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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 08 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[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.

for Marie Johnson
Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, California Service Center. The director later determined that the petition was not properly filed, and thus should not have been approved. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on . The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The director denied the petition because an alien cannot self-petition under this classification.

Citizenship and Immigration Services regulations at 8 C.F.R. § 204.5(i)(1) state "[a]ny United States employer . . . may file an I-140 visa petition" to classify an alien worker as an outstanding professor or researcher. 8 C.F.R. § 204.5(c) lists some classifications under which an alien may self-petition, but it also specifies that only a United States employer may file a petition under section 203(b)(1)(B) of the Act. Similar language appears at section 204(a)(1)(F) of the Act.

On January 24, 1997, the petitioner filed his Form I-140 petition on his own behalf. Part 2 of the petition form lists seven different petition types, including "An alien of extraordinary ability" and "An outstanding professor or researcher." The box beside the latter category was checked. The director approved the petition a few weeks later, on February 12, 1997, and the petitioner applied for adjustment to permanent resident status.

On May 5, 1999, in conjunction with the adjustment application, the acting district director, San Francisco, requested evidence that an alien is permitted to self-petition under the outstanding researcher classification. In response, the petitioner stated "[m]y understanding is that the preliminary approval of my case was based on 'Outstanding professor or Researcher, Sec. 203(b)(1)(B). . . . Waiver of job offer could be found at (2)(B) of the following paragraph." The petitioner also submitted a partial photocopy of 8 U.S.C. § 1153, with passages from various sub-sections circled in red ink. The circled passages read:

> (1) Priority workers.
>
> (B) Outstanding professors and researchers.
>
> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.
>
> (B) Waiver of job offer. The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner also submits background information, from an immigration attorney's web site, regarding the national interest waiver of the job offer requirement.

The highlighted passages relate to different immigrant visa classifications, rather than to a single all-encompassing "priority workers" classification. The national interest waiver relates to a separate classification, described at section 203(b)(2) of the Act. The job offer requirement for outstanding professors and researchers is not subject to this waiver.

On August 8, 2003, the director issued a notice of intent to revoke, stating that the petition was not filed by a qualifying United States employer, and therefore the petition was not properly filed and should not have been approved. The director cited 8 C.F.R. § 204.5(c), which indicates that only a United States employer may file a petition seeking to classify an alien under section 203(b)(1)(B) of the Act.

In response to the notice, counsel stated "Petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act . . . as an alien of extraordinary ability as a Professor/Researcher category [sic]." Counsel then reproduces sections 203(b)(1)(A) and (B) of the Act. Counsel appears to be confused regarding the relationship between these two sections of law. These two sections do not pertain to the same immigrant classification, despite counsel's apparent contention that the "outstanding professors and researchers" classification is not a subset of the "aliens with extraordinary ability" classification. Sections 203(b)(1)(A) and (B) of the Act refer to two entirely distinct classifications, with requirements that, despite some common factors, are far from identical. These two classifications are governed by separate regulations, respectively at 8 C.F.R. §§ 204.5(h) and (i). The I-140 petition form does not indicate that the petitioner seeks classification as an alien of extraordinary ability; rather, it indicates that he seeks the distinct and separate classification of outstanding professor or researcher.

Counsel added "Petitioner asserts that in reliance on CSC's approval of his . . . Petition . . . , he was exempted from the requirement of a job offer and thus that of a labor certification. . . . [I]t is not petitioner's fault to proceed with the adjustment of status [sic]." The job offer requirement under section 203(b)(1)(B) of the Act is not subject to any waiver. The petitioner mistakenly believed that there was such a waiver, because he read an unrelated section of the Act out of context. The petitioner's misunderstanding of the law does not create any presumption or obligation in his favor. With regard to the petitioner's "reliance" on the prior approval of the petition, the approval of a visa petition vests no rights in the beneficiary of the petition but is only a preliminary step in the visa or adjustment of status application process, and the beneficiary is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status. The realization that a petition was approved in error can, if supported by the record, be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Counsel also claimed that "petitioner is grossly prejudiced due to the time lapsed." Section 205 of the Act, 8 U.S.C. § 1155, indicates that the approval of a petition may be revoked "at any time."

The director revoked the approval of the petition on October 8, 2003, because an alien cannot self-petition for classification as an outstanding professor or researcher. The director acknowledged that an alien can self-petition for classification as an alien of extraordinary ability, but the petitioner did not seek that classification.

On appeal, petitioner maintains that his prior attorney, Stanley K. Yim, who prepared the petition form, checked the wrong box on the petition form. Mr. Yim, however, also referred to the "outstanding professors and researchers" classification in a cover letter submitted with the petition. The initial filing, prepared by Mr. Yim, contains no ambiguity as to which classification the petitioner sought in that proceeding, notwithstanding present counsel's seeming misconception that "outstanding professor or researcher" and "alien with extraordinary ability" are the same classification. In a letter dated May 27, 1999, the petitioner himself had indicated "[m]y understanding is that the preliminary approval of my case was based on 'Outstanding professor or Researcher,' Sec. 203(b)(1)(B)." Thus, the petitioner has had numerous opportunities to allege error on the part of his original attorney, but he did not do so until the appeal.

Also, given the petitioner's allegation of error by his prior counsel, it is relevant to observe that the petitioner's present attorney of record has referred to "alien of extraordinary ability" and "outstanding professor or researcher" as though the terms were interchangeable, which they are not. Counsel has also invoked the national

interest waiver, which applies to still another classification. There is no evidence that the initial attorney had confused three distinct classifications in this way.

We cannot, at the appellate stage, arbitrarily change the classification of a petition wrongly approved under a different classification. The different classifications have different standards of eligibility. The petitioner, at the filing stage, never requested consideration as an alien of extraordinary ability, and the director never adjudicated the petition under the standards of that classification. Therefore, there is no basis for reinstating the approval of the petition, under a new classification.

Counsel states that the petitioner "should not suffer and be punished for the Service's error." The only "error" we can find in the record is that the petition was improperly approved in the first instance. Revoking that erroneous approval is the proper remedy for that error. This revocation is not a "punishment" being visited upon the petitioner, because it is no punishment to be denied benefits to which one is not entitled. Revocation is a corrective measure, not a punitive measure.

Counsel and the petitioner understandably protest the fact that nearly seven years have elapsed between the approval and the revocation, and the record offers no explanation for this extraordinary delay, particularly when one considers that the acting district director, San Francisco, was aware of a problem as early as May 1999. Nevertheless, the statute (cited above) specifically allows for revocation "at any time," and the pertinent regulations are silent as to the issue of elapsed time. We have no statutory or regulatory basis to conclude that the passage of time mitigates, in any way, the clear grounds for revocation in this matter. The AAO's appellate review in this proceeding is limited to whether the revocation was warranted. The claimed personal and professional consequences of the revocation are immaterial to that question.

By law, an alien may not self-petition for classification as an outstanding professor or researcher. It should never have been approved, and the director, upon learning of this error, essentially had no choice but to revoke the erroneous approval. The director acted appropriately, albeit belatedly, and the appeal must be dismissed.

This decision is without prejudice to a new petition properly filed, with the appropriate fee and supporting evidence, by a qualifying United States employer. Because this decision rests entirely on technical grounds, the AAO takes no position at this time regarding whether, as of early 2004, the alien possesses the international recognition required by law to qualify as an outstanding researcher.

ORDER: The appeal is dismissed.