



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

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 26529813

Date: MAY 04, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on behalf of himself under the third-preference, immigrant classification as a member of the professions. See Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner is eligible to file an immigrant visa petition under section 203(b)(3)(A)(ii) of the Act. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

The central issue in this proceeding involves the classification sought. The Petitioner filed the Form I-140 marking the box 1.e. in Part 2 for the requested classification as a professional. The Director determined that the Petitioner had not established qualification for classification as a professional. The Director's decision explains that the petition was not accompanied by the required labor certification from the U.S. Department of Labor (DOL), an application for Schedule A designation, or documentation establishing qualification for one of the shortage occupations in the DOL's Labor Market Information Pilot Program. See 8 C.F.R. § 204.5(l)(3). The Director also found that the Petitioner was not eligible for the professional classification under section 203(b)(3)(A)(ii) since a U.S. employer did not file the petition, instead the Petitioner and the Beneficiary are the same individual. See 8 C.F.R. § 204.5(c).

For this appeal, the Petitioner states the Form I-140 petition had "a mistake" and Part 2 should have indicated the requested classification at box 1.h. in Part 2 of the petition, "an NIW (who IS a member of the professions holding an advanced degree or an alien of exceptional ability)." The Petitioner submits a new Form I-140 with the corrected classification.

According to the filing requirements for applications and petitions found at 8 C.F.R. § 103.2(b)(I),

. . . [a]n applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The Form I-140 petition initially received by USCIS was clearly marked under Part 2 as a petition filed for classification as “a professional.” The Petitioner signed the Form I-140 under penalty of perjury, attesting that the information on the form was correct. The petition lacked accompanying documentation indicating the Petitioner sought a different classification. Moreover, the initial petition is incomplete as much of requested information was not provided. As such, the record does not establish that the Petitioner marking the box for a professional was a simple scrivener’s error. Therefore, we agree with the Director’s denial of the petition for failing to provide the required initial evidence.

The Petitioner on appeal requests consideration for a new classification, an employment-based second preference immigrant classification as a member of the professions holding an advanced degree and/or an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification pursuant to section 203(b)(2) of the Act. The Petitioner submitted a new Form I-140 with the appeal marking the corrected classification. We note that this new form also is incomplete.

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. 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, 2008 WL 2743927 (9th Cir. July 10, 2008).

To seek a different visa classification from the petition initially filed and adjudicated by USCIS, the Petitioner must file a separate Form I-140 petition requesting the new classification.

A review of the record does not establish that the Petitioner is eligible for the classification as a professional under section 203(b)(3)(A)(ii) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.