U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9968392

Date: AUG. 05, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, an orthopedic surgeon, seeks classification as an alien 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 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 ten regulatory criteria listed under 8 C.F.R. § 204.5(h)(3)(i)-(x). We dismissed the Petitioner's subsequent appeal, finding that the Petitioner met only one of the ten initial evidentiary criteria.[1]

The matter is now before us on a combined motion to reconsider and motion to reopen. On motion, the Petitioner submits additional evidence and asserts that he meets two criteria in addition to the one criterion we found that he meets in our previous decision.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss 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). 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

[1] The record reflects that the Petitioner provided evidence that he has judged the work of others in his field under 8 C.F.R. § 204.5(h)(3)(iv).

proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.[2]

II. ANALYSIS

The Petitioner has worked as an orthopedic surgeon and on the faculty of a hospital-affiliated medical school. He does not indicate that he intends to work in these capacities in the United States. Instead, he states that he seeks employment as a scientific advisor or consultant in orthopedics and traumatology.

A. Motion to Reconsider

With regard to the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii), the Petitioner maintains that previously submitted letters from current and former and colleagues establish his "leading or critical role." The letters indicate that the Petitioner was the director of the knee surgery unit in the department of orthopedic surgery at the Central Hospital [redacted] and a professor at its affiliated medical school at [redacted] University. He also was the head of the knee surgery unit at the Home Clinic [redacted] We concluded that although the Petitioner appears to have held a leadership position within a particular surgical unit, the evidence submitted did not establish that his position in charge of a specialized surgical unit was a leading or critical role for those hospitals. The Petitioner, for example, did not show how his role as head of a surgical unit influenced or impacted the Central Hospital [redacted] or the Home Clinic [redacted] overall. In addition, the submitted documentation does not demonstrate that those organizations have a distinguished reputation. Lastly, the record does not establish that the Petitioner performed a leading or critical role in his faculty position with the University [redacted], or that the organization has a distinguished reputation. For these reasons, the Petitioner has not shown that our determination for this criterion was incorrect based on the evidence of record at the time of the decision. Therefore, the motion to reconsider will be dismissed.

B. Motion to Reopen

Regarding the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix), the Petitioner initially submitted a letter from a clinic in Venezuela, indicating that the Petitioner earned "an income of more tha[n] 70% of fees, when compared with the rest of the medical specialist[s]." Our appellate decision found that the meaning of this statement is not clear from its phrasing and concluded that the letter did not show the Petitioner's actual remuneration or provide an objective basis for comparison with the remuneration of others in his field.

We further noted that within the Petitioner's response to the Director's request for evidence (RFE), he submitted a statement of his earnings between 2015 and the first six months of 2018 from accountant

[2] 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 and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

[redacted] which contained the following earnings figures, in Venezuelan bolivares fuertes:[3]

2015	Bs.F.182,350,000.00
2016	391,000,000.00
2017	549,200,000.00
Total Income	1,922,200,000.00
January 2018	198,652,000.00
February 2018	214,544,160.00
March 2018	239,907,408.00
April 2018	310,470,000.00
May 2018	406,658,500.00
June 2018	450,990,200.00
Last Six Months Yearly Average	25,294,475.37

Although we found that the Petitioner established that, given the conversion rates in effect as of March 8, 2019, Bs.F.25,294,475.37 were worth $2,532,613.30 in U.S. currency, we determined that the record did not adequately explain the origin of the Bs.F.25,294,475.37 figure, and the other financial figures were problematic for the following reasons:

- The accountant who prepared the above table stated that the figures derived from "bank statements, tax returns, agreements and other documents," but those documents are not in the record, and the accountant did not specify the amounts shown on individual documents. Because the Petitioner did not submit payroll or tax documents, we cannot determine whether the Petitioner's compensation increased substantially every month, or, instead, the figures represent cumulative totals, with the figures for each month or year added to the next. For instance, the amount shown as the Petitioner's income for June 2018 is worth about $45 million in U.S. currency, given the cited exchange rate of roughly ten bolivares fuertes to the dollar, an amount that appears to be implausibly high for a month's remuneration.

- The table does not specify how much of the reported income was in the form of remuneration for services, rather than from other sources such as investments.

