U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-K-S-

DATE: JULY 9, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a trek and expedition guide to mountain climbers, seeks classification as an individual of extraordinary ability. This first preference classification makes immigrant visa 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 Nebraska Service Center denied the Petitioner's Form I-140, Immigrant Petition Alien Worker. We subsequently dismissed the Petitioner's appeal.[1]

The matter is now before us on a motion to reconsider and a motion to reopen. Upon review, we will deny the motions.

I. LAW

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 two options for satisfying this classification's initial evidence requirements. First, a petitioner can demonstrate 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 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). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable evidence if he or she is able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation. Where a petitioner submits qualifying evidence under at least three criteria, we will then 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.[2]

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[1] *See Matter of N-K-S-*, ID# 1646720 (AAO Oct. 23, 2018).

[2] *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.

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.

II. BACKGROUND

The Director denied the petition, finding that the Petitioner had not satisfied any of the initial evidentiary criteria, of which he must meet at least three. On motion, the Director affirmed his decision but found that the Petitioner fulfilled one criterion, leading or critical role under 8 C.F.R. § 204.5(h)(3)(viii). On appeal, we withdrew the Director's determination regarding the leading or critical role criterion and concluded that the Petitioner did not meet any of the criteria, as well as the requirements for comparable evidence under 8 C.F.R. § 204.5(h)(4).

In the Petitioner's motion to reconsider, he argues that he submitted evidence showing that he satisfied at least three criteria. In his motion to reopen, the Petitioner presents additional documentation relating to three of the criteria.

III. ANALYSIS

At the outset, the Petitioner did not include the required statement about whether or not the validity of the unfavorable decision has been, or is, the subject of any judicial proceeding. 8 C.F.R. § 103.5(a)(1)(iii)(C). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Moreover, 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 any criteria.

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). The Petitioner contends that he meets four criteria, as well as an additional criterion through the submission of comparable evidence. He does not, however, specifically argue that our decision was based on an incorrect application of law or policy. Instead, he makes assertions of eligibility under the respective evidentiary criteria without addressing our decision except for our finding as it relates to the published material criterion. Disagreeing with our conclusions without establishing that we erred as a matter of law or pointing to policy 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

2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "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." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

submit, in essence, the same brief and seek reconsideration by generally alleging error in the prior decision). Here, we will address below the Petitioner's references to the published material criterion, along with his argument for comparable evidence, and discuss his new claims of eligibility and submission of new evidence under the motion to reopen section.

Regarding the published material criterion, the Petitioner references an article published in the *Golden Transcript* and asserts that we "referred only as the participant of the event however the Event was organized acknowledge the Mountaineering and the achievement/struggle" (note: errors in the original text have not been changed). The record reflects that we found that although the article was about his work in the field, he did not demonstrate that the *Golden Transcript* constituted a professional or major trade publication or major medium. *See* 8 C.F.R. § 204.5(h)(3)(iii).[3] Here, the Petitioner did not address or dispute our finding or establish that the *Golden Transcript* is a professional or major trade or other major medium.

As it relates to comparable evidence, the Petitioner contends that "we discuss on two more criteria that needs to be evaluated through comparative evidence." However, the Petitioner only makes arguments relating to one criterion, awards. Notwithstanding, the Petitioner asserts that "the praises to [him] should be seen as award[s] he achieved from his hard work, skills and knowledge in the field." In our decision, we thoroughly analyzed and discussed his arguments relating to comparable evidence and determined that he did not demonstrate that the regulatory criteria do not readily apply to his occupation and that the evidence in the record is comparable. *See* 8 C.F.R. § 204.5(h)(4).[4] Although he continues to make claims regarding the inapplicability of "many of the Regulatory criteria" and "the Historic Lack of Acknowledgement Sherpa Achievements," he did not substantiate his assertions through documentary evidence, nor did he show how we previously erred or incorrectly applied policy.[5] Here, the Petitioner did not demonstrate that the criteria do not readily apply to Sherpas and mountain guides and why he cannot offer evidence that meets at least three of the criteria. Furthermore, the Petitioner claimed to meet four criteria without the submission of comparable evidence, including memberships under 8 C.F.R. § 204.5(h)(3)(ii), published material under 8 C.F.R. § 204.5(h)(3)(iii), original contributions under 8 C.F.R. § 204.5(h)(3)(v), and leading or critical role under 8 C.F.R. § 204.5(h)(3)(viii). Moreover, the Petitioner did not establish that Sherpas or mountain guides cannot present evidence relating to the other criteria, such as awards under 8 C.F.R. § 204.5(h)(3)(i), judging under 8 C.F.R. § 204.5(h)(3)(iv), and high salary under 8 C.F.R. § 204.5(h)(3)(ix). The fact that the Petitioner did not provide sufficient documentation that fulfills at least three is not evidence that an individual could not do so or that it does not readily apply. In addition, the Petitioner did not show how receiving "praises" is truly comparable to receiving lesser

[3] *See also* USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 7 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html (instructing that evidence of published material in professional or major trade publications or in other major media publications about the individual should establish that the circulation (on-line or in print) is high compared to other circulation statistics and show the intended audience of the publication).

[4] *See also* USCIS Policy Memorandum PM-602-0005.1, *supra*, at 12 (stating that a petitioner should explain why he has not submitted evidence that would satisfy at least three of the criteria set forth in 8 C.F.R. § 204.5(h)(3), as well as why the evidence he has included is "comparable" to that required under 8 C.F.R. § 204.5(h)(3)).

