U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- CORP.

DATE: MAR. 29, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a restaurant, seeks to classify the Beneficiary as an individual of exceptional ability to serve as a Mediterranean and kosher food menu specialist. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). 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.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not demonstrated that the Beneficiary was an individual of exceptional ability or that the job required an individual with that level of expertise. We dismissed a subsequent appeal.

On motion, the Petitioner asserts that we applied an incorrect standard. Upon review, we will deny the joint motion to reopen and reconsider.

I. LAW

Section 203(b)(2) of the Act provides classification to qualified individuals with exceptional ability in the sciences, arts, or business. Exceptional ability "means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). A petitioner must provide documentation that satisfies at least three of six regulatory criteria in order to meet the initial evidence requirements for this classification. 8 C.F.R. § 204.5(k)(3)(ii). The submission of sufficient initial evidence does not, however, in and of itself establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality"). *See also Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at

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.

II. ANALYSIS

A. Issues

The two issues we addressed on appeal were whether the Petitioner established that the Beneficiary has exceptional ability and whether it demonstrated that the position requires an individual with that level of expertise. As part of our analysis, we noted that the Petitioner obtained a labor certification from the Department of Labor (DOL) for a different occupation, dietician/nutritionist, than the one discussed with the petition, Mediterranean and kosher food menu specialist. The Petitioner does not address that concern on motion. Thus, it remains unresolved whether the labor certification supports the petition.

B. The Director's Decision

In our decision, we acknowledged that some of the Director's requests for evidence raised subjects that are not material to the benefit requested, such as national interest waiver issues and whether the Beneficiary is an advanced degree professional. As we found, the subsequent denial addressed the correct issues. Therefore, our decision focused on whether the Director correctly concluded in that decision that the Beneficiary is not eligible for the classification sought. On motion, the Petitioner continues to assert that the Director mishandled the original adjudication of the petition. The current filing seeks to reopen our previous decision. As we found that the Director ultimately relied on the relevant regulatory provisions to deny the petition, we will not further address the Director's actions in this decision.

C. Summary of Our Decision on Appeal

In our decision, we found that the Beneficiary, whose work experience ended in November 2003, meets no more than two of the regulatory criteria, of which he must meet at least three. 8 C.F.R. § 204.5(k)(3)(ii). Specifically, the Beneficiary's diploma as a technologist of public catering from the [redacted] met the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(A). We next concluded that the Beneficiary's experience as a kitchen manager does not satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) because that criterion requires 10 years of experience "in the occupation for which he or she is being sought," which, according to the DOL, is dietician/nutritionist. Nonetheless, we noted that even if we accepted experience in the kitchen manager occupation as the Director did, the Beneficiary would still need to meet a third criterion, which he did not. The only other criterion the Petitioner addressed was the recognition for achievements and significant contributions to the industry or field. 8 C.F.R. § 204.5(k)(3)(ii)(F). In finding the Beneficiary does not meet this criterion, we determined the letters did not explain how the Beneficiary contributed to the industry or field.

We then found that specialization in a specific cuisine, in this case kosher cooking, is not comparable evidence of exceptional ability. We stressed that a local shortage of workers with such skills is a valid basis for a labor certification, but is separate from whether the Beneficiary has demonstrated exceptional ability. As the Petitioner did not satisfy at least three criteria, including through comparable evidence, we concluded that the record did not contain sufficient initial evidence of the Beneficiary's exceptional ability.

Finally, we analyzed whether the position, which required 10 years of experience in the related position of kitchen manager and knowledge of kosher laws and offered the prevailing wage for a dietician/nutritionist, required exceptional ability. As the proffered wage was not higher than the prevailing wage for the occupation the DOL certified and because knowledge of a particular cuisine type is not indicative of exceptional ability, we found the position did not require someone with exceptional ability.

D. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.23(b)(3) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean 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." The Petitioner does not address any new facts in the motion brief and does not support the filing with new affidavits or other new evidence. Accordingly, the filing does not meet the requirements for a motion to reopen. Below we will consider the Petitioner's discussion of legal and factual errors supporting the motion to reconsider.

E. Motion to Reconsider

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). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

1. General Assertions of Error

The Petitioner first maintains that we mistakenly relied on *Kazarian*, 596 F.3d at 1115, which involves a different classification than the one sought. The Petitioner acknowledges that we expressly cited that case for the structure of our analysis, and not the statutory standard.

Specifically, in exceptional ability cases, we will first consider whether the Petitioner has offered the requisite initial evidence and then evaluate whether the material is indicative of the statutory standard, a degree of expertise significantly above that ordinarily encountered. U.S. Citizenship and Immigration Services (USCIS) Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 4, 20 (Dec. 22. 2010).[1] Moreover, we also cited *Chawathe*, 25 I&N Dec. at 376, for the general proposition that the "truth is to be determined not by the quantity of evidence alone but by its quality." Accordingly, we find no error of law or policy in citing that case.

