U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9438421

Date: SEPT. 03, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a designer and manufacturer of lingerie, seeks to employ the Beneficiary as head designer. It requests her classification under the third-preference, employment-based immigrant visa category ("EB-3") for professionals. See Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Nebraska Service Center denied the petition. Finding that the requested classification does not allow precertification of an offered position for a foreign national of exceptional ability, the Director concluded that the petition lacks a required, individual certification from the U.S. Department of Labor (DOL).

The Petitioner bears the burden of establishing eligibility for the requested benefit. See section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional typically follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must seek DOL certification. See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If DOL approves a position, an employer next submits the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient workers in certain occupations and in other positions requiring exceptional ability, and that the employment of foreign workers in these "Schedule A" jobs will not harm the wages or working conditions of U.S. employees in similar positions. 20 C.F.R. § 656.5. DOL therefore authorizes USCIS to adjudicate applications for Schedule A designation in petition proceedings. 20 C.F.R. § 656.15(a). Thus, in this matter, USCIS rules not only on the petition, but also on its accompanying application for Schedule A

designation. See 20 C.F.R. § 656.15(e) (describing Schedule A determinations by USCIS as "conclusive and final").

II. THE ACCOMPANYING SCHEDULE A APPLICATION

We lack appellate jurisdiction "when the denial of the petition is based upon lack of a certification by the Secretary of Labor." See Department of Homeland Security Delegation Number 0150.1 (effective Mar. 1, 2003) (delegating appellate jurisdiction to us over the matters listed in former 8 C.F.R. § 103.1(f)(3)(iii)). Thus, if the Director correctly found that the petition lacks an individual labor certification from DOL, we must reject the appeal for want of jurisdiction.

A petition for a professional must include an individual labor certification, application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). Here, as the Petitioner indicated on the Form I-140, the petition includes an application for Schedule A designation. Specifically, the Petitioner seeks designation under Group II of Schedule A for a position requiring "exceptional ability in the sciences or arts." See 20 C.F.R. § 656.5(b).[1]

The Director found that designation under Schedule A, Group II is available only to petitioners seeking classification under the second-preference, employment-based immigrant visa category ("EB-2") for members of the professions holding advanced degrees or foreign nationals with exceptional ability. See section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). Most Schedule A, Group II applications have accompanied EB-2 petitions. Also, as just indicated, the EB-2 classification allows petitions for foreign nationals with exceptional ability. DOL and USCIS, however, use different criteria for establishing exceptional ability. Compare 20 C.F.R. § 656.15(d),[2] Schedule A, Group II, exceptional ability, with 8 C.F.R. § 204.5(k)(3)(ii), aliens of exceptional ability.

As the Petitioner argues, neither the Act nor regulations bar Schedule A, Group II applications from EB-3 petitions. The regulation at 8 C.F.R. § 204.5(l)(3)(i) broadly allows "an application for Schedule A designation" to accompany an EB-3 petition. The regulation does not limit the requested designation to Schedule A, Group I.[3] The Director therefore erred in finding that the petition required an individual labor certification certified by DOL.

The Director alternatively found that the Petitioner's Schedule A, Group II application does not state the offered position's need for exceptional ability. The decision states: "Because 'exceptional ability' was not required on the submitted labor certificate, 'exceptional ability' may not be claimed by the petitioner." But part H.14 of the application form, "Specific skills or other requirements," expressly

[1] Schedule A also pre-certifies occupations for nurses and physical therapists under Group I. 20 C.F.R. § 656.5(a).

[2] An employer seeking a labor certification under Group II of Schedule A must file with USCIS "documentary evidence showing the widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field; and documentation showing [that] the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability. In addition, the employer must file documentation about the alien from at least two of the following seven groups [(set forth in (i) through (vii))]." 20 C.F.R. § 656.15(d)(1).

[3] USCIS and the former Immigration and Naturalization Service have accepted and adjudicated EB-3 petitions containing Schedule A, Group II applications. See, e.g., WAC-95-217-52319, 1996 WL 33166989 (AAO Apr. 18, 1996) (finding that an EB-3 petitioner did not establish eligibility for precertification under Schedule A, Group II).

states the position's need for "[e]xceptional design ability." Also, pursuant to 20 C.F.R. § 656.15(d)(1), the filing includes documentary evidence appearing to show acclaim and recognition of the Beneficiary and her past and intended work as a designer in the United States. Thus, the record does not support the Director's finding that the labor certification application does not state the position's need for exceptional ability.

The Petitioner's request for EB-3 classification did not bar the included application for Schedule A designation under Group II. Thus, the petition did not require an individual labor certification certified by DOL. We therefore have jurisdiction over the appeal and will withdraw the Director's contrary decision and remand the matter.

On remand, the Director should adjudicate the Petitioner's Schedule A, Group II application under 20 C.F.R. § 656.15(d) and its EB-3 petition under 8 C.F.R. § 204.5(l). If the Director requests additional evidence or issues a notice of intent to deny, she must afford the Petitioner a reasonable opportunity to respond. Upon receipt of any timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The EB-3 petition contained a valid application seeking Schedule A, Group II designation. The petition therefore did not require an individual labor certification certified by DOL.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.