



U.S. Citizenship
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **NOV 09 2009**
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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:

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).

Perry Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an “alien of extraordinary ability,” pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). 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. The director also noted that even *if* the petition had been filed pursuant to the lesser skilled worker classification pursuant to 8 C.F.R. § 203(b)(3)(A)(i), the record still lacked letters documenting the beneficiary’s experience. The director, however, did not perform a full adjudication under that section of law. For example, the director did not address whether the beneficiary’s personal tax documentation back through 2004 could establish the petitioner’s ability to pay the proffered wage as of the priority date in 2001. 8 C.F.R. § 204.5(g)(2).

On appeal, the petitioner asserts that the beneficiary qualifies as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. The petitioner does not address any of the director’s concerns regarding the beneficiary’s ineligibility pursuant to section 203(b)(1)(A), the classification originally sought.

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.

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, 60898-9 (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 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).

The Form I-140, Immigrant Petition for Alien Worker, was filed on November 29, 2007. The petitioner checked box “a” under Part 2 of the Form I-140 petition requesting to classify the beneficiary 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.” 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).

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.” As the petition was unaccompanied by instructions from the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(1)(A) of the Act. 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. 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 (Comm’r. 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*, 286 Fed. Appx. 963 (9th Cir. July 10, 2008).

Moreover, 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 Thus, a full adjudication by the director under both sections 203(b)(1)(A) and 203(b)(3)(A)(i) of the Act would have been in error.

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, with the accompanying fee, requesting the new classification.

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html> (accessed November 5, 2009 and incorporated into the record of proceeding).

As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The petitioner here has not specifically addressed the reasons stated for denial, the beneficiary's ineligibility as an alien of extraordinary ability pursuant to section 203(b)(1)(A), and has not provided any additional evidence relating to that classification. The petitioner has not even expressed disagreement with the director's decision as it relates to that classification. The appeal must therefore be summarily dismissed.

ORDER: The appeal is dismissed.