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U.S. Citizenship
and Immigration
Services

Ba

FILE: [REDACTED]
LIN 07 216 53303

Office: NEBRASKA SERVICE CENTER

Date: **FEB 02 2009**

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:

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.

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).

JF Grissom
F John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont 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 the arts. The director determined the petitioner had not established that the beneficiary's field of endeavor qualifies under 203(b)(1)(A) of the Act or that the beneficiary has the "requisite 'extraordinary ability' in the field."

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 fine artist. 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.

With the petition, the petitioner submitted a copy of U.S. Department of Labor (DOL) Form ETA 750, Application for Alien Employment Certification. The petitioner submitted no evidence that the beneficiary met any of the criteria listed in 8 C.F.R. § 204.5(h)(3).

On appeal, the petitioner asserts:

[W]e submit that the decision in this case is incorrect because we never claimed that the beneficiary fit into the category of an [“]alien of extraordinary ability.” We did not so indicate on the I-140 petition. The petitioner was accompanied by an approved labor certification application that had been certified by the Department of Labor. The Labor Certification papers state quite clearly that the person is the certified position requires at last two years of experience in the field.

The decision of the Director is predicated upon the beneficiary’s failure to qualify as an alien of extraordinary ability. Persons qualifying in that category are exempt from the Labor Certification requirement. However, in this case, we submitted an approved Labor Certification. Why would we have gone to all the trouble of processing a Labor Certification if we had determined that the beneficiary was an alien of extraordinary ability? The answer is that we would not.

Nonetheless, at Part 2, “Petition Type” of the petitioner’s Form I-140, Immigrant Petition for Alien Worker, the petitioner checked box “a,” indicating that the petition was being filed for an alien of extraordinary ability.

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.¹ If the petitioner now seeks classification of the beneficiary as a skilled worker pursuant to Section 203(b)(3)(A) 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. 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

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html> [accessed on January 30, 2009 and incorporated into the record of proceeding.

classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

Based upon a review of the record of proceeding, the petitioner has failed to submit evidence which demonstrates that the beneficiary is an alien of extraordinary ability and therefore has failed to establish that the beneficiary meets the requirements of the classification sought on the Form I-140 under section 203(b)(1)(A) of the Act.

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.