- The annual figures for 2015 through 2017 do not add up to the amount shown as "Total Income" directly beneath those figures.

- The monthly figures shown for January to June of 2018 have no discernible relation to the much lower figure identified as the "Last Six Months Yearly Average." The record does not show how this average was calculated.

[3] Our appellate decision noted that Venezuela revalued its currency in August 2018, with the new bolivar soberano (VES or B.S.) being phased in to replace the bolivar fuerte (VEF or B.F.), and that all the figures shown above predate the conversion and therefore represent bolivares fuertes. Because the Director relied on the exchange rate for VES, not VEF as the Petitioner did, in calculating his annual salary, we withdrew the Director's specific finding regarding exchange rates but agreed with the Director's conclusion that the Petitioner had not met his burden of proof with respect to this criterion.

Based on those deficiencies in the submitted statement of earnings, we determined that the Petitioner had not provided sufficient evidence to establish his actual salary or remuneration for services.

In addition, we concluded that the Petitioner had not provided a basis to compare his salary in relation to others in the field in Venezuela. The Petitioner resubmitted on appeal a printout from PayScale, showing the following figures for Venezuela as of December 7, 2017:

Physician / General Practice	Bs.750,900
Physician / Internal Medicine	1,368,000

Comparing the Bs.1,368,000 figure to Bs.549,200,000.00 from the accountant's table, the Petitioner asserted that he "earns almost 400 [times] more" than "the maximum amount made by a physician in Venezuela in December 2017."

Our appellate decision found that the PayScale printout was deficient for reasons which included the following:

- The Petitioner is an orthopedic surgeon, not a general practitioner or internist.
- The Petitioner earned remuneration not only as a physician, but also as a university faculty member. There is no indication that the individuals surveyed for the PayScale chart held paid academic positions.
- The chart does not specify the interval of the salaries (e.g., weekly, monthly, or annual).
- An annotation on the chart shows that only 10 individuals provided salary information, a sampling which is too small to support any larger or general conclusions.
- The printout shows "Salary" information, which does not appear to take into account other forms of remuneration such as bonuses and fees for specific services. Without knowing such figures, both for the Petitioner and for others in his field, a fair comparison is not possible.

Based on the foregoing, we concluded that the Petitioner's claim of high remuneration rests on incomplete, uncorroborated, and questionable numbers.

With the current motion, the Petitioner submits articles from the Venezuelan websites BancayNegocios.com and ELestimulo.com and asserts this new documentation "proves that [the Petitioner] earned significantly more than the average medical doctor in Venezuela," and therefore satisfies the regulatory criterion at 8 C.F.R § 204.5(h)(3)(ix). The Petitioner also submits another copy of the aforementioned statement of his earnings, however, since this evidence was previously submitted within the Petitioner's RFE response it is not new evidence and does not satisfy the requirements of a motion to reopen.

The article from Banca Y Negocios.com includes a table of the "levels or ranks of monthly salaries" of public employees in Venezuela in 2018, and indicates under the category "professional university personnel" that for "a Professional III, the maximum level" the highest rank will earn a total of Bs. 611,545.99." The article from EL Estimulo.com dated July 7, 2017, titled "How much does a professional earn in Venezuela?" indicates, based on "data provided by Elsalario.com," that "in Venezuela a medical doctor who practices the profession in the private sector earns approximately

297.72 dollars (800,000 bolivars) while a medical doctor in a public hospital may get up to 59.29 dollars (160,000 bolivars)."

The regulation requires that the Petitioner's salary be high "in relation to others in the field." The aforementioned articles do not contain information that would allow that comparison as they do not include occupational wage data or salary survey results for orthopedic surgeons in Venezuela, nor do they affect our prior determination that the Petitioner's evidence is insufficient to establish his actual salary or remuneration for services as it rests on incomplete, uncorroborated, and questionable numbers. Accordingly, the information provided from Banca Y Negocios.com and EL Estimulo.com does not overcome our previous conclusion that the Petitioner does not meet the regulatory criterion at 8 C.F.R § 204.5(h)(3)(ix). As the new evidence does not demonstrate eligibility, the motion to reopen will be dismissed.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established that our previous 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. Further, the new documentary evidence submitted does not overcome the grounds underlying our previous decision and establish the Petitioner's eligibility for the requested benefit.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.