U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-B-S-, INC.

DATE: APR. 19, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an outpatient mental health clinic, seeks to temporarily employ the Beneficiary as a psychotherapist. To do so, the Petitioner seeks an extension of his status as an O-1 nonimmigrant,[1] a visa classification available to foreign nationals who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner offered inconsistent information regarding the Beneficiary's terms of employment under 8 C.F.R. § 214.2(o)(2)(ii)(B).

On appeal, the Petitioner contends that it provided a proper employment agreement, that the Director applied an incorrect legal standard, and that the Beneficiary meets the regulatory requirements for O-1 classification.

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

I. LAW

As relevant here, section 101(a)(15)(O)(i) of the Act establishes O-1 classification for an individual who has extraordinary ability in the sciences, arts, education, business, or athletics that has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. Department of Homeland Security (DHS) regulations include the following definition: "Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor." 8 C.F.R. § 214.2(o)(3)(ii).

[1] The Petitioner's most recent prior O-1 petition on behalf of the Beneficiary was approved on October 31, 2016.

Next, DHS regulations set forth the initial evidentiary criteria for establishing a beneficiary's sustained acclaim and the recognition of achievements. 8 C.F.R. § 214.2(o)(3)(iii). First, a petitioner can demonstrate a beneficiary's sustained acclaim and the recognition of the individual's achievements in the field through evidence of a major, internationally recognized award, such as the Nobel Prize. 8 C.F.R. § 214.2(o)(3)(iii)(A). If the petitioner does not submit this evidence, then it must submit sufficient qualifying evidence that meets at least three of the eight categories of evidence listed at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1)-(8). If the petitioner demonstrates that the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, it may submit comparable evidence in order to establish the individual's eligibility. 8 C.F.R. § 214.2(o)(3)(iii)(C).

The submission of documents satisfying the initial evidentiary criteria does not, in and of itself, establish eligibility for O-1 classification. See 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994) ("The evidence submitted by the petitioner is not the standard for the classification, but merely the mechanism to establish whether the standard has been met."). Accordingly, where a petitioner provides qualifying evidence satisfying the initial evidentiary criteria, we will determine whether the totality of the record and the quality of the evidence shows extraordinary ability under section 101(a)(15)(o)(i) of the Act and 8 C.F.R. § 214.2(o)(3)(ii), (iii).[2]

Furthermore, an O-1 petition "may only be filed by a United States employer, a United States agent, or a foreign employer through a United States agent." 8 C.F.R. § 214.2(o)(2)(i). In addition, the petition must be accompanied by copies of any written contracts between the petitioner and the beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the individual will be employed. 8 C.F.R. § 214.2(o)(2)(ii)(B). Finally, the regulation at 8 C.F.R. § 214.2(o)(2)(iv)(E) imposes the following requirements on petitions filed by United States agents:

> *Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A United States agent may be: The actual employer of the beneficiary; the representative of both the employer and the beneficiary; or a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by an agent is subject to the following conditions:
>
> *(1)* An agent performing the function of an employer must provide the contractual agreement between the agent and the beneficiary which specifies the wage offered and the other terms and conditions of employment of the beneficiary.

[2] *See also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), in which we held that, "truth is to be determined not by the quantity of evidence alone but by its quality."

(2) A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary, if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues or locations where the services will be performed. A contract between the employers and the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(3) A foreign employer who, through a United States agent, files a petition for an O nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the act and 8 CFR part 274a.

II. ANALYSIS

A. Nature of Proposed Employment

We will first address the Director's finding that the Petitioner offered inconsistent information regarding the Beneficiary's terms of employment under 8 C.F.R. § 214.2(o)(2)(ii)(B). The petition indicates that the Petitioner is seeking to employ the Beneficiary on its premises as a psychotherapist for a period of one year at a weekly wage of $1,400.00 plus "standard benefits." An April 2017 "Purchase of Service Agreement" (PSA) accompanying the initial filing identifies the Beneficiary as the "Contractor" and states that she will be paid "for services rendered in accordance with the rate of $40.00 per hour."[3] In addition, the PSA explains that "[a]s an independent contractor," the Beneficiary "is not eligible for the benefits provided to [the Petitioner's] employees, including, but not limited to, fringe benefits . . . , health insurance, workers' compensation, unemployment compensation or any other employee benefit." The PSA further states that the Beneficiary "reserves the right to work for other organizations or agencies at any time during the duration of this Agreement."

