U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21846702

Date: SEP. 12, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional or Alien of Exceptional Ability

The Petitioner, an entertainment, artist management and promotion business, seeks classification for the Beneficiary as an individual of exceptional ability in the performing arts as a singer/musician. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This second preference classification makes immigrant visas available to foreign nationals who are members of the professions holding advanced degrees or their equivalent or those with exceptional ability in the sciences, arts, or business. Exceptional ability in the performing arts is shown by documenting that the foreign national's work experience in the last 12 months did, and the intended work in the United States will, require exceptional ability.

The Director of the Texas Service Center denied the petition on four grounds. First, the Director concluded that the Petitioner did not establish that the Beneficiary was an individual of exceptional ability because it did not demonstrate that the Beneficiary's work experience in the last 12 months required, or that the intended work in the United States will require, exceptional ability. The Director further found that the Petitioner did not comply with regulations requiring posting notice of the job opportunity, did not establish that it had the ability to pay the offered salary to the Beneficiary, and did not establish that the job offered to the Beneficiary was realistic. We dismissed a subsequent appeal on all of the same grounds. The matter is now before us on a combined motion to reopen and motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the combined motion.

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5 for which the U.S. Department of Labor (DOL) has already determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of noncitizens in such occupations.

Occupations for individuals with exceptional ability in performing arts are designated as Schedule A, Group II occupations. This designation requires that a petitioner submit evidence demonstrating that the beneficiary worked for the past year in a position that requires an individual of exceptional ability and that the beneficiary's services are sought for a position that requires an individual of exceptional ability. 20 C.F.R. § 656.15(d)(2). The petitioner must submit documentation to show exceptional ability (for example, documentation of widespread acclaim and international recognition, play bills and star billings, published material by or about the beneficiary) as outlined in 20 C.F.R. § 656.15(d)(2)((i)-(vi)).[1] As with most filings for an employment-based immigrant that requires a job offer, this petition must include evidence that the prospective United States employer has the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, "new facts" are facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

II. ANALYSIS

As noted above, the Petitioner seeks to classify the Beneficiary as an individual of exceptional ability in the performing arts to fill the offered job of singer/musician. The ETA Form 9089, Application for Permanent Employment Certification, states that the position requires 10 years of experience in the job offered. The Petitioner submitted evidence that the Beneficiary is an international recording artist with more than 25 years of experience as a singer of Pakistani songs in various musical genres.

Both the Director in his denial and our office on appeal found that the record demonstrated the Beneficiary's 10 years of experience as a singer/musician, and included evidence outlined in 20 C.F.R. § 656.15(d)(2)(i-vi) with respect to the Beneficiary's past career as a singer/musician. However, both the Director and our office found that the record did not demonstrate that the Beneficiary's work during the one year prior to filing the petition required exceptional ability, nor that the intended work in the United States requires exceptional ability as required by 20 C.F.R. § 656.15(d)(2).

We also concluded that the Petitioner's notice of filing did not meet the requirements of 20 C.F.R. § 656.10(d)(1)(ii) in that it was not posted in the location of employment, that the Petitioner did not establish its continuing ability to pay the proffered wage to the Beneficiary as of the priority date,[2] and that the Petitioner did not establish that a realistic job opportunity exists for the Beneficiary.

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[1] In *Matter of Chawathe*, 25 I&N at 376, we held that, "truth is to be determined not by the quantity of evidence alone but by its quality."

[2] This petition's priority date is November 30, 2018, the date of the petition's filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

A. Exceptional Ability

As discussed above, to establish that a foreign national is an individual of exceptional ability in the performing arts, a petitioner must establish three elements: 1) that the beneficiary's work experience during the past 12 months required exceptional ability; 2) that the intended work in the United States will require exceptional ability; and, 3) sufficient documentation to show exceptional ability, as listed in 20 C.F.R. § 656.15(d)(2)(i-vi). As noted in our prior decision, the Director did not contest whether the Petitioner had established the third element and we did not raise this issue on appeal. Therefore, at issue first is whether the Petitioner has established the first element – that the Beneficiary's work experience from November 2017 to November 2018 required exceptional ability.