Next, the Petitioner highlights that we noted a spelling variation in two translations. Specifically, the record contains translations of two letters from the same individual with two different spellings of the first name. While we noted the different spellings in a footnote to clarify that we were using the spelling in the most recent translation, they were not a basis for the denial. Thus, we find no error in the inclusion of that footnote.

Also, the Petitioner maintains that we did not objectively evaluate the evidence and drew conclusions without basis. As an example, the Petitioner notes that we found the Beneficiary did not have sufficient relevant experience and, even if we concluded his work was qualifying, he did not meet a third criterion. The Petitioner offers no explanation for how this statement reflects a lack of objectivity. The Petitioner has presented two distinct occupations to different federal agencies, advising the DOL that the occupation is dietician/nutritionist and representing the occupation as a Mediterranean and kosher food menu specialist to us. Given this discrepancy, which the Petitioner has not addressed on motion, we discussed both possibilities to ensure the most comprehensive analysis.

2. Specific Assertions of Error

First, the Petitioner asserts that the labor certification alone is evidence that the Beneficiary's skills are rare. The DOL certifies that there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. 20 C.F.R. § 656.1(a)(1). Given that labor certification is required for third preference positions for skilled, professional, and other workers,[2] it is clear that the DOL's confirmation of shortages are unrelated to our determination of exceptional ability.[3] The Petitioner relies on *Matter of Frank*, 11 I&N Dec. 657 (Dist. Dir. 1966), for the definition of exceptional ability as "something more than what is usual, ordinary, or common, and requires some rare or unusual talent." That decision, involving a qualified tailor deemed not to have exceptional ability, predates the current regulation, which defines exceptional ability as a degree of expertise *significantly* above that ordinarily encountered.

---

[1] *See* http://www.uscis.gov/laws/policy-memoranda.

[2] Section 203(b)(3)(A) of the Act.

[3] *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984) (holding that the Immigration and Naturalization Service (now USCIS) makes its own determination regarding the Beneficiary's entitlement to a specific preference status).

The Petitioner next asserts that we did not consider the comparable evidence the Petitioner offered, specifically, that the Beneficiary is skilled with kosher preparation rules. Our decision did, in fact, consider this material, but found it insufficient. The Petitioner argues our conclusion that specialization in a type of cooking "does not automatically mean" or is not "necessarily indicative" of exceptional ability reveals that our analysis was "one-sided." We disagree. There are numerous types of cooking specialties, of which kosher preparation is only one. Simply specializing in one type of cuisine is not representative of a degree of expertise significantly above that ordinarily encountered among dieticians/nutritionists or menu specialists. On motion, the Petitioner references the Beneficiary's "specialized formal education and religious training." The Beneficiary's formal education focused on catering and took place in Russia. The Petitioner has not corroborated that the Beneficiary received kosher training as part of that education. While the record indicates he worked in restaurants in Israel, it contains only general references in letters from owner of and owner of to his "personal involvement with religious supervisors" and consultations with rabbinical authorities. The Petitioner has not otherwise documented formal religious training. Regardless, specialty training, such as with specific ethnic dishes, vegan cooking, pastries, or kosher rules, does not reflect a degree of expertise significantly above that normally encountered in the field, which includes cooks specializing in all different types of cuisine. Rather, it demonstrates competence to prepare these types of food.

In addition, the Petitioner faults our previous decision for concluding that the reference letters did not demonstrate the Beneficiary's achievements and contributions to the industry or field. The Petitioner asserts that this finding confirms that we used an extraordinary ability standard for letters; however, the Petitioner relies on language that appeared in the Director's decision, not ours, as support.[4] The motion seeks reconsideration of our decision, not the Director's. Our previous decision cited three federal cases other than the one the Petitioner cites on motion for the proposition that letters have more weight when they are more than conclusory and include details beyond the regulatory language. We then thoroughly considered the information in the letters, stating that they did not specify how the Beneficiary has been recognized or how improving the menus of two restaurants contributed to the industry or field.

Finally, the Petitioner asserts that by requiring achievements and significant contributions to the industry or field we used the standard for extraordinary ability, not exceptional ability. While we agree that the Petitioner does not need to establish contributions of major significance in the field as required under 8 C.F.R. § 204.5(h)(3)(v) for the extraordinary ability classification, the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires that the Beneficiary have contributed at some level "to the industry or field." Accordingly, the Petitioner has not demonstrated that we erred by requiring evidence of some influence in the industry or field beyond the two restaurants where he worked.

[4] The Petitioner asserts the Director relied on a test from *Kazarian*, 596 F.3d at 1115, by using the language that letters "cannot form the cornerstone of a successful" petition. That language does not appear in *Kazarian* and the Director did not cite that case.

Ultimately, the record in the aggregate, considering all of the Beneficiary's accomplishments together, does not establish by a preponderance of the evidence that he has demonstrated exceptional ability.

III. CONCLUSION

The motion must be denied because the Petitioner did not establish that the Beneficiary had exceptional ability or that the position requires an individual with exceptional ability.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A- Corp.*, ID# 197586 (AAO Mar. 29, 2017)