The Director issued a request for evidence (RFE) advising the Petitioner that the record "contains discrepant and conflicting information regarding the terms of the Beneficiary's employment." For example, the Director noted that while the petition stated the Beneficiary would receive "standard benefits," the PSA indicated that as a contractor, she was "not eligible for the benefits provided to [the Petitioner's] employees." Additionally, the RFE mentioned the clause of the PSA indicating that the Beneficiary "reserves the right to work for other organizations or agencies at any time during the duration of this Agreement" despite the information listed on the petition indicating that the Beneficiary would be working "full-time" and not "off-site at another company or organization's location." Based on this information, the Director concluded it was "not evident from [the PSA]

[3] Part D of the PSA states that it does not "create an employer-employee relationship between [the Petitioner] and Contractor. Contractor is an independent contractor and not an employee of [the Petitioner]."

whether [the Petitioner] is the Beneficiary's employer or acting as an agent on behalf of the Beneficiary and her employer(s)."

The RFE explained that the PSA was "not sufficient to demonstrate the contractual agreement between [the Petitioner], the Beneficiary, and other employers" and advised the Petitioner of the evidentiary requirements for agents set forth at 8 C.F.R. § 214.2(o)(2)(iv)(E). In addition, it afforded the Petitioner an opportunity to submit further documentation demonstrating the terms of the Beneficiary's employment and to provide a "written statement that addresses the discrepant and conflicting terms of the Beneficiary's employment."

In response, the Petitioner offered a July 2017 "Employment Agreement" between the Petitioner and Beneficiary indicating that she would be paid "a salary at the rate of $1,400 per week" and that benefits such as "life insurance and health and dental" plans would be available to her. This new agreement states that the Beneficiary "is an employee of [the Petitioner]." A July 17, 2017 letter accompanying the Petitioner's response to the RFE contends that "[t]he contract previously provided has been a generic contract that is not applicable to the Beneficiary."

The Director denied the petition, stating: "This new employment agreement has significantly changed the terms of employment from the [PSA] you submitted in the initial filing. Whereas the initial filing indicated that the Beneficiary is "not an employee of [the Petitioner]," you now assert that the Beneficiary is an employee . . . ." Citing to *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998), the Director noted that a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. In addition, the denial decision indicated that the Petitioner provided "conflicting and discrepant information regarding the Beneficiary's terms of employment in the United States" and that these discrepancies "have not been explained satisfactorily." The Director further concluded that the record did not show whether the Petitioner was "the Beneficiary's direct employer or acting as an agent on behalf of the Beneficiary and her employers."

On appeal, the Petitioner asserts that the July 2017 Employment Agreement establishes that the petitioning organization "is the Beneficiary's direct employer." The Petitioner further states that "even though it was not clearly stated in the previous contracts," it "has been the sole employer of the Beneficiary." In addition, while the Petitioner notes that "[p]sychotherapists have been considered to be an 'independent contractor' profession in general,"[4] it maintains that "the Beneficiary did not act as an independent contractor despite the fact that the [PSA] contract was accepted by USCIS during those approved years."

We find that the Petitioner has not overcome the inconsistencies in the record with respect to the Beneficiary's terms of employment. Although the Petitioner offered a new employment agreement in response to the Director's RFE, we find this evidence insufficient to resolve the aforementioned

[4] We note that a United States agent may file a petition in cases involving workers who are traditionally self-employed. *See* 8 C.F.R. § 214.2(o)(2)(iv)(E).

inconsistencies in the record. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* In the present matter, despite the Director's RFE, the Petitioner has not provided sufficient evidence or arguments to overcome the Director's findings that it offered inconsistent information regarding the Beneficiary's terms of employment under 8 C.F.R. § 214.2(o)(2)(ii)(B). Accordingly, we uphold the Director's determination on this issue.

B. Beneficiary's Eligibility as an Individual of Extraordinary Ability Under the Evidentiary Criteria

Although not addressed by the Director, we additionally find that the Petitioner has not offered sufficient evidence to establish that the Beneficiary satisfies at least three of the eight evidentiary categories listed at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*1*)-(*8*).[5] On appeal, the Petitioner claims that the documentation meets at least four of those criteria. As discussed below, we find that the exhibits do not satisfy any of the evidentiary categories described at 8 C.F.R. § 214.2(o)(3)(iii)(B).

> *Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*3*).

The Petitioner listed internet links to various online YouTube videos, but did not provide any supporting documentary evidence of the television shows to demonstrate that they were about the Beneficiary. Nor did it provide the date and author of the television programming, or English language translations of the shows' transcripts. In addition, the Petitioner listed internet links to "articles published," but the information offered does not indicate whether the articles were authored by the Beneficiary or if they were written about her. Regardless, the record does not include copies of these articles including their date, author, and any necessary translation. Furthermore, the record does not show that the coverage was in professional or major trade publications or major media.

