257 56935

Office: NEBRASKA SERVICE CENTER

Date: **APR 13 2009**

IN RE:

Petitioner:
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)

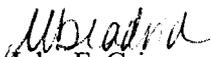
ON BEHALF OF PETITIONER:



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. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant 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 in business. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify 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 to the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). 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 has 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).

This petition seeks to classify the petitioner as an alien with extraordinary ability as a delivery route driver. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

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 July 30, 2007. The petitioner checked box “a” under Part 2 of the Form I-140 petition requesting classification as an alien of extraordinary ability. [REDACTED] on behalf of 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.” With the petition, the petitioner submitted a copy of U.S. Department of Labor (DOL) Form ETA 750, Application for Alien Employment Certification, and a copy of a June 25, 2007 “Final Determination” letter from the DOL. The petitioner submitted no evidence to establish that the beneficiary met any of the criteria listed in 8 C.F.R. § 204.5(h)(3).

On appeal, counsel asserts:

The petitioner wishes to employ the beneficiary as a delivery route driver as a skilled worker requiring at least two years of experience. Attached as Exhibit A is a copy of the original I-140 form submitted to the Department of Homeland Security which shows that the petitioner check[ed] off option “e” on Part 2.

In support of this assertion, the petitioner submits a copy of a Form I-140 that is clearly not the one contained in the record of proceeding which was submitted to USCIS for processing and received under USCIS receipt number LIN 07 257 56935. As indicated above, at Part 2, “Petition Type” of the Form I-140 in the record of proceeding, the petitioner checked box “a,” indicating that the petition was being filed for an alien of extraordinary ability. In Part 8, “Signature,” the petition is dated July 25, 2007 and signed by [REDACTED]. In Part 9 of the petition, [REDACTED] signed as the individual who prepared the document. He also dated his signature as July 25, 2007 and provided his e-mail address.

The copy of the Form I-140 submitted on appeal indicates that the petitioner checked block “e” on the petition, specifying that it was for a professional or skilled worker. Additionally, all of the information in Part 8 and Part 9 of the form differs from that on the petition actually filed with USCIS and contained in the record. The petitioner’s printed name is not the same, his e-mail address is different, and the Form I-140 is dated “06/09/1971.” Further, the signature block in Part 9 contains only the letters “WK” and contains no date and no e-mail address for [REDACTED]. Therefore, the AAO finds that the petitioner knowingly submitted an altered document in an effort to mislead USCIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States. See 18 U.S.C. §§ 1001, 1546. The AAO is left to conclude that counsel and the petitioner made willful misrepresentations as to a material fact, in their attempt to obtain benefits under the Act for the alien beneficiary in violation of section 274C(a)(1),(2), and (5) of the Act, 8 U.S.C. § 1324c(a)(1),(2), and (5).¹ Under Board of Immigration Appeals (BIA) precedent, a material misrepresentation is one which “tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.” *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). Accordingly, the AAO hereby enters a finding of fraud.

Notwithstanding the aforementioned fraud and material misrepresentation, we note that 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

¹ The Service reserves its right to provide formal notice to counsel and the petitioner of their respective violations of section 274C(a)(1),(2), and (5) of the Act, 8 U.S.C. § 1324c(a)(1),(2), and (5), and to issue cease and desist orders with civil money penalties in accordance with section 274C(d)(3) of the Act, 8 U.S.C. § 1324c(d)(3).

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).

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 under section 203(b)(1)(A) of the Act. 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 classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, then the petitioner must file a separate Form I-140 petition requesting the new classification. There is 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.

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. Because the petitioner has attempted to procure a benefit under the Act through fraud, the beneficiary is inadmissible under section 212(a)(6)(C) of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). *See also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed with a finding of fraud and willful misrepresentation of a material fact.

FURTHER ORDER: The AAO finds that the petitioner knowingly submitted fraudulent documentation in an effort to mislead USCIS and the AAO on elements material to his eligibility for a benefit sought under the immigration laws of the United States.

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