U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-T-

DATE: AUG. 22, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a lawyer, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3), which requires documentation of a one-time achievement or exhibits that meet at least three of the ten regulatory criteria. We upheld that decision on appeal and reaffirmed our findings in seven subsequent motion decisions.

The matter is now before us on an eighth motion, a joint motion to reopen and reconsider. In his current motion, the Petitioner offers new evidence and maintains that it is self-evident that he performed a leading or critical role for a qualifying organization as of the date of filing and that we erred by not considering events that occurred after that date.

Upon review, we will deny both motions.

I. LAW

Section 203(b) of the Act makes visas available to foreign nationals with extraordinary ability in the sciences, arts, education, business, or athletics as demonstrated by sustained national or international acclaim and achievements that have been recognized in the field through extensive documentation. The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can show sustained acclaim and the recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then he or she must provide sufficient qualifying items that meet at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain

media, and scholarly articles). Satisfaction of at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1]

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentation.[2] As noted in our previous decisions and explained further below, however, the new facts must demonstrate eligibility as of the date of filing; a petition cannot be approved at a future date after a Petitioner becomes eligible under a new set of facts.[3] Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence.[4] A party seeking to reopen a proceeding bears a "heavy burden."[5]

A motion to reconsider must offer the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy.[6] A motion to reconsider is based on the existing record and the Petitioner may not introduce new facts or new evidence relative to his or her arguments. A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new materials.[7]

II. ANALYSIS

The Petitioner is a lawyer specializing in international law. As previously acknowledged, the Petitioner has served as the judge of others. Specifically, he judged the round of the Therefore, he meets one criterion.[8] The Petitioner proposes that he also meets the scholarly articles criterion[9] and the leading or critical role criterion.[10] We explained in prior decisions that the Petitioner's thesis did not appear in a professional or major trade publication or

[1] *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011); *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" and that USCIS examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true").

[2] 8 C.F.R. § 103.5(a)(2).

[3] 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); *see also Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) adopting the holding in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

[4] *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)).

[5] *Id.* at 110.

[6] 8 C.F.R. § 103.5(a)(3).

[7] *Compare* 8 C.F.R. § 103.5(a)(3) *and* 8 C.F.R. § 103.5(a)(2).

[8] 8 C.F.R. § 204.5(h)(3)(iv).

[9] 8 C.F.R. § 204.5(h)(3)(vi).

[10] 8 C.F.R. § 204.5(h)(3)(viii).

other major media and that he published his other article after the date of filing. We have further considered in depth the Petitioner's evidence relating to his role as an "Additional Representative" to the for the concluding that this responsibility did not meet the plain language requirements of this criterion.

In support of the motion to reconsider, the Petitioner contends that, because first preference visas are current, he need not show eligibility as of the date of filing. As part of his motion to reopen, the Petitioner offers new exhibits relating to the The Petitioner has not met the requirements of a motion or established eligibility for the benefit sought. The case law he cites does not support his position and the new evidence does not overcome the concerns that we have raised and reiterated in our previous decisions.[11]

A. Motion to Reconsider

In this motion, the Petitioner's primary contention of legal error is that the regulations at 8 C.F.R. § 103.2(b)(1), (12) and case law, namely *Katigbak*, 14 I&N Dec. at 49, do not apply in this matter because the visas for the first preference classification are current,[12] and because the Petitioner has filed a new petition and could file an even newer one. The regulation at 8 C.F.R. § 103.2(b)(1) states: "An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request." When a Petitioner responds to a request for evidence, the response must demonstrate eligibility at the time of filing. 8 C.F.R. § 103.2(b)(12). Neither of these provisions is limited to classifications that are not current. While *Katigbak* does express concern with securing a priority date prior to eligibility, the concept of eligibility at the time of filing is not limited to petitions for visa classifications with priority dates. Specifically, petitioners seeking nonimmigrant visas, which do not have priority dates, must exhibit the beneficiaries' eligibility as of the date of filing. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). Accordingly, the Petitioner has not shown that we erred as a matter of law by not considering the Petitioner's achievements after the date of filing. Rather, both regulations and precedent decisions support our legal conclusions.

With respect to the newer, pending petition, it is under the jurisdiction of the Director, and its filing does not give us the discretion to consider the Petitioner's evidence of post-filing accomplishments in the context of motions on the petition before us. It remains that the Petitioner can best seek review of his new accomplishments by pursuing his subsequent petition rather than by filing additional motions on this petition that cannot cure concerns about eligibility at the time of filing.

