U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11063779

Date: NOV. 30, 2020

Motion on Administrative Appeals Office Decision

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

The Petitioner, a music group, seeks to classify the Beneficiary, a musician, as a foreign national of extraordinary ability in the arts. To do so, the Petitioner seeks O-1 nonimmigrant 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 California Service Center denied the petition, concluding that the Petitioner had not indicated or established that the Beneficiary has been nominated for or received a significant national or international award or prize, and it did not satisfy at least three of six listed regulatory criteria. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). The Director also determined that the Petitioner provided insufficient information regarding the Beneficiary's proposed duties in the United States. 8 C.F.R. § 214.2(o)(2)(ii). We dismissed the Petitioner's subsequent appeal from that decision. Although in our appellate decision we withdrew the previous finding pertaining to the Beneficiary's proposed duties in the United States, we concluded that the documentation submitted did not satisfy at least three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). 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 both motions.

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 U.S. Citizenship and Immigration Services (USCIS) 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 reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant a

motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

In dismissing the appeal, we determined that the record does not support a finding that the Petitioner satisfies the requirements of at least three of the six initial evidentiary criteria at 8 C.F.R § 214.2(o)(3)(iv)(B). In the Petitioner's motion to reconsider, it argues that it submitted evidence showing that it satisfied three criteria, relating to lead or starring participant in productions or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), lead, starring, or critical role for organizations and establishments at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*), and significant recognition for achievements at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*). In its motion to reopen, the Petitioner presents additional documentation relating to the significant recognition for achievements criterion. For the reasons discussed below, the Petitioner's motion to reconsider does not establish that we erred in our prior decision. Further, the new evidence submitted in support of the motion to reopen does not demonstrate that the Petitioner satisfied at least three of the six categories listed at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*).

A. Motion to Reconsider

First, the Petitioner asserts on motion that we applied a higher standard than is set forth in the regulations, effectively requiring the Petitioner to prove that the Beneficiary is at the very top of his profession, rather than that he is prominent in his field of endeavor. Our appellate decision, however, did not mention or impose such a requirement. Regardless, we will address below the Petitioner's assertion that we may have gone beyond the regulatory requirements. The Petitioner contends that it meets three criteria. We will discuss the Petitioner's submission of new evidence under the motion to reopen section.

Regarding the criterion relating to lead or starring role in productions or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), in our appellate decision we determined that while the submitted promotional posters and photographs indicate that the Beneficiary has been a keyboardist for several bands and the music arranger and/or performer on several CDs, the documentation submitted did not establish that the Beneficiary performed services in a lead or starring role in those productions or events. We also determined that the posters and photographs regarding events at which the Beneficiary has performed do not establish that the bands' live shows have a distinguished reputation, and the Petitioner had not otherwise submitted critical reviews, advertisements, publicity releases, publications or other evidence establishing the distinguished reputation of the aforementioned productions or events.

In addition, our appellate decision concluded that the Petitioner did not establish that the Beneficiary's prospective services developing several albums and performing at various venues in Texas will be in a lead or starring role. We determined that the Petitioner had not submitted, as required, critical reviews, advertisements, publicity releases, publications or other evidence that would distinguish the Beneficiary's proposed role as leading or starring within its upcoming productions, or their distinguished reputations. The Petitioner disputes our conclusions without directing to a particular law, regulation, or policy that specifically shows that we erred in our determinations. Instead, the Petitioner asserts that in order to establish the distinguished reputation of the events and productions at which the Beneficiary has and will perform, "the caliber of the shows need not be stratospheric

. . . ." We do not disagree with the Petitioner's statement; our appellate decision, however, did not mention or impose such a requirement. The Petitioner does not identify any specific error of law or policy in our appellate decision relating to this criterion.

In reference to the lead, starring, or critical role for organizations and establishments criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*), our appellate decision noted that the Petitioner claimed that the Beneficiary satisfies this criterion based upon his past role with [redacted] in Venezuela. We concluded that, although the Petitioner provided a letter from that organization's founder, [redacted] confirming that the Beneficiary was a teacher and "head of the piano chair" for 10 years, and praising his "talent, professionalism and responsibility with his students," the letter did not detail sufficiently the Beneficiary's starring or leadership position, or the critical nature of his role with the organization. Our previous decision also concluded that the documentation submitted did not establish that the Beneficiary's proposed work as a musician for the petitioning band will be in a lead, starring, or critical role for the organization. We determined that the letters submitted from the Petitioner's president, asserting that the Beneficiary's "extensive" experience as a pianist, arranger and producer "is of vital importance to the shows offered by our group," do not describe how the Beneficiary will contribute to the petitioning organization as a whole, how his position fits within the overall hierarchy of the group, or how the Beneficiary will be responsible for the Petitioner's success or standing to a degree consistent with the meaning of a "critical role."

The Petitioner disputes our conclusions without directing to a particular law, regulation, or policy that specifically shows that we erred in our determinations. Instead, the Petitioner makes the general, unsupported assertions that the Beneficiary's proposed roles as a pianist, arranger, and producer for its upcoming productions "are self-evident with respect to the Beneficiary's place in the hierarchy," and that his past role "as head of the [redacted] Piano Department . . . would be a critical role for any music institution." However, disagreeing with our conclusions without establishing that we erred as a matter of law or policy or pointing to precedent decisions that contradict 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). The Petitioner has not shown that our determination for this criterion was incorrect.

In reference to the significant recognition for achievements criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*), our appellate decision noted that the petition was accompanied by recommendation letters from the Beneficiary's own current and former colleagues and persons who have worked with him on music projects. Our previous decision concluded that, although the letters provide that the Beneficiary is recognized for his work ethic, artistry, and innate talent as a keyboardist and music arranger, and confirm that he performed his work admirably in prior projects, they did not indicate what, exactly, constitute the Beneficiary's recognized achievements in the field. For these reasons, the Petitioner has not demonstrated the Beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*).

For the reasons discussed above, the motion does not establish that our latest decision was incorrect based on the evidence of record at the time of the decision. Therefore, the motion to reconsider is dismissed.

B. Motion to Reopen

As mentioned previously, in its motion to reopen the Petitioner presents additional documentation relating to the significant recognition for achievements criterion. The Petitioner provides a certificate of excellence the Beneficiary received from The Conservatory of Music at [redacted] for his participation as a featured musician in its World of Music workshop and master class. It also submits an award certificate for outstanding service the Beneficiary received from the [redacted] University jazz department for his participation as a featured artist in its Latin jazz master class. The Petitioner contends that these materials satisfy the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*), as evidence of "the [B]eneficiary's extraordinary ability in music through his contributions to the pedagogy of music education." The Beneficiary received those certificates in March 2020, after the filing date of the Form I-129, Petition for a Nonimmigrant Worker, on November 2, 2018. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Regardless, the Petitioner has not offered supporting evidence indicating that the Beneficiary's receipt of those certificates constitutes significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field. Therefore, the Petitioner has not overcome our finding that it does not meet the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*).

As the evidence does not demonstrate eligibility, the motion to reopen is dismissed.

III. CONCLUSION

As the motion to reconsider does not demonstrate our latest decision was based on an incorrect application of law or USCIS policy, and evidence provided in support of the motion to reopen does not overcome the grounds underlying our previous decision, the motions are dismissed.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.