The record also includes various articles written by the Beneficiary in [redacted] a free monthly Spanish language [redacted] magazine distributed in Pennsylvania and New Jersey, which discussed topics such as confidence, life balance, and procrastination. As these articles are not about the Beneficiary, they do not meet this regulatory criterion. The regulations contain a separate and distinct criterion relating to authorship of scholarly articles in professional journals at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*6*). The Beneficiary's articles are further addressed in our discussion of that criterion. The plain language of the regulation requires "published material . . . about the alien." Without evidence that the Beneficiary has been the subject of

[5] The Petitioner does not claim a major, internationally recognized award to establish the Beneficiary's eligibility under the single evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iii)(A).

material in professional or major trade publications or major media, the Petitioner has not established that she satisfies this criterion.

> *Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*5*).

In order to satisfy the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*5*), a petitioner must establish not only that a beneficiary has made original contributions but that they have been of major significance in the field. For instance, a petitioner may show that a beneficiary's contributions have been widely implemented throughout the field, have substantially impacted or influenced the field, or have otherwise risen to a level of major significance in her overall field.

The record includes letters of support from the Petitioner, [redacted] (the Beneficiary's former employer in the Dominican Republic), [redacted] magazine, and various religious organizations. These letters discuss the Beneficiary's talent as a psychotherapist, writing and presentations skills, job responsibilities, and expertise in her field. For example, [redacted] Senior Pastor at [redacted] asserts that the Beneficiary "is a strong resource that we would like to take advantage of and plan to use her to help this congregation and our community." In addition, [redacted] founder and editor, praises the Beneficiary's skills "as a writer and researcher" and states that "[s]he always takes great pride in her writing, conducts herself professionally and is easy to work with." The record, however, does not show that the Beneficiary's work has affected psychotherapy practices in the field or has otherwise risen to the level of an original scientific contribution of major significance in the field.

With respect to the Beneficiary's published and presented work, there is no presumption that every research article or conference presentation is a contribution of major significance in the field; rather, a petitioner must document its actual impact. In this case, the Petitioner has not offered evidence demonstrating that the Beneficiary's articles are cited at a level commensurate with contributions "of major significance in the field," nor does the record include other documentation showing her articles' influence or importance. For the above reasons, the Petitioner has not established that the Beneficiary meets this regulatory criterion.

> *Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*6*).

The Petitioner offered articles authored by the Beneficiary in [redacted] but the record does not demonstrate that this regional magazine is a professional journal or form of major media. Furthermore, the Petitioner has not shown that the Beneficiary's general wellness articles for [redacted] readership in Pennsylvania and New Jersey constitute scholarly articles in the field of psychotherapy, as opposed to articles for the general population in the aforementioned states. Therefore, the Petitioner has established that the Beneficiary meets this regulatory criterion.

> *Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*7*).

The record includes a letter from the Petitioner stating that the Beneficiary performs her duties in an excellent manner and that she has helped her patients examine and improve their lives. In addition, the Petitioner submitted a letter from [redacted] indicating that the Beneficiary worked there from 2003 until 2010, performed quality work, and demonstrated responsibility and commitment to the center. The aforementioned statements, however, are not sufficient to demonstrate that the Beneficiary has been employed in a critical or essential capacity for the aforementioned organizations. The evidence does not differentiate the Beneficiary from the Petitioner and [redacted] other therapists, and is insufficient to establish that her specific role has contributed to those organizations in a way that was of substantial importance to their success or standing. Furthermore, the record does not include supporting evidence demonstrating these organizations' distinguished reputation in the field. As a result, the Petitioner has not provided sufficient material to meet this criterion.

C. Prior O-1 approvals

The record indicates that USCIS has previously approved multiple petitions for O-1 status filed on behalf of the Beneficiary. These prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the petitioner's or beneficiary's qualifications. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not be bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

III. CONCLUSION

The Petitioner has not resolved the inconsistencies regarding the Beneficiary's terms of employment under 8 C.F.R. § 214.2(o)(2)(ii)(B). Further, the record does not satisfy at least three of the eight evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). Even if these initial evidentiary requirements had been met, the cumulative record does not demonstrate the Beneficiary's sustained national or international acclaim and recognition for achievements. 8 C.F.R. § 214.2(o)(3)(iii). Nor does the evidence show a level of expertise indicating that she is one of the small percentage at the very top of the field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). Consequently, the Petitioner has not established that the Beneficiary is eligible for an extension of her O-1 nonimmigrant status as an individual with extraordinary ability in the sciences.

ORDER: The appeal is dismissed.

Cite as *Matter of C-B-S-, Inc.*, ID# 1096656 (AAO Apr. 19, 2018)