U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-L-J-

DATE: DEC. 23, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a nurse practitioner, seeks classification as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the immigrant visa petition. We rejected a subsequent appeal. The matter is now before us on motions to reopen and reconsider. The motions will be denied.

The Petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The Director found that the Petitioner does not qualify for classification as an alien of exceptional ability, and that she has not established that a waiver of a job offer would be in the national interest. We rejected the Petitioner's appeal as untimely filed on May 18, 2015.

On motion, the Petitioner submits a brief and additional evidence. The Petitioner asserts that our decision rejecting the appeal as untimely was in error and should be reconsidered. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions or legal citation to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must submit the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The regulation at 8 C.F.R. § 1.2 explains that when the last day of a period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. The date of filing is not the date of submission, but the date of actual receipt with the proper signature and the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i). The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*) provides that an appeal that is not filed within the time allowed must be rejected as improperly filed.

The record indicates that the Director issued the unfavorable decision February 10, 2015. The Director properly gave notice to the Petitioner that she had 33 days to file the appeal. As the Director served the decision by mail, the regulation at 8 C.F.R. § 103.8(b) and 8 C.F.R. § 1.2 apply, and the appeal should have been filed on or before Monday, March 16, 2015, the next business day after the 33rd day of the Director's service of the decision by mail. Neither the Immigration and Nationality Act nor the pertinent regulations grant us authority to extend the time limit to file an appeal. The Form I-290B, Notice of Appeal or Motion, was received by USCIS on Tuesday, March 17, 2015, 35 days after the Director served the decision by mail. Accordingly, as the Form I-290B was untimely filed, we rejected the appeal as improperly filed.

The Petitioner asserts that the mailbox rule "should be applicable" in her case and, therefore, her appeal should have been considered filed at the time that it was mailed. Again, the regulation at 8 C.F.R. § 103.2(a)(7)(i) provides that the date of filing is not the date of mailing, but the date of actual receipt with the proper signature and the required fee. As the Director's decision was mailed, the Petitioner was afforded an additional three days to file the appeal pursuant to the regulation at 8 C.F.R. § 103.8(b). Furthermore, as the 33rd day of the filing period occurred on a Sunday, the Petitioner was permitted to file the appeal on the 34th day, Monday, March 16, 2015. In this instance, however, USCIS did not receive the Petitioner's appeal until the 35th day, Tuesday, March 17, 2015.

The Petitioner asserts that her "case presents exceptional circumstances" and that the matter should be reopened and reconsidered. The Petitioner cites *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (holding that the Board's power to reopen or reconsider cases sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship); *Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005) (holding that the Board abused its discretion in finding that it did not have authority to extend the time in which an individual must file his Notice of Appeal from a Decision of an Immigration Judge); and *Zhong Guang Sun v. U.S. Dep't of Justice*, 421 F.3d 105 (2d Cir. 2005) (holding that an overnight delivery service's failure to timely deliver a Notice of Appeal can constitute an extraordinary circumstance excusing an individual's failure to comply with the 30-day time limit for filing an appeal).

However, in *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006), the BIA, applying the courts' findings in *Oh* and *Zhong Guang Sun*, held that even if the appeal was delayed by an overnight delivery service, the error would not automatically warrant special consideration of the appeal. Furthermore, unlike the BIA, whose *Practice Manual* provides an exception for untimely filings "in rare circumstances," we have no similar provision for delays in delivery. Additionally, as the BIA in *Liadov* did not find that an appeal placed with an overnight courier service 48 hours before the filing deadline constituted a "rare circumstance," we similarly cannot conclude that an exception is warranted in the present matter where the Petitioner placed her appeal with the U.S. Postal Service (USPS) on Saturday afternoon expecting a delivery on the following Monday, the final day for submission of her appeal. In *Liadov*, the BIA noted that its *Practice Manual* warns parties to "anticipate all Post Office and courier delays." Like the BIA, "we do not find the fact that delivery

was a day or 2 past the 'guaranteed' date to be a 'rare' circumstance that would excuse the late filing. Such delays are not 'extraordinary' events." *Id.* at 992.

