U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-D-P-

DATE: SEPT. 22, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an entrepreneur, seeks classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is normally attached to this immigrant classification. *See* § 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not qualify as a member of the professions holding an advanced degree, and that he had not established that a waiver of a job offer requirement would be in the national interest. The Petitioner appealed the matter to us, and we dismissed the appeal. Specifically, we found that he did not qualify for classification as either an advanced degree professional or an individual of extraordinary ability, and was therefore not eligible for a national interest waiver.[1]

The matter is now before us on a combined motion to reopen and reconsider. On motion, the Petitioner submits a brief stating that he is providing new facts to establish eligibility and that our previous decision contained "mistakes of law and fact."

Upon review, we will deny the motion.

I. LAW

A motion to reopen is based on documentary evidence of new facts, and a motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3).

[1] *See Matter of D-D-P-* ID# 457568 (AAO May 25, 2017).

To establish eligibility for a national interest waiver, a petitioner must first demonstrate 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. *See* section 203(b)(2) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[2]

II. ANALYSIS

In his combined motion to reopen and reconsider, the Petitioner asserts that he is providing new evidence of his eligibility and that our previous decision incorrectly applied the law and facts. He maintains that he meets the requirements for classification both as a member of the professions holding an advanced degree and as an individual of exceptional ability. We consider each below.

As a preliminary matter, the Petitioner maintains in his motion to reconsider that our previous decision applied an improper standard of proof. He contends that we applied a "clear and convincing" standard rather than the required "preponderance of the evidence" standard. He correctly notes that a petitioner must establish that he meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010). However, he does provide further explanation or evidence to support his contention that we applied the incorrect standard in adjudicating his appeal.

A. Advanced Degree Professional

The Petitioner stated on his Form I-140, Immigrant Petition for Alien Worker, Part 2, that he is seeking second preference classification as a "member of the professions holding an advanced degree or an alien of exceptional ability." As such, we adjudicated the appeal according to the second preference classification requirements.

We noted in our previous decision that the record included an ETA Form 9089, dated February 27, 2016, indicating that the highest level of education that the Petitioner had achieved was high school. The Petitioner confirmed in his appellate submission that he has not yet attained an advanced degree and stated that he is currently enrolled in a Master's degree program in business administration at the [redacted] He further asserted that he is studying criminal justice with [redacted] online, yet he "has not completed the program." As such, we found that the Petitioner had not established his eligibility as a member of the professions holding an advanced degree at the time of filing.

[2] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

On motion, the Petitioner avers that he "has submitted documentation to show that he has earned through work experience and academic studies sufficient credit from March 2013 to be accepted in the [redacted] Master of Business Administration program." He also indicates that he "earned 13 credits towards his Bachelor of Science degree from [redacted] along with full course sessions at the [redacted] in 1997 and 1999." He claims that he meets the visa preference classification based upon his "official academic record" and "ample documentation of contracts and business related activities which show that he has functioned at the highest levels for a sustained period of time." He offers no additional evidence, however, to show that he has completed a U.S. baccalaureate degree or a foreign equivalent degree, nor does he address the inconsistencies in the record regarding his academic record. Accordingly, he has not demonstrated through his motion to reopen that he qualifies as an advanced degree professional or the equivalent through the attainment of a baccalaureate degree and five years of progressive experience.

For purposes of a motion to reconsider, the question is whether our decision was correct based on the record that existed at the time of adjudication. Here, arguments the Petitioner offers on motion do not establish that our previous findings were based on an incorrect application of the law, regulation, or USCIS policy, nor does the motion demonstrate that our latest decision was erroneous based on the evidence before us at the time of the decision.

B. Exceptional Ability

Regarding the Petitioner's qualification as an individual with exceptional ability in business, our appellate decision determined that the Petitioner did not establish he meets any of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). We further found that the record in the aggregate did not support a finding that he has achieved the level of expertise required for exceptional ability classification.

On motion, he claims that he has "substantially met these requirements," and that we "failed to consider the objective business documentation submitted" which "shows the significance of [his] original contributions and achievement in the business world and the material facts that abundantly support his claim of exceptional ability." He does not provide new evidence; rather, he argues that the previously submitted evidence establishes his eligibility. Accordingly, he has not demonstrated through his motion to reopen that he satisfies this prong.

In the motion to reconsider, the Petitioner claims that he meets five of the six evidentiary requirements, 8 C.F.R. § 204.5(k)(3)(ii)(B-F); however, he does not offer pertinent precedent decisions or legal citations that demonstrate our latest decision was based on an incorrect application of law or USCIS policy. Nevertheless, we address each claimed criteria below.

> *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 record does not include letters from prior employers attesting to the Petitioner's experience in the field. On motion, he maintains that he has provided evidence in the form of corporate governance documents and contracts that establish that he has been "self-employed" and owns a majority of controlling shares in five companies. He resubmits the corporate formation documents and copies of Nigerian government contracts with and As we noted in our appellate decision, it is unclear how these companies relate to the Petitioner as his name does not appear on most of the documents. The memorandum of association for and the articles of association for do list the Petitioner as "director." However, the Petitioner provided a resume and a Form 9098 documenting his employment history and neither document references as a prior employer. The resume indicates that the Petitioner was employed by from 2012 until 2014, and from 2014 until 2015.

Furthermore, while the Petitioner claims that he was a "director" of the corporate formation documents list his spouse, as the sole director of the corporation. Regardless, neither company provided a letter showing the Petitioner's full-time experience in his occupation. Finally, we note that the Petitioner indicates that he is currently employed by yet, this organization did not provide a letter in support of the Petitioner's eligibility. As such, he has not established any error in our finding regarding this criterion.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

On motion, the Petitioner claims that he meets this criterion based upon his receipt of a license as a salesman from the The Petitioner is seeking eligibility as an individual of exceptional ability based upon his experience as an entrepreneur. He has not shown that a license to sell home improvement services relates to his stated profession. As such, he has not demonstrated error in our finding that he does not meet this criterion.

> *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 avers on motion that he meets this criterion based upon the contracts contained in the record. As we discussed previously, the record includes copies of Nigerian government contracts with and The contracts are for services to install solar infrastructure and vary in value. Many do not reference the Petitioner and cannot be considered his "salary." Additionally, the

remuneration noted in the contracts is ascribed to the contracting company, not the Petitioner individually. As such, he has not met the plain language of this criterion.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner maintains on motion that he meets this criterion based upon evidence that paid a training contribution to the Nigerian government in 2012, and registered with the Nigeria Social Insurance Trust Fund in 2013. The record does not include evidence that either organization is a professional association. Furthermore, while the Petition claims on motion that business registrations with the Federal Inland Revenue Service and the Pension Commission meet this criterion, he has not offered evidence or information explaining how these entities qualify as professional associations.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F).

As we stated in our appellate decision, the Petitioner has not provided letters or testimony from interested parties attesting to his achievements or significant contributions. On motion, the Petitioner claims that he has been "confirmed and recognized" for achievements and contributions. He does not offer any additional evidence or explanation to support his contention that our latest decision was based on an incorrect application of law or USCIS policy. As such, he has not established that he meets this regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

In sum, the evidence does not establish that the Petitioner meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). Further, a review of the record in the aggregate does not support a finding that he has achieved the level of expertise required for exceptional ability classification.

III. CONCLUSION

In this matter, 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.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of D-D-P-*, ID# 755301 (AAO Sept. 22, 2017)