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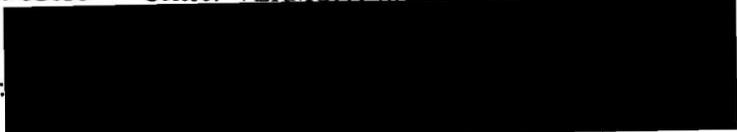
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FILE: EAC-02-158-52835 Office: VERMONT SERVICE CENTER Date: **SEP 06 2005**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


Robert F. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a research center, medical center and hospital. It seeks to employ the beneficiary permanently in the United States as a biochemical researcher. A Form ETA 750, Application for Alien Employment Certification bearing no Department of Labor certification accompanied the petition. The director determined that the petition required a labor certification denied the petition accordingly, without prejudice to the petitioner filing a new petition with a proper labor certification.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The I-140 petition was submitted on April 11, 2002. It was signed on behalf of the petitioner by an official who is identified in other documents in the record as the Deputy Director Obesity Research Center (hereinafter ORC Deputy) of the petitioner. On page one of the petition, Part 2, Petition type, an "x" was marked in the block beside item "e," for "A skilled worker (requiring at least two years of specialized training or experience) or professional." (I-140 petition, page 1). On page two of the petition, Part 5, Additional information about the petitioner, the petitioner claimed to have been established in 1855, to currently have "7,000 +/-" employees, to have a gross annual income of "\$942 Million +/-," and to have a net annual income of "\$5.51 M+- (Not For Profit)."

With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated July 22, 2002, the director requested an ETA 750 endorsed by the Department of Labor or a statement explaining which group of Schedule A occupations entitles the beneficiary to a blanket labor certification. The director also requested additional evidence relevant to the beneficiary's qualifications. The RFE set a deadline of October 17, 2002 for any response.

An initial response to the RFE was received by the director on August 7, 2002. That response consisted of a hand-written letter dated August 2, 2002 from counsel stating the following:

Please note that the I 140 requested, was [sic] for classification as First Preference (Extraordinary) or Second Preference (Exceptional). Please clarify if the case had been assessed per the above requests and found to be wanting or if it had mistakenly been immediately considered for third Pref. classification.

Kindly inform me in a timely way well before the October 17, '02 deadline.

(Letter from counsel, August 2, 2002, at 1).

The record contains no indication of any response by the director to counsel's request for clarification of the director's understanding of the preference category applicable to the instant petition.

A second response to the RFE was received by the director on October 9, 2002. Included in that response was a letter from the ORC Deputy dated September 27, 2002 in which he stated, "I'm writing this letter in support of the petition for [the beneficiary] who is petitioning in the category of a skilled worker or professional." (Letter from ORC Deputy, September 27, 2002, at 1). No letter from counsel accompanied the petitioner's second response to the RFE nor does the record contains any other communications from counsel, other than the hand-written letter dated August 2, 2002 which is quoted above.

Neither of the petitioner's two responses to the RFE included a Form ETA 750 certified by the Department of Labor.

In a decision dated February 10, 2003, the director noted the conflicting requests in the record concerning the category under which the petitioner was seeking classification of the beneficiary. The director noted that a petition may request only one classification and the director stated that the petition would be treated as a request for classification as a skilled worker or professional under section 203(b)(3) of the Act, which is the third preference category, pursuant to the statements of the petitioner's ORC Deputy. The director noted that the record lacked an individual labor certification from the Department of Labor, as required by the regulation at 8 C.F.R. § 204.5(l)(3). The director then denied the petition, without prejudice to the filing of a new petition submitted with the required labor certification.

The director stated that no appeal was authorized from the denial decision, in accordance with 8 C.F.R. § 103.1(f)(3)(iii)(B).

