Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-T-, LLC

DATE: FEB. 11, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a tax preparation service, seeks second preference immigrant classification for the Beneficiary, its owner, as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Beneficiary did not qualify for classification either as a member of the professions holding an advanced degree or as an individual of exceptional ability, and that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

The Petitioner appealed the matter to us, and we dismissed the appeal.[1] The matter is now before us on combined motions to reopen and reconsider. For the reasons discussed below, we will deny the motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] *See Matter of S-T-, LLC,* ID# 1218240 (AAO May 3, 2018).

To establish eligibility for a national interest waiver, a petitioner must first demonstrate that the beneficiary qualifies for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification 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 sets out this sequential framework:

> (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. . . . [T]he 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)(3)(i) provides that, in order to show an individual is a professional holding an advanced degree, the petition must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation for the beneficiary that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[2] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the three prongs of the framework are met.[3]

II. ANALYSIS

The Petitioner previously submitted the Beneficiary's bachelor of arts degree in French language and literature from [redacted] in South Korea. In our prior decision, we noted that the record did not include an academic credentials evaluation to establish the Beneficiary's foreign degree's equivalency to a United States degree as required under 8 C.F.R. § 204.5(k)(3)(i)(A). Thus, the Petitioner did not show that the Beneficiary holds the foreign equivalent of a degree above that of baccalaureate. Alternatively, the record did not indicate that the Beneficiary's degree is the foreign equivalent of a United States baccalaureate degree and establish that she has progressive post-baccalaureate experience in her specialty equivalent to an advanced degree under the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). Accordingly, we affirmed the Director's determination that the Beneficiary did not qualify for classification as a member of the professions holding an advanced degree. We also noted that the Petitioner had not claimed that the Beneficiary qualified as an individual of exceptional ability. As the Petitioner did not establish the Beneficiary's eligibility for the underlying immigrant classification, we found that discussion of the national interest waiver would serve no meaningful purpose.

A. Motion to Reconsider

On motion, the Petitioner does not contest our finding that the Beneficiary did not qualify for classification as a member of the professions holding an advanced degree. Instead, it lists the regulatory criteria for individuals of exceptional ability and asserts that the Beneficiary meets four of those criteria: 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (C), and (E). The Petitioner's evidence relating to the Beneficiary's eligibility for these criteria will be considered below in our discussion of the motion to reopen.

The Petitioner has not met the requirements for a motion to reconsider as it has not demonstrated that we erred in our previous analysis based on the record before us on appeal. Further, the motion to reconsider does not establish that our previous findings were based on an incorrect application of the law, regulation, or USCIS policy.

---

[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*).
[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

B. Motion to Reopen

As discussed below, a review of the record and the evidence presented on motion does not indicate that the Beneficiary has met at least three of the exceptional ability evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii).

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Petitioner provided the Beneficiary's bachelor of arts degree in French language and literature from [redacted] in South Korea, but it has not established that this degree relates to her area of exceptional ability as a tax consultant. In addition, the Petitioner offered transcripts from [redacted] in [redacted] California and [redacted] in [redacted] California indicating that the Beneficiary completed some coursework in an associate's degree in arts. The record, however, does not include evidence showing that she received an associate's degree from either college. Furthermore, the Petitioner has not established that this coursework relates to her area of exceptional ability. For these reasons, the Petitioner has not established that the Beneficiary meets this criterion.

> *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)

On motion, the Petitioner submits a May 2018 letter from the Beneficiary asserting that she "has more than 10 years of experience in payroll, tax preparation while running a business with her husband from 2007-2018."[4] In addition, the record includes a letter from the Beneficiary's spouse stating that they operated a sushi restaurant together in [redacted] Oregon from 2007 until 2014.

In this matter, the occupation sought for the Beneficiary is tax consultant. The Petitioner's evidence does not sufficiently demonstrate that the Beneficiary's experience operating a restaurant constitutes full-time experience as a tax consultant. Specifically, the regulation at 8 C.F.R. § 204.5(g) provides, in pertinent part: "Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received." The aforementioned letters lack specificity regarding the Beneficiary's duties and the amount of time she devoted to payroll and tax preparation versus her other responsibilities associated with running the restaurant. Regardless, the Form I-140 in this matter was filed in July 2016, and the Petitioner has not demonstrated that the Beneficiary had at least ten years of full-time experience as a tax consultant at the time of filing, as it indicates that her claimed qualifying experience began in 2007. *See* 8 C.F.R. § 103.2(b)(1). The record therefore does not establish that the Beneficiary satisfies this criterion.

[4] We note that in part 5 of the Form I-140, the Petitioner indicated that its business was established on December 21, 2015.

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

In support of the motion, the Petitioner submits two "tax consultant" licenses for the Beneficiary from the [redacted] with expiration dates of May 2018 and May 2019. In addition, in response to the Director's request for evidence, the Petitioner previously provided a July 2017 notice from [redacted] inviting her to take its "Tax Consultant State Only examination." As the record shows the Beneficiary received her tax consultant licenses after the Form I-140 was filed, they do not demonstrate her eligibility for this criterion at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). Regardless, the record contains an October 2015 certificate from the Internal Revenue Service stating that the Beneficiary "met the requirements to become an enrolled agent" and that she is thereby "granted unrestricted rights to represent taxpayers before the Internal Revenue Service." The Petitioner's motion also includes a credential from the Internal Revenue Service reflecting the Beneficiary's "Enrollment to Practice" with an October 2015 issue date. Thus, the Beneficiary meets this criterion.

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

The Petitioner provided evidence of the Beneficiary's membership in the National Association of Tax Professionals and the National Association of Professional Women. Accordingly, she satisfies this criterion.

III. CONCLUSION

The Petitioner's motion does not show that our previous decision was based on an incorrect application of law or policy and does not include new information or evidence that overcomes the grounds underlying our previous decision. The Petitioner has not demonstrated that the Beneficiary meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) to qualify as an individual of exceptional ability. In addition, the record does not show that she qualifies as a member of the professions holding an advanced degree. The Petitioner therefore has not established the Beneficiary's eligibility for the underlying EB-2 visa classification.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of S-T-, LLC*, ID# 1788689 (AAO Feb. 11, 2019)