U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-C-

DATE: JAN. 19, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a restaurant owner, seeks classification 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, Nebraska Service Center, initially approved the petition. On further review of the record, the Director determined that the Petitioner was not eligible for the benefit sought. Accordingly, the Director served the Petitioner with two notices of intent to revoke (NOIR) the approval of the immigrant visa petition, setting forth the reasons therefore, and ultimately revoked the approval of the petition. The Director found that the Petitioner did not qualify for classification as an individual of exceptional ability, and that she had not established that a waiver of a job offer requirement would be in the national interest.

The matter is now before us on appeal. In her appeal, the Petitioner provides additional documentation and argues that she satisfies the evidentiary requirements for eligibility as an individual of exceptional ability. The Petitioner further contends that she "qualifies for a waiver of the labor certification requirement."

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

I. LAW

The Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition[.]" Section 205 of the Act, 8 U.S.C. § 1155. The Board of Immigration Appeals has discussed revocations on notice as follows:

> [A] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be

> sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

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.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> > (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 –
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> > > (i) National interest waiver. . . . [T]he Attorney General[1] 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)(ii) sets forth the following six criteria, at least three of which an individual must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Only those who demonstrate "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2).

II. ANALYSIS

On appeal, the Petitioner indicates that "[t]here were no allegations of fraud, misrepresentation, wrongdoing, or newly-discovered evidence" relating to the revocation. The aforementioned circumstances, however, are not necessary in order for the Director to issue the NOIR. The Director's determination that the evidence of record at the time the NOIR was issued did not show that the Petitioner had satisfied at least three regulatory criteria under 8 C.F.R. § 204.5(k)(3)(ii) is a proper basis for revoking the approval. By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Matter of Ho*, 19 I&N Dec. at 590.

A. Evidentiary Criteria for Exceptional Ability

The record reflects that, since 2008, the Petitioner has owned and operated [redacted] in [redacted] California. As discussed below, a review of the record indicates she does not meet at least three of the relevant 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 submits an official academic record showing that she earned a bachelor of business administration degree from [redacted] Accordingly, the Petitioner has established that she meets this regulatory 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)

The Petitioner indicates that "she has been a business owner for less than ten years" and therefore does not meet 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).

The Petitioner states that "she is not engaged in a profession which requires a professional license or certification." Thus, she 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 provided Forms W-2, Wage and Tax Statements, from [redacted] reflecting that she earned $24,000 in 2010 and $45,600 in 2015. She also submitted data from the U.S. Census Bureau indicating that the mean income for "Nonfarm Self-Employment" in 2009 was $28,414; information from [redacted] stating that the U.S. national average salary for small business owners in 2011 was $44,576; and a report from [redacted] noting that in 2009 female small-business owners' average annual salary was between $25,000 and $70,000.

As the Petitioner's income of $24,000 in 2010 falls below the aforementioned average salary amounts, she has not shown that this compensation demonstrated exceptional ability. With respect to her Form W-2 from 2015, the Petitioner received this salary after she filed the petition on March 19, 2012. We note that eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Regardless, the Petitioner has not shown that her 2015 salary is reflective of exceptional ability based on the data submitted. Accordingly, the Petitioner has not established that she meets this regulatory criterion.

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

The Petitioner offers a June 2016 letter from the [redacted] Chamber of Commerce thanking her for "support this past year" and for having "chosen chamber membership." In addition, she submits a certificate of appreciation from the [redacted] Chamber of Commerce "for continued support this 2016-2017 year." We note that the letter and certificate were issued after the petition's filing date and therefore do not relate to her eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Furthermore, while the documents state that the Petitioner has supported the [redacted] Chamber of Commerce and has "chosen chamber membership," they do not

provide the association's membership requirements or otherwise indicate that membership is for professionals. For these reasons, the Petitioner has not demonstrated that she meets this regulatory criterion.

> *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).

The Petitioner contends that the June 2016 letter and certificate of appreciation from the Chamber of Commerce meet this criterion. The letter states: "Your financial contribution as well as time and dedication, has helped maintain the Chamber as a strong advocate for business and citizens in our community. Your commitment is indicative of your desire to have a voice in this community on matters that impact you as well as others[.]" The Petitioner has not established that her financial support, time, and dedication provided to a local chamber of commerce constitute "achievements and significant contributions to the industry or field." For instance, the record does not include documentary evidence showing that the Petitioner's activity with the Chamber of Commerce has contributed significantly to the restaurant industry or the field of business. Furthermore, as previously mentioned, the June 2016 letter thanked the Petitioner for her "support this past year" and the certificate of appreciation was "for continued support this 2016-2017 year." Recognition received after the petition's filing date does not demonstrate the Petitioner's eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49.

