U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9441556

Date: AUG. 11, 2020

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (Extraordinary Ability – O)

The Petitioner, a television production business, seeks O-2 nonimmigrant visa classification for the Beneficiary as an accompanying individual to [redacted], a television producer and director of talent acquisition, whose petition for O-1 classification was filed concurrently. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(ii), 8 U.S.C. § 1101(a)(15)(O)(ii).

The Director of the California Service Center approved the O-1 petition but denied the Petitioner's request to extend the Beneficiary's O-2 status for three years, concluding that the record did not establish that the Beneficiary seeks to enter the United States solely for the purpose of accompanying and assisting in the artistic performance of the O-1 individual, as required by section 101(a)(15)(O)(ii)(I) of the Act. We dismissed the Petitioner's appeal from that decision. The matter is now before us on a combined motion to reopen and reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the combined motion.

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). 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.[1]

[1] The Petitioner did not include the required "statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

The Petitioner seeks to extend the Beneficiary's O-2 nonimmigrant status and has offered him continuing employment in the position of television producer. The Beneficiary was previously granted O-2 classification as an accompanying individual to [redacted] for the period from May 8, 2015 to November 19, 2017. In dismissing the appeal, we determined that the Petitioner did not establish that the Beneficiary seeks to enter the United States solely for the purpose of accompanying and assisting in the O-1's artistic performance as a director of talent acquisition and executive producer. Specifically, we concluded that the evidence indicated that during the period of the Beneficiary's authorized O-2 employment with the O-1 artist the Beneficiary worked separate and apart from the O-1 artist, performing services for companies identified on his 2015 and 2016 Form 1040, U.S. Individual Income Tax Return. The O-2 classification does not entitle the Beneficiary to work separate and apart from the O-1 artist to whom he provides support. *See* 8 C.F.R. § 214.2(o)(4)(i).

In the Petitioner's motion, it asserts that "[the Beneficiary"] has never been given an adequate opportunity to defend and explain his foreign income," and presents additional documentation. Upon consideration of the Petitioner's claims and evidence on motion, we conclude that the Petitioner did not establish that the Beneficiary seeks to enter the United States solely for the purpose of accompanying and assisting in the O-1's artistic performance as a director of talent acquisition and executive producer.

As discussed in our appellate decision, within its initial submission the Petitioner provided the Beneficiary's undated biography, which indicated that he has been working for five years as a "producer and entrepreneur," and has produced the television shows [redacted] and [redacted], the video for the [redacted], and has been part of the productions [redacted], [redacted], [redacted], and [redacted] The biography further indicated the Beneficiary previously ran his family's import-export business and had opened his own business. The Director issued a request for additional evidence ("RFE") in which she requested, *inter alia,* evidence establishing that the Beneficiary has not been working "separate and apart from the O-1 whom he or she supports," including the following: (1) copies of the Beneficiary's 2015 and 2016 W-2, 1099-MISC or other documents evidencing wages paid to him; and (2) copies of the Beneficiary's 2015 and 2016 Form 1040, U.S. Individual Income Tax Returns. Within the Petitioner's RFE response, it provided a copy of the Internal Revenue Service Form 1099 it issued to the Beneficiary for 2016, and a copy of the Beneficiary's U.S. Federal Income Tax Return for 2016. That tax return indicated he received income from self-employment from two sources: as an "artistic director" with the Petitioner, and from '[redacted]" The Director denied the petition, concluding that "[e]ven if the [B]eneficiary is supporting the endeavors of the O-1 artist, the [B]eneficiary does not appear to be in the U.S. solely to support the O-1 based on his income derived from [redacted]"

On appeal, the Petitioner acknowledged that the Beneficiary "received income from [redacted]" but asserted that the Beneficiary "worked exclusively for [the Petitioner] in the United States" and that he "was not operating a foreign business in the United States." It provided a letter from [redacted], an accountant from the firm that prepared the Beneficiary's 2016 Federal Income Tax Return, which stated that the "income reported on Schedule C is for self-employed consulting income earned in [redacted]" We determined that this evidence did not sufficiently

address the issue of whether the Beneficiary worked separate and apart from the O-1 artist during his authorized O-2 employment with the O-1 artist, as the Petitioner had not provided evidence pertaining to the details of the Beneficiary's self-employment, such as documentation identifying the services he provided, where and when he provided those services, the clients he served, the duration of the employment, and whether the employment was in a full-time or part-time capacity.

On motion, the Petitioner provides a letter from [redacted], an accountant, who states that the Beneficiary, is the "100% shareholder as it appears in the Corporation documents for [redacted]. . . and . . . [redacted] . . therefore he is the sole beneficiary of the utilities that result of the operations once the municipal, state and national taxes have been paid." Regarding [redacted] the Petitioner further submits two forms titled, respectively, "Profit Calculations and Vacation Bonus Year 2015 [redacted] and "Profit Calculations and Vacation Bonus Year 2016," that include the names and start dates of several employees of that company. The Petitioner acknowledges that the Beneficiary "does own a foreign business that provides consulting services" for which "[h]e is the sole owner that receives all income" but asserts "[t]his business had employees abroad that do the work and run the business . . . . His employees do the work and he receives the income as the owner. This does not mean that he works or operates a business in the United States." The record, however, lacks supporting documentation to corroborate counsel's claims. 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.

Reviewed in its totality, the evidence submitted on motion does not sufficiently address the issue of whether the Beneficiary worked separate and apart from the O-1 artist during his authorized O-2 employment with the O-1 artist. The Beneficiary's aforementioned tax returns for 2015 and 2016 indicate his sole ownership of several companies, including the import and export business [redacted] the construction business [redacted] and his partnership in the Delaware company [redacted] formed in August 2016. The Petitioner has not provided evidence pertaining to the details of the Beneficiary's self-employment, such as documentation identifying the services he provided, where and when he provided those services, the clients he served, the duration of the employment, and whether the employment was in a full-time or part-time capacity. Therefore, the documentation submitted, without more, is insufficient to establish that the Beneficiary seeks to enter the United States solely for the purpose of accompanying and assisting in the artistic performance by the O-1 artist, as required. Further, the Petitioner does not specifically argue that our decision was based on an incorrect application of law or policy. Disagreeing with our conclusions without establishing that we erred as a matter of law or pointing to policy that contradicts our analysis of the evidence is not a ground to reconsider our decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit, in essence, the same brief and seek reconsideration by generally alleging error in the prior decision).

III. CONCLUSION

The assertions made by the Petitioner on motion do not establish that our previous decision was grounded in an incorrect application of law or policy. In addition, the new evidence submitted on

motion does not overcome the grounds underlying our previous decision or demonstrate the Beneficiary's eligibility for this classification.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.