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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B2

FILE:

[REDACTED]
LIN 07 257 56935

Office: NEBRASKA SERVICE CENTER

Date: **JAN 13 2010**

IN RE:

Petitioner: [REDACTED]
Beneficiary: [REDACTED]

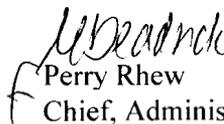
PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[REDACTED]
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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and entered a separate finding of fraud and material misrepresentation. The petitioner has filed a motion to reconsider, seeking a reversal of the finding of fraud and material misrepresentation, and consideration of the petition under a different classification. The AAO will grant the petitioner's motion and withdraw the finding of fraud and material misrepresentation. However, the remaining grounds for denial cited in the AAO's appellate decision will be affirmed, and the petition will remain denied.

The petitioner seeks to employ the beneficiary permanently in the United States a delivery-route driver. On Part 2 of the Form I-140, Immigrant Petition for Alien Worker, 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.¹ The director determined that the petitioner had not submitted evidence demonstrating the beneficiary's eligibility for the classification sought. The AAO affirmed the director's finding on appeal and entered an additional finding of fraud and material misrepresentation.

On motion, counsel states:

The petitioner . . . and the beneficiary . . . should not have to suffer the immense consequences for an error that occurred in the handling of the I-140 Petition by his previous counsel's staff. Petitioner sought to apply legitimately under the category of "skilled worker," as that was the case when his labor certification process began on April 30, 2001, over 8 years ago. Due to the apparent error by previous counsel, the petitioner has now suffered the consequences without intentionally causing them. Petitioner has sustained a great burden in legal fees, application fees, Labor Certification costs, and a processing time of 8 years for the application finally to be reviewed by USCIS [U.S. Citizenship and Immigration Services].

* * *

In consideration of . . . the [petitioner's] true intention for classification, the petitioner respectfully requests reconsideration . . . and a re-opening of the matter for analysis of the I-140 Petition.

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 --

¹ The Form I-140 petition was prepared and submitted by [REDACTED] In this decision, the term "previous counsel" shall refer to [REDACTED]

- (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.

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 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 July 30, 2007. With the petition, the petitioner submitted a *June 25, 2007 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 AAO and the director found that the petitioner had submitted no evidence demonstrating that the beneficiary had met any of the regulatory criteria listed in 8 C.F.R. § 204.5(h)(3).

In this case, the petitioner has failed to demonstrate the beneficiary's receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3). Further, the submitted documentation does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). 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.

With regard to the AAO's finding of fraud and material representation, counsel had stated on appeal that:

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 counsel's assertion, the petitioner submitted a copy of a Form I-140 that was 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 indicated 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 differed from that on the petition actually filed with USCIS and contained in the record. The petitioner's printed name was not the same, his e-mail address was different, and the Form I-140 was dated "06/09/1971." Further, the signature block in Part 9 contained only the letters [REDACTED] and contained no date and no e-mail address for [REDACTED]. Therefore, the AAO found that 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. Accordingly, the AAO entered a finding of fraud and material misrepresentation.

On motion, counsel states:

Petitioner[']s current counsel . . . substituted in as counsel for Petitioner . . . and alien [the beneficiary], due to the retiring of Petitioner's previous attorney, [REDACTED]. If [REDACTED] office made an error in the filing of the I-140 [petition] for Avalon Tent & Party by originally categorizing the petitioner to that of a Category "A," Alien of Extraordinary Ability, instead of the correct classification of Category "E," a Skilled Worker, that was simply a typographical error. The [petition] submitted on appeal by my office was furnished by [REDACTED]. In receipt of the original file and in counsel's haste to quickly conclude that this was an obvious error in the determination of the Nebraska Service Center, the corrected version of the application was construed as the original. The evidence of the approval of the "Final Determination" from the DOL, led me to believe that the path of skilled worker under category "E," and not that of Category "A" was the relevant classification as that is the classification of the submitted Labor Certification.

* * *

Plaintiff[']s current counsel, misinterpreted the corrected version of the I-140 as a copy provided by [REDACTED], as the original I-140 submitted to the Nebraska Service Center, and therein led to the appeal by counsel . . . in particular arguing that there was an error made by USCIS.

Counsel's explanation that the amended version of the Form I-140 submitted on appeal was an unintentional error caused by the substitution of counsel is plausible. Accordingly, our finding of fraud and material misrepresentation in the appellate decision is hereby withdrawn.

Although we withdraw our finding of fraud and material misrepresentation, we affirm our appellate findings that the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act and that the petitioner is precluded from requesting a change of classification

once a decision has been rendered by the director. On motion, counsel states: “The petitioner in this case, never intended for the use of an alien of extraordinary ability.” While the documentation initially submitted in this case may be consistent with a different immigrant visa 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 previously discussed, 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.” 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. Further, 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.² If the petitioner seeks classification of the beneficiary under a different immigrant visa classification, then the petitioner must file a separate Form I-140 petition, with the accompanying fee, requesting the new classification.

ORDER: The AAO withdraws its April 13, 2009 finding of fraud and material misrepresentation. The remaining grounds for denial in the AAO’s appellate decision are affirmed, and the petition will remain denied.

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