As further evidence for this criterion, the Petitioner points to her E-2 status, a nonimmigrant classification for those who have invested, or are actively in the process of investing, a substantial amount of capital in a bona fide enterprise in the United States. She argues that USCIS' multiple approvals of E-2 nonimmigrant visa petitions filed on her behalf demonstrate that "federal government agencies of the United States have recognized the Petitioner's contributions to the nation's economy through her business endeavor." Specifically, the Petitioner contends the E-2 regulations pertaining to marginality at 8 C.F.R. § 214.2(e)(15) and (16) require "that the investor must demonstrate an ability to develop and direct the investment enterprise, to the degree that it is making a significant contribution to the U.S. economy."

The regulation at 8 C.F.R. § 214.2(e)(15) defines the term "marginal enterprise" as "an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family." It further states that "[a]n enterprise that does not have the capacity to generate such income, but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise." *Id.* The regulation at 8 C.F.R. § 214.2(e)(16) requires that the foreign national "develop and direct" the enterprise. Demonstrating that the enterprise she develops and directs is not "marginal" does not necessarily establish that the Petitioner has made "a significant contribution to the U.S. economy." Furthermore, USCIS' approval of the Petitioner's nonimmigrant petition is not evidence of recognition for achievements and significant contributions.

Regardless, the Petitioner's prior E-2 nonimmigrant visa petition approvals do not preclude USCIS from denying an immigrant visa petition which is adjudicated based on an entirely different standard. Many Form I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd.*, 724 F. Supp. at 1103. Furthermore, our authority over a USCIS service center, the office responsible for adjudicating the nonimmigrant visa petition, is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of an individual, we are not bound to follow that finding in the adjudication of another immigration petition. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Because the Petitioner has not provided evidence that she received recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations as of the petition's filing date, she has not established that she meets this regulatory criterion.

Comparable evidence

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows for the submission of "comparable evidence" if the above standards "do not readily apply to the beneficiary's occupation." In this case, as the Petitioner acknowledges on appeal that "at least 4/6 standards readily apply," she has not shown that the standards at 8 C.F.R. § 204.5(k)(3)(ii) are not readily applicable to her occupation.

Nonetheless, the Petitioner argues that her company's corporate income tax returns demonstrate revenue generation and economic contributions that are indicative of her exceptional ability in business. The tax returns show a net operating loss of $7413 in 2008 and taxable income of $24,672 in 2009, $39,678 in 2010, $64,347 in 2011, and $38,667 in 2012. The tax returns from 2013 – 2015 post-date the filing of the petition and therefore they do not demonstrate the Petitioner's eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. While the 2008 – 2012 tax returns show increased taxable income in every year except 2012 and steady growth in her company's revenue, the Petitioner has not shown that the successful operation of her business and ability to generate a profit set her apart from other small business owners in the restaurant industry. Furthermore, she does not explain how the corporate tax returns are "comparable" to any specific objective evidence required at 8 C.F.R. § 204.5(k)(3)(ii)(A) – (F). Without arguments and evidence indicating that the quality of the submitted documentation is of the same caliber of objective evidence required by any specific criterion, the Petitioner has not established that her evidence is comparable.

Summary

The record supports the Director's finding that the Petitioner did not meet at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) or provide comparable evidence demonstrating her exceptional ability. Further, a review of the record in the aggregate does not support a finding that the Petitioner has achieved the level of expertise required for this classification.

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that she qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. The Petitioner does not claim that she is an advanced degree professional and, as discussed above, has not shown that she meets the regulatory criteria for classification as an individual of exceptional ability. As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot.

III. CONCLUSION

As the Petitioner has not demonstrated that she qualifies for classification as an individual of exceptional ability under section 203(b)(2)(A) of the Act, she has not met her burden to establish eligibility for the immigration benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Accordingly, we affirm the Director's revocation.

ORDER: The appeal is dismissed.

Cite as *Matter of A-C-*, ID# 86858 (AAO Jan. 19, 2017)