[11] The filing of multiple motions is disfavored as it can lead to any unnecessary expenditure of government resources. *Cf. Doherty*, 502 U.S. at 323 (citing *Abudu*, 485 U.S. at 108; *see also Selimi v. Ashcroft*, 360 F.3d 736, 739 (7th Cir. 2004).

[12] A "current" listing on the U.S. State Department's visa bulletin manes that numbers are authorized for issuance to all qualified applicants. *See* https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-august-2016.html.

Finally, in our previous decisions, we discussed the documentation and law at length and detailed our reasoning. The Petitioner relies on *Tongatapu Woodcraft Hawaii Ltd. v. Feldman*, 736 F.2d 1035, 1308 (9th Cir.) for the proposition that our prior decisions were an abuse of discretion. That decision, however, reviewed the revocation of the approval of a petition, not a denial as is the case in this matter. The court noted that it could set aside an agency decision that is arbitrary, capricious, or an abuse of discretion. The remainder of this section of the decision, however, addressed the government's burden in revocation proceedings.

Abuse of discretion is the review standard for a federal court. Our review of motions like this filing involves determining whether the Petitioner has provided new facts corroborating eligibility[13] and whether the motion was supported by pertinent precedent decisions to establish that the prior decision was based on an incorrect application of law or USCIS policy.[14] In addition, it is the Petitioner's burden to document his eligibility.[15] Our responsibility when issuing an adverse decision is to explain in writing the specific reasons for that decision[16] and articulate a rational connection between the facts found and the choice made.[17] We have detailed our reasoning and considered all evidence relating to the time of filing, and *Tongatapu Woodcraft Hawaii Ltd.* does not support a conclusion that we have the discretion to waive the requirement to show eligibility at the time of filing or that we previously abused our discretion.

B. Motion to Reopen

In support of his motion to reopen, the Petitioner relies on new information about an event that attended in In addition, he presents information about the and its relationship with consulting associations and non-governmental organizations. He also offers a letter and certificate of appreciation relating to a prior internship he had with the Policy Development and Studies Branch of the in 2007. This evidence does not establish the Beneficiary's eligibility at the time of filing.

First, we have repeatedly considered the Beneficiary's role as an "Additional Representative" of the to the Specifically, we have noted the record lacks evidence of how this position fits within the overall hierarchy of the or his impact on that association. As the matter is now before us on an eighth motion and the Petitioner does not offer any new exhibits relating to his services for the at the time of filing, we will not reexamine our prior findings. We will address the remaining submissions below.

[13] 8 C.F.R. § 103.5(a)(2).
[14] 8 C.F.R. § 103.5(a)(3).
[15] Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).
[16] 8 C.F.R. § 103.3(a)(1).
[17] *Visinscaia*, 4 F. Supp. 3d at 130, (citing *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013)).

With respect to the new evidence about the [redacted] we do not question that [redacted] offices are organizations or establishments with a distinguished reputation or that the [redacted] benefits from the organizations with which it coordinates. At issue is whether the Beneficiary performed in a leading or critical role for the [redacted] office where he worked as an intern.

The [redacted] issued a certificate of appreciation to the Petitioner in July 2007 recognizing his "completion of the [redacted] in the [redacted] of the Protection of Civilians Section, Policy Development and Studies Branch, [redacted] confirms the Petitioner's employment as an intern with that branch. While there, the Beneficiary supported a project to strengthen the role of regional organizations in protecting civilians during armed conflict, researched various protection concerns, and supported other research tasks as assigned. Upon completion of his internship, he remained as a volunteer for an additional three months. The Petitioner supplied a Security Council report from the Secretary-General on the protection of civilians during armed conflict from October 2007. The report does not credit those who contributed to it.

In general, a leading role is evident from the role, its duties, and how it fits within the overall hierarchy of the organization. A critical role is apparent from a petitioner's impact on the entity. The Petitioner provided an organizational chart for various offices of the [redacted] but it does not specify where interns fit within the hierarchy of employees. Accordingly, the Petitioner has not established that an intern is a leading role for the [redacted] office where he worked. Further, [redacted] explains that the Petitioner contributed to various research projects but she does not suggest that the Petitioner had a significant impact on her office beyond their need for interns to complete assigned research. For the reasons discussed above, the Petitioner has not presented new facts that support his eligibility at the time of filing.

III. CONCLUSION

The Petitioner did not support his motion to reconsider with legal authority showing that our prior decisions were based on an incorrect interpretation of law or policy. The motion does not contain evidence of new facts that support eligibility at the time of filing. Accordingly, the motions will be denied. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Otiende*, 26 I&N Dec. 1 at 128. Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of H-T-*, ID# 10491 (AAO Aug. 22, 2016)