[5] In fact, we pointed out in our decision that the Petitioner undermined his own argument when he claimed comparable evidence for published material and submitted a *New York Times* article about Sherpas, confirming that published material does readily apply to his occupation.

nationally or internationally recognized prizes or awards for excellence in the field. As such, the Petitioner did not establish that he qualifies for an additional criterion, as well as other criteria, through the submission of comparable evidence.

For the reasons discussed above, the Petitioner has not demonstrated that our appellate decision was incorrect. We conducted a *de novo* review of the record on appeal, thoroughly analyzed the evidence, and ultimately concluded that the Petitioner did not satisfy at least three regulatory criteria. Here, the Petitioner did not show how we erred or misapplied law or policy. Accordingly, the Petitioner did not meet the requirements for a motion to reconsider.

B. Motion to Reopen

We previously determined that the Petitioner's membership with the [redacted] did not satisfy the membership criterion. On motion, the Petitioner indicates his membership with the [redacted] and [redacted]. He submits a letter from [redacted] chief administrative officer for [redacted], who confirmed the Petitioner's membership with [redacted]. In addition, he presents a letter from [redacted] general secretary for [redacted] who claimed that [redacted] "is an exclusive association that limits its membership to only those elite mountaineers who have been successful in summiting the highest mountain in the world." We note that the Petitioner does not offer on motion any additional documentation regarding [redacted] and [redacted] Regardless, the letters do not demonstrate that the associations require outstanding achievements for membership, as judged by recognized national or international experts in the field of expertise. *See* 8 C.F.R. § 204.5(h)(3)(ii).[6] Moreover, while [redacted] limits membership to those who have summited Mt. Everest, the Petitioner did not show that [redacted] membership is judged by recognized national or international experts consistent with this regulatory criterion.

In addition, we found that his recommendation letters did not establish that he made original contributions of major significance in the field. *See* 8 C.F.R. § 204.5(h)(3)(v).[7] On motion, the Petitioner discusses letters that have already been submitted, reviewed, and considered; accordingly, we will not address them in this proceeding. The Petitioner presents three additional letters reflecting specific instances where the Petitioner assisted and rescued climbers. For example, [redacted] indicated an occasion when the Petitioner "worked very hard to rescue the injured and bring back bodies" as a result of a helicopter crash. Moreover, [redacted] recounted a time when the Petitioner "stage[d] and execute[d] a high-altitude rescue from the summit of Mt. Everest that would have resulted in the death of [redacted] an [redacted] climber, if [the Petitioner] had not succeeded." Further, [redacted] described the Petitioner's "expertise in the rescue and body recovery efforts after the 2014 avalanche." As discussed in our appellate decision, while we recognize

[6] *See also* USCIS Policy Memorandum PM-602-0005.1, *supra*, at 6-7 (providing an example of admission to membership in the National Academy of Sciences as a Foreign Associate that requires individuals to be nominated by an academy member, and membership is ultimately granted based upon recognition of the individual's distinguished achievements in original research).

[7] *See also* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 7 (providing an example that although work may be "original," this fact alone is not sufficient to establish that the work is of major significance).

the personal impact he has had in rescuing others on Mt. Everest, he did not demonstrate that his contributions rise to a level of major significance in the overall field.[8]

As it relates to the leading or critical role criterion, we determined that the Petitioner's submission of a letter from [redacted], the co-owner and program director for [redacted] demonstrated that he performed in a leadership role or was critical to the success of the organization. *See* 8 C.F.R. § 204.5(h)(3)(viii).[9] Moreover, we found that the Petitioner did not provide objective evidence from [redacted]s website to corroborate its claims of a distinguished reputation.[10] On motion, he presents another letter from [redacted] who indicated that the Petitioner "has a very unique skill set that includes strong interpersonal skills working with guides and clients, high altitude adaptation, and the technical climbing techniques necessary for this demanding job." Although [redacted] praised the Petitioner for his skills, he did not establish that those skills resulted in a leading role or contributed to the overall success of [redacted]. Here, [redacted] updated letter does not contain specific, detailed information reflecting the nature of the Petitioner's role with [redacted].[11] In addition, while [redacted] claimed that [redacted] "is one of the largest mountain guide services in the world," the Petitioner did not offer any supporting evidence showing [redacted]s distinguished reputation.

For the reasons discussed above, the new documentation submitted on motion does not overcome our original decision, finding that the Petitioner did not satisfy at least three of the evidentiary criteria.

IV. CONCLUSION

The Petitioner has not shown that our previous decision was incorrect based on the record before us, nor does his new evidence on motion demonstrate that he has fulfilled at least three of the evidentiary criteria.[12] In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met

[8] *See Visinscaia*, 4 F. Supp. 3d at 134-35 (upholding a finding that a ballroom dancer had not met this criterion because she did not corroborate her impact in the field as a whole).

[9] *See* USCIS Policy Memorandum PM-602-0005.1, *supra*, at 10 (indicating that the evidence must either establish that the individual is or was a leader or that he contributed in a way that is of significant importance to the outcome of the organization or establishment's activities).

[10] *Id.* at 10-11 (defining *Merriam-Webster's Dictionary* definition of "distinguished" as marked by eminence, distinction, or excellence).

[11] *Id.* at 10 (stating that letters from individuals with personal knowledge of the significance of a petitioner's leading or critical role can be particularly helpful in making this determination as long as the letters contain detailed and probative information that specifically addresses how the role for the organization or establishment was leading or critical).

[12] As the Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Moreover, we need not consider whether he seeks to enter the United States to continue work in his area of extraordinary ability under section 203(b)(1)(A)(ii) of the Act, and whether his entrance will substantially benefit prospectively the United States under section 203(b)(1)(A)(iii) of the Act.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of N-K-S-*, ID# 3463758 (AAO July 9, 2019)