U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-J-T-

DATE: APR. 19, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an oil and gas well field superintendent, 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). In addition, the Petitioner seeks a national interest waiver of the job offer requirement that is normally attached to this classification. *See* § 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). This discretionary waiver allows U.S. Citizenship and Immigration Services (USCIS) to provide an exemption from the requirement of a job offer, and thus a labor certification, when doing so serves the national interest.

The Director, Texas Service Center, denied the petition and a subsequent motion to reconsider. We dismissed the Petitioner's appeal, finding that she established her eligibility as an advanced degree professional, but did not establish that a waiver of the job offer requirement is in the national interest.

The matter is now before us on a motion to reconsider. In her brief, the Petitioner contends that our interpretation of the eligibility requirements for a national interest waiver is incorrect and invalid. She alternately argues that her previously submitted evidence satisfies the requirements in question.

We will deny the motion.

I. LAW

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 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).

A motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

To establish eligibility for a national interest waiver, a petitioner must first demonstrate his or her qualification for the underlying visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences arts or business. Because this classification normally requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

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) National interest waiver. . . . 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.[1]

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." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Matter of New York State Department of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must demonstrate that he or she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must show that

[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he or 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.

While the national interest waiver hinges on prospective national benefit, a petitioner's assurance that he or she will, in the future, serve the national interest cannot suffice to establish prospective national benefit. *Id.* at 219. Rather, a petitioner must justify projections of future benefit to the national interest by establishing a history of demonstrable achievement with some degree of influence on the field as a whole. *Id.* at 219, n.6.

II. ANALYSIS

In dismissing the Petitioner's appeal, we found that she had not established sufficient influence on her field to meet the third prong of the *NYSDOT* national interest analysis. We disagreed with the Petitioner's interpretation of the third prong as excluding only those petitioners with no demonstrable achievement. Instead, we found that it requires a petitioner to establish a past record that "justifies projections of future benefit to the national interest." We noted that footnote six, which states that we seek a "past history of demonstrable achievement with some degree of influence on the field as a whole," clarifies the level of past achievement necessary to justify projections of future benefit to the national interest. Our decision discussed letters in the record from four colleagues and two independent professionals in the Petitioner's field attesting to the significance of her achievements and her influence on the field. We determined, however, that the content of those letters did not sufficiently demonstrate such influence so as to establish the Petitioner's eligibility without supporting documentation. The Petitioner argues on motion that our application of the *NYSDOT* analysis is incorrect and invalid. She alternately contends that we abused our discretion in finding that she did not meet the requirements of that analysis.

A. Validity of Eligibility Analysis

The Petitioner argues that the eligibility criteria articulated in *NYSDOT*, and in particular the language in footnote six specifying that a petitioner must have had "some degree of influence on the field as a whole," go beyond the statute and that *NYSDOT* constitutes an improperly promulgated rule. She states:

> The Service cannot "interpret" into being standards that go beyond the statute. In that regard, it is noteworthy that the Service never promulgated a regulation to support the toss off footnote that has so eviscerated the NIW process, and which overall has resulted in Congress' visa allocation never being fully utilized.

She maintains that the footnote in question creates an "impermissible substantive change" to the requirements under the statute and therefore requires "notice and publication," citing *Perez v. Ashcroft*, 236 F. Supp. 2d 899 (N.D. Ill. 2002). In that decision, a District Court stated that courts generally defer to an agency's formal interpretation of its governing statute, but that substantive

rules that "create law" must be issued must be implemented through formal rulemaking procedures. *Id.* at 903. She further contends that "there are a long line of cases which hold that rule interpretations made by a single individual – as NYSDOT was made – are NOT entitled to deference." (Emphasis in original). In support of this position, she cites court decisions finding that limited deference is afforded to an interim regulation and an agency policy, respectively. *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998), and *Ngwanyia v. Ashcroft*, 302 F. Supp. 2d 1076 (D. Minn. 2004).

