U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-X-

DATE: JAN. 28, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a clinical investigator, 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 revoked the approval of the petition, concluding that the Petitioner had not satisfied the initial evidentiary 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 10 regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). We affirmed the Director's decision on appeal. The Petitioner then filed a motion to reopen and reconsider our previous decision, which we denied.[1]

The matter is now before us on the second motions to reopen and reconsider. On motion, the Petitioner submits additional documentation, asserting that he meets at least three criteria for this classification under 8 C.F.R. § 204.5(h)(3).

Upon *de novo* 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.

Section 203(b)(1)(A) of the Act makes visas available to immigrants with extraordinary ability. The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen

[1] Our most recent decision in this matter is *Matter of H-X-*, ID# 1227778 (AAO Jun. 15, 2018).

to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). A petitioner can demonstrate a one-time achievement (that is a major, internationally recognized award). Alternatively, he or she must provide documentation that meets at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x) (including items such as awards, memberships, and published material in certain media). 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).

II. ANALYSIS

In our prior decision, we held that the Petitioner did not meet the requirements for a motion to reconsider and that the new evidence he submitted with the motion to reopen did not establish eligibility under the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii). Here, the Petitioner submits this joint motion to reopen and reconsider our previous decision in which we reached those conclusions.

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). It 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 (DHS) policy.

The Petitioner does not cite binding precedent decisions or other legal authority establishing that we incorrectly applied the pertinent law or agency policy in our prior decision based on the evidence of record at the time. To establish eligibility, we note that the Petitioner cites regulations from the Food and Drug Administration, which are not dispositive in this matter. Therefore, the Petitioner has not established that our prior decision was based on an incorrect application of law or policy, and he has not met the requirements for a motion to reconsider.[2]

[2] The Petitioner contends that the authority of the Attorney General, now the Secretary of DHS, to revoke the approval of a petition, as stated in section 205 of the Act, does not extend to the Director. While this is beyond the scope of our review, we note that section 204 of the Act gives the Attorney General authority over petitions for aliens seeking classification as an alien of extraordinary ability. Section 204(a)(1)(E) of the Act, 8 U.S.C. § 1154(a)(1)(E); *see also* 8 C.F.R. § 2.1 (allowing the Secretary of DHS to delegate her authority) and 8 C.F.R. § 205.2 (stating that a Service officer authorized to approve a petition under section 204 of the Act has authority to revoke the approval of a petition).

B. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

In our dismissal of his appeal, we held that the Petitioner met only the scholarly articles criterion at 8 C.F.R. § 204.5(h)(3)(vi). In his first motion, he submitted new evidence related to his membership in the and we found that this evidence failed to satisfy the regulatory requirements of 8 C.F.R. § 204.5(h)(3)(ii). In the instant motion, he submits several pages from the Standard Occupational Classification (SOC) Manual, highlighting the occupational description for Medical Scientists, Except Epidemiologists, under SOC code 19-1042, and he resubmits other material already in the record. Here, the Petitioner does not explain how the information from the SOC manual relates to his claim regarding the membership criterion, nor does he show how it establishes eligibility under 8 C.F.R. § 204.5(h)(3)(ii). Therefore, the Petitioner has not met the requirements for a motion to reopen.

III. CONCLUSION

The Petitioner has not demonstrated that he meets at least three of the criteria under 8 C.F.R. § 204.5(h)(3)(i)-(x). The motion to reconsider is denied because the Petitioner has not established that our previous findings were based on an incorrect application of the law, regulations, or USCIS policy. The motion to reopen is denied because the Petitioner has not submitted new evidence demonstrating that he meets the initial requirements for the classification sought.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of H-X-*, ID# 1925252 (AAO Jan. 28, 2019)