U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-F- INC.

DATE: NOV. 20, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a ballroom dance studio,[1] seeks to employ the Beneficiary as a dancer. It initially requested classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience. The Petitioner also requested Schedule A designation for the offered position.[2]

The Acting Director of the Nebraska Service Center denied the petition, concluding that the petition does not qualify for Schedule A, Group I or II designation.

On appeal, the Petitioner asserts that it "inadvertently" requested the skilled worker classification instead of the "extraordinary ability" classification. It states that it would have demonstrated eligibility for the extraordinary ability classification but for the error on the petition.

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigrant visas are divided into five preference categories, three of which are relevant here. The first preference category includes persons with extraordinary ability in the sciences, arts, education, business, or athletics; outstanding professors and researchers; and multinational managers or executives. The second preference category includes professionals

[1] The Petitioner was involuntarily dissolved in the state of Illinois on [redacted] 2017. Ill. Sect. of State, https://www.ilsos.gov/corporatellc/CorporateLlcController (last visited Nov. 13, 2018).

[2] A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has 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 foreign nationals in such occupations. The current list of Schedule A, Group I occupations includes professional nurses and physical therapists. Group II is for persons of exceptional ability in the sciences, arts, or performing arts. *See* 20 C.F.R. § 656.5.

holding advanced degrees and persons of exceptional ability in the sciences, arts, or business. The third preference category includes skilled workers, professionals, and unskilled workers.

Employment-based immigration generally follows a three-step process. First, in many types of cases, an employer must first obtain an approved ETA Form 9089, Application for Permanent Employment Certification, from the DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Here, the Petitioner requested a Schedule A designation for the offered position. Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with USCIS. Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15. The petition in this case was filed with a duplicate uncertified ETA Form 9089, and the labor certification and petition indicate that they are being filed for a Schedule A occupation.

II. CHANGE OF CLASSIFICATION

In Part 2.1.f. of the Form I-140, the Petitioner specified that the petition was being filed for a skilled worker requiring at least two years of specialized training or experience. In Part 2.2.b., the Petitioner also specified that it was being filed for a Schedule A, Group I or II designation.

As noted by the Director in her decision, Schedule A, Group I does not apply to dancers. It currently applies only to professional nurses and physical therapists. Further, the Director indicated that a Schedule A, Group II petition must be filed under the second preference category for a person of exceptional ability.[3] The Petitioner filed this petition under the third preference category for a skilled worker.

On appeal, the Petitioner asserts that it intended to apply for the extraordinary ability classification but checked the wrong box on the petition. It states that it intended to check Part 2.1.a. of the Form I-140. Therefore, on appeal, the Petitioner seeks to change the classification from third preference for skilled workers to first preference for persons with extraordinary ability in the sciences, arts,

[3] On the version of the Form I-140 filed by the Petitioner, Part 2.1.d. represents the second preference category for professionals holding advanced degrees and persons of exceptional ability (except those persons seeking a national interest waiver).

education, business, or athletics. *See* section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A).[4] However, the Petitioner also states on appeal that it established "the minimum of 3 of the 6 criteria as required by 8 C.F.R. Section 204.5(k)(3)(i)." The regulation at 8 C.F.R. § 204.5(k)(3) applies to the second preference classification for persons of exceptional ability, not the first preference classification for persons with extraordinary ability. Thus, the Petitioner makes conflicting assertions regarding the classification it is requesting on appeal.[5]

The USCIS website gives the following instructions with regarding to correcting an error:

> When we accept your Form I-140 for processing, we create an electronic record and mail a Form I-797, Receipt Notice, to you and the representative on the Form G-28. The receipt notice will indicate the visa category that you requested on Part 2 of the Form I-140. Make sure this category is correct. If it is not correct (for example, if you or USCIS has made a clerical error), immediately call the USCIS Contact Center at 800-375-5283 or 800-767-1833 (TTY) to request that we change the visa classification before making a decision on your form.
>
> Although you may request that we change the visa classification to correct a clerical error in Part 2 of the form, we will make the final determination about whether to change the visa classification based on everything in your case. If we deny your Form I-140 because you are ineligible for the requested visa category, we will also deny any related application that you filed with it (for example, Form I-485, Form I-765, Form I-131).
>
> We cannot change the visa category if we have already made a decision on your Form I-140.

Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker, https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited Nov. 13, 2018). Therefore, USCIS guidance permits a petitioner to request a change of classification prior to adjudication to correct a clerical error in Part 2 of the Form I-140.

Here, the Petitioner did not request a change of classification until after a decision had been made by the Director. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The Petitioner may not amend the petition on appeal in order to establish

[4] On the version of the Form I-140 filed by the Petitioner, Part 2.1.a. represents the first preference category for persons with extraordinary ability.

[5] The Petitioner has not resolved these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

eligibility under a different classification. Further, the Petitioner's request to change the classification is flawed, as it seemingly requests both the first preference and second preference classifications.

III. CONCLUSION

The Petitioner has not established that the petition qualifies for Schedule A designation under the employment-based third preference classification of skilled worker.

ORDER: The appeal is dismissed.

Cite as *Matter of C-F- Inc.*, ID# 01522764 (AAO Nov. 20, 2018)