We note that, by law, we are required to follow *NYSDOT* as published precedent. *See* 8 C.F.R. § 103.3(c), which indicates that precedent decisions are binding on all USCIS officers. The petitioner contends that *NYSDOT* constitutes impermissible rulemaking and is "arguably invalid for failure to follow the [Administrative Procedure Act (APA)] procedure." *NYSDOT*, however, does not represent a fundamental change in the underlying law, but rather an interpretation of already-existing law and regulations. To date, neither Congress nor any other competent authority has overturned the precedent decision, and at least one federal court has rejected the argument that the precedent decision violates the APA, stating:

> Plaintiff also argues that the adoption of *NY[S]DOT* as a precedent decision is a violation of the APA's notice and comment requirement. *See* 5 U.S.C. § 553(b) & (c). However, notice and comment proceedings are not required when an agency adopts an interpretive rule. *See* 5 U.S.C. § 553(b)(A). *NY[S]DOT* is clearly interpretive because it does not create new rights or duties, but rather "provides a reasonable and predictable interpretation" of the statute. *See Mejia-Ruiz v. INS,* 51 F.3d 358, 364 (2d Cir. 1995). Thus, Plaintiff's claim of a violation of the APA's notice and comment requirement fails as well.

Talwar v. INS, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001). *See also Sodipo v. Rosenberg*, 77 F. Supp. 3d 997, 1001 (N.D. Cal. 2015) (stating that the *NYSDOT* test is entitled to deference from the courts under the doctrine associated with *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

We further note that Congress is presumed to be aware of existing administrative and judicial interpretations of statute. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Beyond that presumption, in this instance Congress' awareness of *NYSDOT* was in fact demonstrated by its 1999 amendment to section 203(b)(2) of the Act in direct response to the 1998 precedent decision. Congress, at that time, could have taken any number of actions to limit, modify, or completely reverse the precedent decision. Instead, it let the decision stand, apart from a limited exception for certain physicians, as described in section 203(b)(2)(B)(ii) of the Act. Because Congress has made no further statutory changes in the decade since *NYSDOT*, we can presume that Congress has no further objection to the precedent decision or our interpretation of it.

For the reasons discussed above, the Petitioner has not established that we were incorrect to apply the eligibility analysis articulated in *NYSDOT*.

B. Petitioner's Eligibility

In addition to contesting the validity of the *NYSDOT* analysis, as discussed above, the Petitioner contends that her submitted evidence meets the criteria set forth in that decision. The Petitioner correctly notes that she is required to establish her eligibility by a "preponderance of the evidence," which means demonstrating that something is more likely than not to be true. She argues that the submitted letters establish her eligibility under that standard, and that we were incorrect in finding that greater detail and documentary evidence would be required to support the writers' conclusions regarding the Petitioner's influence on the field as a whole. She states:

> [T]he Service did not give any credence at all to these letters, not because it found them incredible, but because it thought more detail was required. If applicant had submitted only [redacted] letter, that might be plausible but when [six] established and reputable individuals including one of the leading experts on oil and gas matters for the entire United States all say the same thing, that demonstrates that it is more likely than not applicant has had some influence – as opposed to no influence at all.

The Petitioner maintains that six "unimpeached witnesses" have attested that her innovations have been adopted in other locales, and that such evidence establishes that she has had a national influence. As noted by the Petitioner, the dismissal of her appeal was not based on a finding that the letters' authors were of dubious credibility. Rather, we determined that their conclusions regarding the Petitioner's influence on the field were not sufficiently supported by the information contained in the letters or by objective documentary evidence in the record. The letters indicated that the Petitioner was involved in practices and innovations at [redacted] that had been adopted by other companies. We found, however, that they did not explain whether the Petitioner was responsible for the creation of those practices or innovations that had been adopted, and that the record did not include documentary evidence to support the statements regarding their adoption.

The Petitioner cites *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm'r 1988), which held that inconsistent or questionable advisory opinions need not be accepted. She argues that such concerns are not present in this instance, and that there is a reasonable explanation for the lack of objective documentary evidence regarding her influence, namely the proprietary nature of her contributions to her employer. The Petitioner has not cited any pertinent legal authority supporting the view that USCIS must accept advisory opinions as fact in the absence of credibility concerns or that such opinions alone would always be sufficient for meeting the Petitioner's burden of proof. *Matter of Caron International, Inc.* stated instead "[t]his Service may, in its discretion, use advisory opinions" as expert testimony. *Id.* at 795. As discussed above, our dismissal in this case was based not only on the lack of documentary evidence to support the letters, but also on a finding that the information in those letters was not sufficient to support the conclusions contained therein. The Petitioner has not established that this finding was improper.

III. CONCLUSION

According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. The Petitioner in this case has not established through pertinent legal authority that our application of the *NYSDOT* analysis was incorrect, or that our finding regarding her eligibility was erroneous. Accordingly, the motion will be denied.

ORDER: The motion to reconsider is denied.

Cite as *Matter of S-J-T-*, ID# 16768 (AAO Apr. 19, 2016)