The Petitioner, on motion, provides new evidence "of the Beneficiary's continued acclaim since this petition has been pending, his busy artistic schedule, and his ability to attract enormous crowds at his concerts on account of his continued exceptional ability." The Petitioner also notes the Beneficiary's recently released single of January 22, 2022 and provides the following additional evidence:

- Printouts demonstrating the Beneficiary's Spotify channel with 29,138 listeners and comprised of albums released from 1993 to 2019, and singles released in 2021 and 2022.
- Printouts demonstrating the Beneficiary's YouTube channel exhibiting various music videos posted in September 2014, May 2016, February 2021, June 2021, and January 2022.
- Printouts of a Pakistani YouTube channel demonstrating postings and viewings of collections of the Beneficiary's music in the last 10 years.
- Evidence that the Beneficiary hosted "Coke Studio," a Pakistani annual music television program, for one season in 2015.
- A printout of what appears to be an undated advertisement for a product of Lipton tea company with a handwritten note asserting that the Beneficiary is a "brand ambassador" for Lipton.
- A statement dated November 21, 2016 from the chief officer of a radio station stating that the Beneficiary has been signed to a monthly on air show for the entire year of 2017, that the station will sponsor concerts in 2017, and that the station "is in talks to promote the book [the Beneficiary] is in the process of completing."
- Printouts of promotional materials and social media postings for a radio station dated May 2017 to July 2018, February 2020, and February 2021 featuring the Beneficiary's radio program.
- Evidence of the Beneficiary's "employment as headliner and main attraction for a U.S.-Pakistan cultural association," including promotional material and social media posts exhibiting the Beneficiary's live performances from 2018-2022.

The Petitioner asserts that the Beneficiary's work experience from November 30, 2017 to November 30, 2018, the one-year period prior to filing the petition, required exceptional ability and included "both sold-out concerts and a four-year tenure as prime time on-air artistic talent" with the radio station. However, in examining the new evidence submitted on motion, we note that the statement from the radio station's officer was written in 2016, before the claimed employment of the Beneficiary in 2017, and prior to the one-year period before filing the petition. The Petitioner does not submit a

contract or employment agreement between the Beneficiary and the radio station, or evidence of payroll or tax records corroborating the actual employment of the Beneficiary in any capacity. Although the promotional materials and social media postings mention the Beneficiary's radio program, this evidence reflects dates covering only a portion of the one-year period before the petition was filed, from November 2017 to July 2018. Nor does the evidence demonstrate that the Beneficiary's work as a radio program host required exceptional ability.

We also note that the evidence reflects only one performance in 2018, shown in a printout from a website advertising a "2018 Annual Dinner and Musical Night with [the Beneficiary]." The printout does not state the date or location of the performance, and the only date reflected on the printout is listed above the event title and is stated "03/12/2023." It is unclear when or whether this performance actually occurred, whether it occurred between November 2017 and November 2018, and why a future date is listed on the printout. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. *Id.*

Of the Beneficiary's albums listed on his Spotify channel, only one had a release date within the one-year period prior to filing the petition: it was released on June 15, 2018. However, the Petitioner does not claim or submit evidence demonstrating that the Beneficiary's work experience in recording this album took place during the period from November 2017 to November 2018 or that it required exceptional ability.

The new facts and evidence the Petitioner submits reflect the Beneficiary's accomplishments before and after the one-year period before filing the petition and do not demonstrate that his work in the 12 months prior to filing required exceptional ability. A petitioner must establish a beneficiary's possession of all job requirements of an offered position by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, we will dismiss the motion to reopen on this basis.

The Petitioner, on motion, also asserts that we erred in our previous decision. The Petitioner cites to the *USCIS Policy Manual*, https://www.uscis.gov/policymanual, and asserts that we did not apply the correct definition of exceptional ability for individuals in the performing arts. The Petitioner asserts that we instead incorrectly applied the definition of "exceptional ability" which is attributed to Schedule A, Group II occupations for individuals of exceptional ability in the sciences or arts,[3] and then incorrectly imposed the requirements for individuals of "extraordinary ability" under the first preference classification.[4] The Petitioner further states that "there is no statutory or regulatory requirement that conditions eligibility to the mere temporal continuity of an artist's career and the AAO cannot impose it as a novel requirement."