The petitioner then submitted a motion to reopen and reconsider, which was received by the director on April 2, 2003. The motion was signed by the petitioner's ORC Deputy. In that letter the ORC Deputy stated that the previous requests in the I-140 petition and in his own letter dated September 27, 2002 for classification under the third preference category had been administrative errors and that the petitioner's intention had been to request classification either in the first preference category or, alternatively, in the second preference category. The ORC Deputy asserted that the evidence in the record overwhelmingly established the beneficiary's extraordinary ability or, alternatively, that the beneficiary had exceptional ability or held a Master's degree and was doing work in the national interest of the United States.

In a decision dated September 30, 2003 the director granted the petitioner's request to reconsider the denial decision. The director stated the following:

When you submitted your petition, you typed an "X" in Part 2 of the petition indicating a request for third-preference skilled worker or professional. The petition was filed, we note, by a 7000-employee hospital represented by an experienced immigration attorney.

Your motion asserts that the supporting documents overwhelmingly make a case for classification as an alien of extraordinary ability or for classification as an alien of exceptional ability whose work is in the national interest. We do not agree. The beneficiary is the recipient of a 2001 medical degree, and she is offered employment as a researcher at your hospital at a salary of \$15,000 yearly on a full-time basis, according to your petition's Application for Alien Employment Certification. While we are aware that researcher salaries in nonprofit institutions are modest, the salary offered to the present beneficiary is nonetheless remarkably modest. That fact, in conjunction with her recent medical degree, does not in our judgment, make a strong argument for treating the petition as a request for first-preference or second-preference classification.

(Director's decision, September 30, 2003, at 1).

The petitioner then submitted to the director a second motion to reopen or reconsider in the form of a letter dated October 23, 2003, signed by the ORC Deputy. The letter explained the beneficiary's current salary and a planned raise in salary, and requested a favorable decision on the petition. The letter was supported by documentation pertaining to the beneficiary's salary and her education. The letter and supporting documents were initially received by the director on October 24, 2003, but were returned to the petitioner for lack of payment of a \$110.00 filing fee which was required for a motion to reopen or to reconsider. The letter and supporting documents were then resubmitted with the filing fee, and were received by the director on November 12, 2003.

In a decision dated March 26, 2004 the director dismissed the petitioner's motion filed on November 12, 2003. In his decision the director stated the following:

Your motion makes the following statements:

- 1) The beneficiary is requesting "classification as a researcher who has the equivalency of a Bachelor of Science degree in Biochemistry and not as someone with a medical degree" as we described her in our denial.
- 2) The beneficiary is now earning \$14.32 hourly, which translates into a yearly full-time salary of about \$26,062.

In summary, you defend your petition with an explanation that the beneficiary has a lower degree than we described her as having, and by explaining that her salary has increased from \$15,000 to more than \$26,000 since the petition was filed. However, we denied your petition as a third-preference petition lacking a labor certification and we mentioned only in passing that the beneficiary's credentials and achievements did not appear to qualify her for a classification having more restrictive criteria. Your motion addresses issues that are essentially immaterial to the grounds for denial.

(Directors decision, March 26, 2004, at 1-2).

The director therefore dismissed the motion.

The petitioner filed a third motion to reopen or reconsider on April 27, 2004, in the form of a letter dated April 9, 2004. Like the previous letters, the letter was signed by the petitioner's ORC Deputy. The first sentence of the letter states as follows: "Please reopen and reconsider your letter dated March 26, 2004 regarding the petition to classify the beneficiary as an 'extraordinary chef' under section 203(b)(1)(A) of the Immigration and Nationality Act." (Letter from ORC Deputy, April 9, 2004, at 1). The reference to "extraordinary chef" is an apparent error, since all evidence in the record indicates that the offered position is as a biochemical researcher.

The April 9, 2004 letter repeats the petitioner's earlier assertions concerning an error in the director's decision of September 30, 2003 in which the director stated that the beneficiary had a medical degree, rather than a bachelor's degree in biochemistry. The April 9, 2004 letter asserts that the petitioner's evidence concerning the beneficiary's education is material to the reasons for the denial of the petition. The letter then presents information in support of the petitioner's claim that the beneficiary should be classified as "extraordinary," including information summarizing research papers of the beneficiary. (Letter from ORC Deputy, April 9, 2004, at 3).