With regard to following the regulations concerning filing a timely appeal, it is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. *Bridges v. Wixon*, 326 U.S. 135, 153 (1945); *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Matter of A-*, 3 I&N Dec. 714 (BIA 1949); *cf. Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984); *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980). *See also Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission,* 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). Furthermore, an agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner,* 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures).

The legal citations provided by the Petitioner do not demonstrate that our latest decision was based on an incorrect application of law, regulation, or USCIS policy. In addition, the motion does not establish that our decision was incorrect based on the evidence of record at the time of the decision. Accordingly, the motion to reconsider is denied.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

On motion, the Petitioner provides a copy of the USPS shipping label for the I-290B submission that reflects "2-day" service with a "Scheduled Delivery Date" of March 16, 2015. In addition, she submits a payment receipt indicating a "Scheduled Delivery Day" of March 16, 2015. The aforementioned evidence, however, does not establish that USCIS received the Form I-290B within the time period permitted by the regulations. The Petitioner must overcome the basis for rejection of her untimely appeal before we will revisit the merits of any earlier decision. For example, if the Petitioner had submitted evidence demonstrating that the Form I-290B was received by USCIS on or before March 16, 2015, and that we erred in rejecting the appeal as untimely, then there would be a proper basis for withdrawing our May 2015 decision. The Petitioner has not done so in this proceeding. The Petitioner has not submitted any evidence showing that her appeal was timely or that we should not have rejected the late appeal. In this matter, the motion to reopen does not include any new facts or other documentary evidence to overcome the grounds underlying our previous findings. Accordingly, the motion to reopen is denied.

Even if the appeal had been timely filed, the submitted evidence did not establish the Petitioner's eligibility for the national interest waiver, and the appeal would have been dismissed.

I. LAW

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements 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 regulation at 8 C.F.R. § 204.5(k)(2) states, in pertinent part:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above the baccalaureate level.
>
> . . . .
>
> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

II. ISSUES

The Director determined that the Petitioner did not qualify for classification as an alien of exceptional ability, and that she had not established that a waiver of a job offer would be in the national interest. The Petitioner received a Master of Science in Nursing degree from [redacted] in 2013. According to the U.S. Department of Labor's *Occupational Outlook Handbook* (*OOH*), 2014-15 Edition, nurse practitioners must earn at least a master's degree for entry into their occupation. *See* http://www.bls.gov/ooh/healthcare/nurse-anesthetists-nurse-midwives-and-nurse-practitioners.htm,

accessed on December 17, 2015, copy incorporated into the record of proceedings. Accordingly, as the Petitioner qualifies as a member of the professions holding an advanced degree, the issue of her exeptional ability is moot. The remaining issue is whether the Petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." *Matter of New York State Dep't of Transp. (NYSDOT)*, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must demonstrate that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must show that she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

The Petitioner has established that her work as a nurse practitioner is in an area of substantial intrinsic merit. It remains, then, to determine whether the proposed benefits of the Petitioner's work will be national in scope and whether she will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Although the national interest waiver hinges on prospective national benefit, the petitioner must establish her past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that she will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the petitioner, rather than to facilitate the entry of an individual with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

Furthermore, eligibility for the waiver must rest with the petitioner's own qualifications rather than with the position sought. Assertions regarding the overall importance of a petitioner's area of expertise cannot suffice to establish eligibility for a national interest waiver. *Id.* at 220. At issue is whether the petitioner's contributions in the field are of such significance that she merits the special benefit of a national interest waiver, a benefit separate and distinct from the visa classification she seeks. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

III. FACTS AND ANALYSIS

A. National in Scope

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on May 27, 2014. She indicated that her work as a nurse practitioner is in the national interest of the United States. The second prong of the *NYSDOT* national interest analysis requires that the benefit arising from the Petitioner's work will be national in scope. The Petitioner submitted an October 2014 letter from

[redacted] Assistant Professor, [redacted] stating:

> The role of Primary Care Nurse Practitioner [NP] is in very high demand specifically related to the Affordable Care Act of 2010. There is growing need for primary care in the underserved, poor areas in the U.S. which the Affordable Care Act of 2010 when fully implemented will address. NPs like [the Petitioner] are needed in these underserved, poor areas for example New Mexico to alleviate the maldistribution and shortage of primary care providers. [The Petitioner] being a woman of color will further enhances [*sic*] her ability to work in this population to meet their health care needs.

