

identifying data deleted to  
prevent identity unwarranted  
invasion of personal privacy

PUBLIC COPY



U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**

B3



DATE: **JUN 19 2012** OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is [REDACTED]. According to a September 30, 2010 letter from [REDACTED] [REDACTED] the petitioner hired the beneficiary as a lecturer in the [REDACTED] for two years beginning from [REDACTED]. The central issue in this case involves the classification sought. On Part 2 of the Form I-140, Immigrant Petition for Alien Worker, filed on October 18, 2010, former counsel for the petitioner checked box "b," indicating that the petitioner seeks to classify the beneficiary pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B), as an outstanding professor or researcher. On April 20, 2011, the director determined that the petitioner has not established that the beneficiary qualifies for classification as an outstanding professor or researcher.

Upon review, the AAO concludes that 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 after adjudication in order to establish eligibility. In addition, 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):
  - (B) Outstanding professors and researchers – An alien is described in this subparagraph if –
    - (i) the alien is recognized internationally as outstanding in a specific academic area,
    - (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
    - (iii) the alien seeks to enter the United States--
      - (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
      - (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
      - (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

In this case, the petitioner filed the Form I-140 petition on October 15, 2010. The petitioner checked box "b" under Part 2 of the Form I-140 petition requesting the beneficiary be classified as an outstanding professor or researcher. On behalf of the petitioner, the petitioner's former counsel, [REDACTED] certified through the electronic filing that the Form I-140 petition under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct." The petition was

accompanied by a letter from former counsel that repeatedly states that the beneficiary is eligible to be classified as an outstanding professor or researcher. Former counsel concluded the letter with the statement: “[the petitioner] qualifies [for] more than 2 criteria of the immigrant visa petition under the EB-1B category.” Former counsel also filed a voluminous amount of documents to support her assertion that the petitioner is eligible for the outstanding professor and researcher classification. In addition, former counsel categorized the September 30, 2010 two-year appointment letter from the [REDACTED] as a “Permanent Job offer from [REDACTED] to [the beneficiary].”

On December 7, 2010, the director issued a Request for Evidence (RFE), noting that the [REDACTED] letter from [REDACTED] does not establish that the beneficiary has been offered a tenured position or a position that is on tenure-track, as required under section 203(b)(1)(B)(iii)(I) of the Act and the regulation at 8 C.F.R. § 204.5(i)(3)(iii). As such, the director requested evidence relating to the beneficiary’s employment offer, and evidence showing that the beneficiary has at least three years of experience in teaching and/or research in the academic field.

In a letter dated January 6, 2011, former counsel asserted that she had made a mistake on the petition and the petitioner had wanted to seek to classify the beneficiary pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. Former counsel also submitted a December 27, 2010 letter from [REDACTED] stating that “[the petition] was meant to be filed as EB1A and not EB1B.” On April 20, 2011, the director denied the petition finding that the petitioner has not shown that the beneficiary meets the statutory and regulatory requirements for classification as an outstanding professor or researcher, pursuant to section 203(b)(1)(B) of the Act.

On appeal, counsel requests that the AAO adjudicate the petition pursuant to section 203(b)(1)(A) of the Act, under the classification as an alien of extraordinary ability. Counsel asserts that former counsel checked the wrong box under Part 2 of the Form I-140 petition and that it was an “administrative and clerical error.”

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 outstanding professor or researcher.” Former counsel certified and filed the Form I-140 petition by internet, on behalf of the petitioner, under penalty of perjury, attesting that the information on the form was true and correct. As all the documents, filed along with the petition, were presented as supporting evidence for a request of classification as an outstanding professor or researcher, the director properly adjudicated the petition pursuant to section 203(b)(1)(B) of the Act. Accordingly, the petitioner is precluded from requesting a change of classification on appeal. 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 (Assoc. Comm’r 1998). In addition, the Court of Appeals for 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, No. 06-55879, 286 F. Appx 963, 965 (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 petition covered the cost of the director's adjudication of the I-140 petition, in this case, for classification as "[a]n outstanding professor or researcher." Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356(m), 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.<sup>1</sup> If the petitioner now seeks to classify the beneficiary as "[a]n alien of extraordinary ability," pursuant to section 203(b)(1)(A) of the Act, then it must file a separate Form I-140 petition requesting the new classification. On appeal, counsel's reliance on *Roudnahal v. Ridge*, 310 F. Supp. 2d 884 (N.D. Ohio 2003), is misplaced. First, *Roudnahal* does not deal with a change of classification on a Form I-140 petition. Rather, *Roudnahal* deals with USCIS's duty to adjudicate Form I-485 applications. Second, *Roudnahal* is a U.S. district court case. Its holding is not binding precedent on the AAO. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). In short, counsel has cited 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 regulation at 8 C.F.R. § 103.2(b)(8)(i) provides in pertinent part: "If the record evidence establishes ineligibility, the benefit request will be denied on that basis." Furthermore, the regulation at 8 C.F.R. § 103.2(b)(8)(ii) provides in pertinent part: "If all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request for lack of initial evidence or for ineligibility . . . ."

The director concluded that the petitioner has not submitted the required initial evidence necessary to support a petition seeking to classify the beneficiary as an outstanding professor or researcher. Specifically, the director found that (1) the petitioner has not submitted sufficient evidence to show that it has offered the beneficiary a teaching position that is a tenured or tenure-track position, and (2) the petitioner has submitted no evidence in response to the director's RFE that shows the beneficiary has at least three years of experience in teaching and/or research in the academic field. Counsel does not contest this finding on appeal. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); see also *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

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.

---

<sup>1</sup> See [http://www.whitehouse.gov/omb/circulars\\_a025](http://www.whitehouse.gov/omb/circulars_a025).

**Order:** The appeal is dismissed.