In an undated decision, the director dismissed the petitioner's motion filed on April 27, 2004. A hand-written note attached to the file copy of the decision states that the decision was sent on July 26, 2004, a date which is confirmed by CIS electronic records showing a mailing of a denial notice on that date. In his decision, the director stated as follows:

Title 8, Code of Federal Regulations, part 103.5 provides that a motion to reopen must state new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. Further, a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or Service policy.

Your motion does not provide new facts to be proved nor does it give reasons for reconsideration. Therefore your motion is hereby dismissed per 8 CFR 103.5(a)(4).

(Director's decision, [July 26, 2004], at 1).

The petitioner filed a Form I-290B Notice of Appeal on August 25, 2004. The notice is signed by the petitioner's ORC Deputy. The notice states that it is an appeal from the decision dated "July 23, 2004." However, nothing in the record indicates any decision by the director issued on that date. Rather, the most recent decision of the director is the decision dismissing the petitioner's third motion to reopen or reconsider, a decision which CIS electronic records show to have been mailed on July 26, 2004.

The initial issue before the AAO is whether the AAO has jurisdiction over the appeal of the director's denial of the petitioner's third motion to reopen or reconsider. As noted above, the underlying decision of the director on the merits of the petition was issued on February 10, 2003. That decision was a denial of the petition on the grounds that the petition was seeking third preference classification but that which no individual labor certification had been issued.

In the director's decision of February 10, 2003 denying the petition, the director stated that no appeal was authorized from the decision, in accordance with 8 C.F.R. § 103.1(f)(3)(iii)(B). That subsection of the regulations gave the Associate Commissioner for Examinations appellate jurisdiction over decisions on "Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under §§ 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act ; . . ." 8 C.F.R. § 103.1(f)(3)(iii)(B) (January 1, 2003 ed.). In the regulations in effect at the time of the director's decision, the Associate Commissioner for Examinations was given supervisory authority over the director of the AAO. See 8 C.F.R. § 103.1(f)(3)(i) (January 1, 2003 ed.).

The regulations granting jurisdiction for administrative appeals have been revised since the director's decision in order to conform with the new organizational structure of the Department of Homeland Security. However, the jurisdictional provision cited by the director has been retained through its incorporation by reference, along with other jurisdictional provisions, in the relevant delegation of authority from the Secretary, Department of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

In the instant case, the original decision was a denial of an employment-based third preference immigrant visa petition because of the lack of an individual labor certification. That decision falls within the exception clause in the regulatory provision which grants appellate jurisdiction over employment-based immigrant visa decisions. The exception clause states, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act: . . ." 8 C.F.R. § 103.1(f)(3)(iii) (January 1, 2003 ed.).

The instant appeal is from a decision to deny a motion to reopen or to reconsider. The regulation at 8 C.F.R. § 103.5(a)(6) states as follows: "A field office decision made as a result of a motion may be applied [sic] to the [AAO] only if the original decision was appealable to the [AAO]."

Since the original decision in the instant case was not appealable to the AAO, the decision of July 26, 2004 denying the petitioner's motion to reopen or to reconsider is also not appealable to the AAO. 8 C.F.R. § 103.5a(a)(6). For the foregoing reasons, the AAO lacks jurisdiction over the instant appeal. The appeal therefore must be rejected.

In the petitioner's repeated motions, the petitioner asserts that the petition was not in fact intended to be a third preference petition for a skilled worker or a professional. The petitioner asserts in essence that the director was put on notice by the nature of the evidence in the case that the petitioner's designation of the petition as one for a skilled worker or professional, by checking block "e" on the I-140 petition, was an administrative error. Presumably the petitioner believes that if the petition had been treated as one for a preference category which does not require an individual labor certification the director's denial of the petition would have been administratively appealable, and moreover, that the evidence would establish that the petition should be approved. The petitioner's submissions, however, do not explain the petitioner's reasoning, and the evidence submitted for the record by the petitioner is replete with errors and inconsistencies.