[3] 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. *See* section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A).

[4] This classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation. *See* section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A).

Neither the Director's decision nor our prior decision discusses a requirement that the Beneficiary maintain a continuous career of sustained exceptional ability. Rather, both decisions determined that, despite the Beneficiary's extensive and successful career in music, the record does not demonstrate that he possesses the recent work experience required in the regulations for classification as an individual of exceptional ability. As discussed above, the record, including evidence submitted on motion, does not document the Beneficiary's employment in any capacity for any entity, for the specific period of November 2017 to November 2018. Rather the evidence tends to indicate that the Beneficiary released an album in June 2018 and hosted a radio program during the period from May 2017 to July 2018. The Petitioner does not describe, and the record does not document, the Beneficiary's work experience from July to November 2018, or that his experience during the one-year period required exceptional ability. Therefore, we will dismiss the motion to reconsider on this basis.

Because the Petitioner has not established on motion that it meets the first element in classifying the Beneficiary as an individual of exceptional ability in the performing arts, we need not consider the second element - whether the intended work in the United States would require exceptional ability. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

B. Additional Bases for Denial

On motion, the Petitioner does not state new facts supported by documentary evidence to overcome the additional grounds for denial, including its ability to pay the proffered wage, that it properly posted its notice of filing, or that its job offer to the Beneficiary is realistic. Nor does it demonstrate how we erred in these determinations.

In its brief on motion the Petitioner, through counsel, asserts that it has the continued ability to generate revenue during a pandemic, and claims that the notice of filing was properly posted at the location where the Beneficiary would report as an employee. No documentary evidence is submitted in support of these assertions. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. As noted in our prior decision, the Petitioner's 2018 federal tax return reflects net income below the proffered wage of $125,000 and no net current assets.

We also noted that the notice of filing was posted at the Petitioner's owner's residence in New Jersey and the record did not demonstrate that the Beneficiary would perform any aspects of the offered job at this location. On motion, the Petitioner does not provide additional evidence that the Beneficiary will perform any job duties at its New Jersey location. Although the Petitioner asserts that the "Notice of Filing posting requirement does not perfectly fit or ideally meet the circumstances of a Schedule A, Group II application for a performing artist," it does not demonstrate that it is exempt from this requirement.

In our previous decision we noted that the notice of filing is also deficient in that it does not include a statement regarding the use of in-house media, as required by 20 C.F.R. § 656.10(d)(1)(ii). We noted the importance of this requirement, particularly where, as here, the Petitioner claims that its posting location is a home office, presumably where it will not be visible to most employees, and where employees would look to in-house media for employer notices. The Petitioner does not address this deficiency on motion, and, therefore, has not overcome this issue.

Lastly, we found that the Petitioner had not demonstrated that, as of the November 30, 2018 priority date, it would have been able to offer the Beneficiary employment as a singer/musician. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977) (stating that a petitioner must establish that a job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until a beneficiary obtains lawful permanent residence). We noted that the Petitioner had not submitted evidence of other events it had scheduled where the Beneficiary might have performed. On motion, the Petitioner does not provide this or other evidence that its job offer was realistic or explain how we erred in our finding. In fact, only one flyer submitted on motion mentions the Petitioner as a contact or promotor for the Beneficiary and it is dated July 31, 2021, nearly three years after the priority date. The Petitioner states that the evidence demonstrates that the Beneficiary has "the continued success, recognition and demand as a performer of exceptional ability since this petition was filed and while it has been pending that create substantiated and credible assurances of continued long-term bookings and other artistic opportunities." However, the evidence does not establish that, as of the November 30, 2018 priority date, the Petitioner and/or the Beneficiary were eligible for the benefit sought, including that the job offer was realistic.

As the Petitioner has not stated new facts or provided new evidence relevant to the adverse decision, or described how we erred in our decision, the motion to reopen and the motion to reconsider are also dismissed on these grounds.

III. CONCLUSION

The Petitioner's submission does not state new facts supported by documentary evidence or establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(2), (3). The Petitioner has not shown proper cause for reopening or reconsideration of our previous decision, nor established eligibility for the benefit sought.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.