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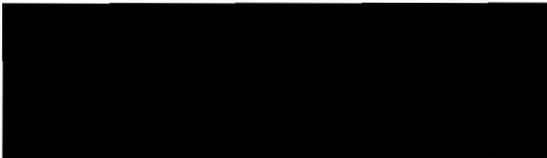
FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:
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NOV 19 2009

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:



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
Chief, Administrative Appeals Office

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

The petitioner is a produce wholesale distributor. It seeks to employ the beneficiary permanently in the United States as a fruit grading supervisor. 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.

On appeal, counsel submits a brief. 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 in order to establish eligibility. Additionally, the Act prohibits U.S. Citizenship and Immigration Services (USCIS) from providing a petitioner with multiple adjudications for a single petition with a single fee.

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 on March 12, 2007. 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 an Application for Alien Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor. On the same date, the director issued a Form I-797C receipt notice listing the classification sought as "Alien of Extraordinary Ability, Sec. 203(b)(1)(A)." There is no evidence that either counsel or the petitioner attempted to correct the classification sought at this

time. Instead, five months later, on August 6, 2007, the beneficiary filed a Form I-485, Application to Register Permanent Residence or Adjust Status. In support of this adjustment application, the beneficiary submitted the Form I-797C listing the classification sought as alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act.

On July 9, 2008, the director requested the evidence required under the regulations relating to section 203(b)(1)(A) of the Act. In response, counsel requests that the petition be amended to seek classification pursuant to section 203(b)(3)(A)(iii) of the Act.

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. The director acknowledged counsel's attempt to amend the petition but stated that the petition would be adjudicated as filed.

On motion, counsel asserted that the classification requested on the original petition was a clerical error for which the petitioner and the beneficiary should not be penalized. Counsel acknowledged that the AAO has previously held that a request to amend the classification will not be entertained after the petition is adjudicated, counsel notes that the request to amend the petition in this matter predates the final adjudication of the petition. In a footnote, counsel claimed another error regarding the classification sought. Specifically, counsel noted that the request to amend the petition requested that it be adjudicated pursuant to section 203(b)(3)(A)(iii) of the Act and asserted that it should have requested consideration pursuant to section 203(b)(3)(A)(i) of the Act. The director dismissed the motion, concluding that the filing did not cite any precedent decisions.

On appeal, counsel continues to request that the petition be adjudicated pursuant to section 203(b)(3)(i) of the Act. Counsel further asserts that the motion was supported by AAO decisions and should not have been dismissed. Counsel concludes that the director's failure to consider the request to amend the petition prior to the adjudication of the petition "contradicts" a precedent decision by the AAO. The decision referenced by counsel, however, is not a designated precedent pursuant to 8 C.F.R. § 103.3(c).

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 counsel or the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(1)(A) of the Act. The record contains no evidence that the petitioner attempted to correct the classification sought upon receiving the Form I-797C, a form used by the petitioner to support the August 6, 2007 Form I-485 adjustment application. The July 9, 2008 request for evidence issued by the director did not seek clarification of the classification sought, but evidence pertaining to eligibility under the classification indicated on the petition.

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*, Slip Copy, 286 Fed. Appx. 963 (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.¹ If the petitioner subsequently seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3)(i) 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 filed.

As stated above, the AAO decisions on which counsel relies are not designated precedent decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS 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.

In this matter, the petitioner's appellate submission does 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 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 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.

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>.