Prior to the director's initial decision denying the petition the record contained inconsistent requests concerning the classification category. On the petition, the box for skilled workers and professionals was checked, which is a third preference category. Counsel later requested that the petition be classified as "First Preference (Extraordinary) or Second Preference (Exceptional)." Still later, the petitioner's ORC Deputy requested classification in the category for skilled workers and professionals. It was therefore reasonable for the director to treat the petition as a third preference petition for a skilled worker or a professional, notwithstanding the fact that the record contained evidence summarizing the beneficiary's research work, evidence which might be relevant to a first preference or second preference classification.

After the director's initial decision of March 26, 2004, the petitioner submitted repeated motions, and the evidence submitted in support of those motions contained further errors and inconsistencies.

In a letter dated February 26, 2003, the petitioner's ORC Deputy states that the evidence "supported a case for extraordinary talent and ability or alternatively (as allowed in various approved paperwork) exceptional talent and ability or a Master's Degree (proof of which the beneficiary has submitted), whose work is in the national interest of the US." (Letter from ORC Deputy, February 26, 2003, at 1). The ORC Deputy fails to state in which of those categories the petitioner seeks classification. Moreover the ambiguous grammar leaves uncertain whether the parenthetical phrase "(proof of which the beneficiary has submitted)" refers to proof of a Master's degree held by the beneficiary or to proof of the beneficiary's exceptional ability. No evidence in the record shows a Master's degree held by the beneficiary. Rather, the record indicates studies of the beneficiary in Belgium which are evaluated as equivalent to a U.S. bachelor's degree, plus several months of medical school studies in Granada, West Indies, resulting in no degree or certificate.

An amended page one of the instant I-140 petition submitted with the letter dated February 26, 2003 contains a further inconsistency. Although the form instructs that only one classification category be checked, the petitioner checked both block "a", for "An alien of extraordinary ability," and block "i," for "An alien applying for a national interest waiver (who is a member of the professions holding an advanced degree or an alien of exceptional ability)." Below the check boxes the petitioner wrote the word "Alternatively." (Amended page one, I-140 petition).

By checking two blocks on the amended page one of the I-140 petition, the petitioner failed to comply with the instructions on the form which require that only a single block be checked. Instructions on CIS petitions are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

A further inconsistency in the petitioner's documentation is found in a letter dated April 9, 2004 from the petitioner's ORC Deputy in which the ORC Deputy requests classification of the beneficiary as an "extraordinary chef," even though all of the other evidence in the record indicates that the offered job is as a medical researcher.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

For the foregoing reasons, the evidence in the record fails to support the petitioner's contention that the director made an error in treating the petition as a third preference petition for a skilled worker or professional. That category requires either an individual labor certification or evidence that the offered position is a Schedule A occupation for which the Department of Labor has made a blanket labor certification. *See* INA § 203(b)(3)(C), 8 U.S.C. § 1153(b)(3)(A)(i). The offered position of medical researcher is not a Schedule A occupation and the record lacks an individual labor certification.

The decision of the director of February 10, 2003 to deny the petition for lack of an individual labor certification was not an appealable decision. Therefore the AAO lacks jurisdiction over the appeal of the director's decision dated July 26, 2004 denying the petitioner's motion to reopen and reconsider the director's earlier decision.

One error was made by the director in the course of the proceedings below. In the director's decision dated September 30, 2003 on the petitioner's first motion to reopen and reconsider, the director stated that the beneficiary held a medical degree. However, as noted above, the record indicates that the only degree held by the beneficiary is a degree obtained in Belgium which is evaluated as equivalent to a U.S. bachelor's degree. The Form ETA 750B states that the beneficiary attended medical school in Granada from August 2001 until November 2001, but it states that no certificate or degree was awarded as a result of those studies. The director's statement that the beneficiary holds a medical degree was therefore not supported by the record. That error, however, is not material to the director's decision, since the grounds for the denial of the petition were the absence from the record of an individual labor certification.

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 met that burden.

ORDER: The appeal is rejected.