[redacted] mentioned the "shortage of primary care providers" in "underserved, poor areas." The U.S. Department of Labor (DOL) addresses worker shortages through the labor certification process, and therefore an asserted shortage alone is not sufficient to demonstrate eligibility for the national interest waiver. *See NYSDOT*, 22 I&N Dec. at 218. Furthermore, the Nursing Relief for Disadvantaged Areas Act of 1999, P.L. 105-95, 113 Stat. 1312 (Nov. 12, 1999) created a nonimmigrant classification for nurses in health professional shortage areas. Notably, this act also created the national interest waiver for physicians serving in underserved areas. The act did not, however, mention nurses in the context of the national interest waiver while expressly amending that provision for physicians.

DOL has designated nurses as an occupation in which "there are not sufficient United States workers who are able, willing, qualified, and available," defined as Schedule A Group I. 20 C.F.R. § 656.5(a)(2). Employers wishing to hire nurses already undergo an expedited process that bypasses the DOL pursuant to 20 C.F.R. § 656.5(a)(2). An employer seeking labor certification for a Schedule A occupation may apply directly with USCIS rather than DOL pursuant to 20 C.F.R. § 656.15. Therefore, the labor certification process for which the Petitioner seeks a waiver is already expedited through the Schedule A, Group I process. The Petitioner has not explained how waiving that process is in the national interest. Moreover, the Petitioner has not shown that providing nursing services in her geographic area will translate into benefits for the United States that are national in scope.

In addition, [redacted] stated that the Petitioner's ethnicity enhances her ability to work in underserved, poor areas. While diversity among health care providers may improve service to underserved populations, the Petitioner's ethnicity is not evidence that she has or will make an impact on the field of nursing other than to benefit her specific patients, which, while having intrinsic merit, is not national in scope. The Petitioner has not shown that her nursing services demonstrate prospective benefits on a national level. *NYSDOT* provides examples of employment where the benefits would not be national in scope:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national

> interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act.

NYSDOT, 22 I&N Dec. at 217, n.3. The Petitioner has not established that her work with patients will produce national benefits in the field of nursing. The record does not demonstrate that her proposed employment is within a framework that has a national impact, such as the proper maintenance of bridges and roads already connected to the national transportation system that was the subject of *NYSDOT*. *See NYSDOT,* 22 I&N Dec. at 217. Accordingly, the Petitioner has not established that the proposed benefits of her work will be national in scope.

B. Serving the National Interest

The Petitioner initially submitted documentation pertaining to her exceptional ability as a nurse practitioner. For example, the Petitioner provided her Master of Science in Nursing degree, Bachelor of Science in Nursing degree, academic transcript from [redacted] nurse practitioner certification from the Maryland Board of Nursing, and membership in the American Association of Nurse Practitioners. Academic records, licenses, and professional memberships are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), and (E), respectively. However, in this matter, the Petitioner must also demonstrate eligibility for the additional benefit of the national interest waiver.

We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Pursuant to section 203(b)(2)(A) of the Act, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. *NYSDOT*, 22 I&N Dec. at 218, 222. Therefore, whether a given individual seeks classification as an alien of exceptional ability or as a member of the professions holding an advanced degree, that individual cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in her field of expertise. The national interest waiver is an additional benefit, separate from the classification sought, and therefore eligibility for the underlying classification does not demonstrate eligibility for the additional benefit of the waiver. Without evidence showing that the Petitioner's work has influenced the field as a whole, we cannot conclude that she has demonstrated eligibility for the national interest waiver. *See id,*. at 219, n. 6.

The Petitioner provided various reference letters discussing her activities in the field. For example, [redacted] Vice President for Student Affairs at [redacted] stated:

> [The Petitioner] was a dedicated student and during her Curricular Practical Training and her Optional Practical Training she learned effectiveness in delivering high quality, lower cost health care services for numerous health care needs. Her work with the underprivileged and clients with special needs is admirable.

While [redacted] indicated that the Petitioner's practical training enabled her to effectively deliver quality service to her underprivileged patients and special needs clients, there is no documentary evidence showing that Petitioner's work has influenced the nursing field as a whole or has otherwise affected the field at a level that would justify a waiver of the job offer requirement.

