U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-T-

DATE: MAY 15, 2018

MOTION ON ADMINSTRATIVE 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, concluding that the record did not establish, as required, that the Petitioner satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3), which require documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria set forth under 8 C.F.R. § 204.5(h)(3)(i)-(x). We upheld that decision on appeal and reaffirmed our findings in ten subsequent motion decisions.

On combined motions to reopen and reconsider, the Petitioner again asserts that he meets the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii) and the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii).

Upon review, we will deny 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

To be eligible for this classification, a petitioner must show that he or she is a person of extraordinary ability. 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 demonstrate 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 that

petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets 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). Where a petitioner submits qualifying evidence under at least three criteria, we will determine whether the totality of the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *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), *aff'd*, 683 F.3d. 1030 (9th Cir. 2012).

II. ANALYSIS

In our previous decisions denying the Petitioner's motions, we determined that he did not meet the initial evidence requirements under 8 C.F.R. § 204.5(h)(3). The Petitioner established that he has served as a judge of the work of others in his field under 8 C.F.R. § 204.5(h)(3)(iv), but did not submit evidence which established that met two additional criteria. On motion, he repeats his assertion that, as a fellow of the American Bar Foundation, he satisfies the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii), and that his work during a 2007 internship with an office of the United Nations meets the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii).[1] In addition, the Petitioner once again asserts that Rule 42(a) of the Federal Rules of Civil Procedure should be applied to allow us to consider evidence that postdates his filing of the petition.

A. 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.

Regarding the membership in associations criterion at 8 C.F.R. § 204.5(h)(3)(ii), we explained in our most recent decision that since the Petitioner did not become a fellow of the [redacted] until 2016, six years after the filing of his petition for the requested classification, this event cannot be considered in evaluating his eligibility. The regulation at 8 C.F.R. § 103.2(b)(1) is clear that a petitioner must establish eligibility for the requested immigration benefit at the time of filing. On motion, the Petitioner points out that he was admitted to practice law in [redacted] in 2008, but has not established that his admission to the [redacted] bar would meet the requirements of this criterion.

[1] The Petitioner also claims that he meets the requirements of 8 C.F.R. § 204.5(h)(3)(v) based on the number of times his dissertation has been downloaded. However, our review on motion is limited to the issues contained in our most recent decision.

The Petitioner also reasserts his claim to have played a leading or critical role for organizations with a distinguished reputation under 8 C.F.R. § 204.5(h)(3)(vii). He challenges our previous characterization of his role as a volunteer by noting that his grounds pass issued by the United Nations Headquarters identifies him as a "Consultant." He also refers to a previously submitted document which describes his duties for the [redacted] That document, however, lists his position title as "Volunteer." Regardless of the Petitioner's title with [redacted] during the ten-month period he was there, he has not cited to case law, statute, regulation, or policy to establish that our previous decision regarding his role was incorrect.

The Petitioner further restates his assertion that the rule at Fed. R. Civ. P. 42(a) should be applied to consolidate his second petition requesting the same immigrant visa classification with this petition. He cites to the Administrative Procedure Act (APA) at 5 U.S.C. § 702, which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

While the Petitioner is correct that, under the APA, our decisions are subject to review in United States district courts, he provides no citation to support his assertion that "the instant administrative proceedings should be considered being present under the color of the Federal Rules of Civil Procedure." As stated in our most recent decision, the AAO is not a court, and thus the Federal Rules of Civil Procedure do not apply to proceedings before us. Rather, we are bound by our own agency's regulation at 8 C.F.R. § 103.2(b)(1), which provides that a petitioner "must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication."

The Petitioner also asserts that the rule at 8 C.F.R. § 103.2(b)(1) does not address the situation present in his case, where two petitions for the same classification are pending simultaneously, and that this "merits a discretionary departure from the general rule." However, each immigrant petition is a separate record of proceeding with a distinct burden of proof, and each petition must stand on its

own merits. *See generally* § 291 of the Act. Accordingly, we may not consider evidence that postdates the filing of this petition, including the Petitioner's status as an fellow.

B. Motion to Reopen

In support of his motion to reopen, the Petitioner has submitted new evidence, which is reviewed below under the applicable evidentiary criteria. As stated above and in our previous decisions, the Petitioner must first establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). We may then consider additional evidence that postdates the filing of this petition. However, even if we were to consider such proof, the Petitioner would still have not established that he meets the requisite three of ten evidentiary criteria.

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.* 8 C.F.R. § 204.5(h)(3)(ii).

The Petitioner has previously submitted evidence of his membership as a fellow of the an election that occurred six years after the filing of this petition. He now submits the bylaws of the which indicate at Section 3.01 that fellows are elected by the Board of Directors, and at Section 4.01 ("General Qualifications") that fellows "must be recognized as a person of outstanding achievement and high character in the jurisdiction or nation in which such Fellow practices." The Petitioner has also submitted a list of members of the which indicates that some of these Board members were or are officers of the The evidence submitted relates to events occurring more than six years after the filing of the petition and therefore cannot be considered for establishing eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) ("Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become eligible under a new set of facts.")

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

The Petitioner has previously asserted that his role as an "Additional Representative" of the to the at Vienna satisfies this criterion, and now submits new evidence on motion. This evidence indicates that the organized and hosted a side event at the in Vienna on May 2017, and that the Petitioner was one of three members who were issued security badges for this session. A webpage of the alumni association of the states that the Petitioner was responsible for hosting and organizing the side event.

Under 8 C.F.R. § 103.2(a)(1)(i) a motion must be filed within 30 days of the decision it seeks to reopen. We last considered the Petitioner's role with [redacted] in our decision dated August 22, 2016. In his tenth and most recent motion, the Petitioner did not raise it, nor did our decision address the issue. Therefore, the Petitioner's role with [redacted] is not an issue properly before us and we need not consider the evidence submitted.

III. CONCLUSION

The Petitioner has not established that our previous decision was based upon an incorrect application of law or policy, or that it was erroneous based upon the evidence in the record of proceedings. In addition, he has not submitted new evidence which supports his eligibility for the requested classification at the time of filing.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of H-T-*, ID# 1161068 (AAO May 15, 2018)