U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-S-D-P-

DATE: APR. 18, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a French bakery, seeks to classify the Beneficiary as an individual of exceptional ability to serve as an executive head pastry chef. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary is an individual with exceptional ability and that the job requires that level of ability. On appeal the Petitioner submits additional evidence and asserts that the Beneficiary's experience and salary demonstrates his exceptional ability.

Upon *de novo* review, we will dismiss appeal.

I. LAW

Section 203(b)(2) of the Act provides classification to qualified individuals 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. The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." Unless seeking a waiver in the national interest, the petition must be accompanied by a valid, individual labor certification or an application for Schedule A delegation that demonstrates the job requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). In the instant case, the Petitioner secured an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor.

In explaining the evidentiary requirements, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria related to exceptional ability. Specifically, a petitioner must provide documentation that satisfies at least three of these criteria in order to meet the initial requirements for this classification. The submission of sufficient initial evidence does not, however, in and of itself

establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality").[1]

II. ANALYSIS

The Director concluded that the Petitioner had not demonstrated either that the Beneficiary is an individual of exceptional ability or that the job requires someone with that level of skill. On appeal, the Petitioner only addresses the first issue. The Petitioner has not submitted the required initial evidence to corroborate the Beneficiary's exceptional ability and has not resolved that the job requires an individual of exceptional ability.

A. Prior O-1 Visa

U.S. Citizenship and Immigration Services has approved at least two nonimmigrant visa petitions classifying the Beneficiary as an individual of extraordinary ability in the arts. An approval of a nonimmigrant visa does not mandate the approval of a similar immigrant visa. We must decide each case on a case-by-case basis. Moreover, the required initial evidence for nonimmigrants of extraordinary ability in the arts[2] is very different than that for the immigrant classification at issue in this proceeding. As discussed below, the Petitioner has not provided the initial required evidence for the immigrant classification sought.

B. The Beneficiary's Exceptional Ability

The Director found that the Beneficiary meets two of the regulatory criteria, of which he must meet three. Specifically, the Director concluded that the Beneficiary's vocational training certificates from the [redacted] satisfied the degree, diploma, certificate, or similar award from a college, university, school, or other institutes of learning criterion. 8 C.F.R. § 204.5(k)(3)(ii)(A). Next, the Director accepted that the reference letters and reviews of the café where the Beneficiary works showed that he had received recognition for achievements and significant contributions to the industry or field. 8 C.F.R. § 204.5(k)(3)(ii)(F). At issue is whether the Beneficiary meets a third criterion. On appeal, the Petitioner contends that the Beneficiary has 10 years of experience in the occupation and has commanded a salary or other remuneration which demonstrates exceptional ability.[3] 8 C.F.R. § 204.5(k)(3)(ii)(B), (D).

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[1] *Cf. Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).
[2] 8 C.F.R. § 214.2 (o)(3)(iv).
[3] The Petitioner has never affirmed that the Beneficiary has a license or membership in a professional association and the record contains no evidence relating to these criteria. 8 C.F.R. § 204.5(k)(3)(ii)(B), (E).

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The Petitioner must demonstrate that the Beneficiary has the necessary 10 years of experience as of the priority date in this matter. *See* 8 C.F.R. § 103.2(b)(1). The required documentation of such experience consists of letters from current or former employers.[4] On appeal, the Petitioner relies on letters from the Petitioner's owner; manager of and a contract with The record also contains the Beneficiary's résumé and a contract between the Beneficiary and represented by

The Beneficiary's résumé details the Petitioner's work as a head baker for from 2003 through 2005, as a head baker for from 2005 through 2009, for again from 2009 through 2012, and finally as executive head baker for the Petitioner from 2012 through the present. confirms that the Beneficiary worked for him for six years total between 2003 and 2012. attests that the Beneficiary joined the petitioning company in 2012. According to the labor certification, the Beneficiary began working there in October 2012. Thus, the Beneficiary accumulated an additional 20 months of employment as of the priority date in June 2015. The six years with and 20 months with the Petitioner do not amount to 10 years of experience.

The contract between and the Beneficiary does not contain any information indicating it represents the Beneficiary's employment for the employer appearing on his résumé and the labor certification for 2005 through 2009. In his initial letter, affirmed that the Beneficiary's employment for was at Regardless, while the contract has a start date of August 2005, the record does not contain a letter from this employer confirming the dates that the Beneficiary worked there. Without this information, the Petitioner has not documented the Beneficiary's 10 years of experience as of June 2015.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Petitioner must demonstrate that, as of June 2015, the Beneficiary had already commanded a salary or other remuneration for services indicative of exceptional ability. The only wages the Petitioner documented are three pay stubs for $3,700 each during early 2016, which annualizes to $96,200. While this wage is considerably above the prevailing wage of $30,722 for a level IV baker, the Petitioner has not established that the Beneficiary commanded this salary prior to June 2015.

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[4] 8 C.F.R. § 204.5(k)(3)(ii)(B); *see also* 8 C.F.R. § 204.5(g)(1).

C. Job Requirements

The labor certification must reflect that the job requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4). The Director concluded the Petitioner did not meet this requirement. The appellate brief does not address this issue.

The specific job requirements on the ETA Form 9089 are a high school diploma, no training, and five years of experience. Thus, the job requires no credential from an institute of higher learning and less than 10 years of relevant employment. 8 C.F.R. § 204.5(k)(3)(ii)(A), (B). The special skills are knowledge of French baking and pastry ingredients and American equivalents, particular baked items, and general baking standards. The Petitioner has not explained how these special skills denote a French baker with skills significantly above that ordinarily encountered. Finally, the offered wage equals the prevailing wage and, as such, is not indicative of a job that requires an individual of exceptional ability. While the Petitioner is paying the Beneficiary well above the prevailing wage, the terms of the labor certification, including the offered wage, do not reflect job requirements consistent with exceptional ability as required.

III. CONCLUSION

The Petitioner has not provided the required initial evidence of the Beneficiary's exceptional ability and has not demonstrated that the position requires an individual of exceptional ability.

ORDER: The appeal is dismissed.

Cite as *Matter of L-S-D-P-*, ID# 274939 (AAO Apr. 18, 2017)