[redacted] an adjunct faculty at [redacted] asserted that health care providers "like [the Petitioner] are needed in [the] U.S. and will potentially make ground-breaking contributions to reducing health care cost which is a national interest," but there is no evidence demonstrating that the Petitioner's work has already had such an effect or has otherwise affected the field as a whole. Speculation about possible future impact of the Petitioner's work does not establish that she had already influenced the field at the time of filing. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In addition, [redacted] mentioned the importance of the nurse practitioner profession and the "unequal distribution of health care services in the United States." General statements regarding the importance of a given field of endeavor, or the urgency of an issue facing the United States, cannot by themselves establish that an individual benefits the national interest by virtue of engaging in the field. *NYSDOT*, 22 I&N Dec. at 217. Such information addresses only the "substantial intrinsic merit" prong of *NYSDOT*'s national interest test. We do not dispute the importance of having qualified nurse practitioners working in our nation's healthcare facilities. At issue in this matter, however, is whether the Petitioner's individual contributions in the field are of such significance that she merits the special benefit of a national interest waiver.

[redacted] a nurse practitioner at [redacted] and a clinical preceptor for several colleges and universities in Maryland, stated:

> During her studies and clinical practice here with me at [redacted] [the Petitioner] had the opportunity to work and learn to provide professional services to the underprivileged and clients with special needs that need either short-term or long-term care of a skilled and caring practitioner. [The Petitioner] was able to bridge the gap and became an integral part of the health care team at our facility. She advanced from working one on one to working with and being responsible for an entire unit in the facility. [The Petitioner] was able to become the gatekeeper of the services for the patient population she was responsible for.

Although [redacted] described the Petitioner's work serving the patients at [redacted] she did not explain how the Petitioner's activities have had a wider impact outside of the facility or have otherwise affected the field as a whole. In addition, [redacted] Medical Director the Comprehensive Psychiatric Emergency Program at the [redacted] asserted that the Petitioner "has the necessary professionalism and academic competence for success in her field of practice," but did not provide specific examples of how the Petitioner's work has influenced the field of nursing as a whole.

The Petitioner submitted letters of varying probative value. We have addressed the specific assertions above. Generalized conclusory assertions that do not identify specific contributions or their impact in

the field have little probative value. *See 1756, Inc. v. U.S. Att'y Gen.*, 745 F. Supp. 9, 15 (D.D.C. 1990) (holding that an agency need not credit conclusory assertions in immigration benefits adjudications). In addition, uncorroborated assertions are insufficient. *See Visinscaia v. Beers*, 4 F.Supp.3d 126, 134-35 (D.D.C. 2013) (upholding USCIS' decision to give limited weight to uncorroborated assertions from practitioners in the field); *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (holding that an agency "may, in its discretion, use as advisory opinions statements . . . submitted in evidence as expert testimony," but is ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought and "is not required to accept or may give less weight" to evidence that is "in any way questionable"). The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the petitioner's eligibility. *Id. See also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). As the submitted reference letters did not establish that the Petitioner's work has influenced the field as a whole, they do not demonstrate her eligibility for the national interest waiver.

IV. CONCLUSION

Considering the letters and other evidence in the aggregate, the record does not establish that the benefits of the Petitioner's work are national in scope, that she has influenced the field as a whole, or that she will otherwise serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. A plain reading of the statute indicates that it was not the intent of Congress that every advanced degree professional or alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. The Petitioner has not shown that her past record of achievement is at a level sufficient to waive the job offer requirement which, by law, normally attaches to the visa classification sought. Although the Petitioner need not demonstrate notoriety on the scale of national acclaim, she must have "a past history of demonstrable achievement with some degree of influence on the field as a whole." *See NYSDOT*, 22 I&N Dec. at 219, n.6. On the basis of the evidence submitted, the Petitioner has not established that a waiver of the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

As the evidence provided in support of the motion to reopen does not overcome the grounds underlying our previous decision, and the motion to reconsider is not supported by any pertinent precedent decisions or legal citations that demonstrate our latest decision was based on an incorrect application of law or USCIS policy, the motions are denied. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of T-L-J-*, ID# 14838 (AAO Dec. 23, 2015)