U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16493438

Date: APR. 21, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a development director, 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 Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner satisfied at least three of the initial evidentiary criteria for this classification. The Petitioner appealed that decision to our office, and we dismissed the appeal. We determined that the Petitioner met the requisite initial evidentiary requirements but concluded in a final merits determination that he did not establish his sustained national or international acclaim and that he is among the small percentage of individuals at the very top of his field. The Petitioner subsequently filed a motion to reconsider, which we also dismissed. The matter is now before us on a combined motion to reopen and motion to reconsider.

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. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals with extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements 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 demonstrate sustained acclaim and the recognition of their 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 they 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 meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether 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).

III. ANALYSIS

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i), which, in this case, was our dismissal of the Petitioner's previous motion to reconsider. The issue before us is whether the Petitioner has submitted new facts to warrant reopening or established that our decision to dismiss the previous motion was based on an incorrect application of law or USCIS policy.

A. Prior AAO Decisions

In our decision dismissing the Petitioner's appeal, we determined that although he met the initial evidence requirements by satisfying three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), he did not establish his sustained national or international acclaim and that he is among the small percentage of individuals at the very top of his field. *See* 8 C.F.R. 204.5(h)(2).

In the prior motion to reconsider, the Petitioner argued that we overlooked or did not properly weigh certain evidence related to the awards, judging, and original contributions criteria at 8 C.F.R. § 204.5(h)(3)(i), (iv) and (v). He asserted that proper consideration of that evidence should have resulted in a conclusion in the final merits determination that he established his sustained acclaim and placement among the small percentage of at the very top of his field. In dismissing the motion to reconsider, we considered each of his claims in turn and explained how our appellate decision did in fact address the specific evidence he claimed had been overlooked. We observed that while the Petitioner may have disagreed with our assessment of that evidence, he did not establish that we had

overlooked it in adjudicating his appeal, or that we had misapplied law or USCIS policy in our evaluation of such evidence. Finally, we acknowledged the Petitioner's request that we consider new evidence submitted for the first time in support of his motion to reconsider. We did not consider the new evidence, emphasizing that a motion to reconsider must establish that our prior decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

B. Motion to Reconsider

With the current motion, the Petitioner submits a brief in which he repeats nearly verbatim the same arguments made in his brief in support of his first motion to reconsider. Specifically, the Petitioner once again claims that we failed to consider certain evidence he submitted in support of the awards, judging and original contributions criteria at 8 C.F.R.§ 204.5(h)(3)(i), (iv) and (v) in adjudicating his appeal. As noted, these claims were acknowledged and thoroughly addressed in our decision dismissing the previous motion. The Petitioner makes no reference to the merits of that decision but rather focuses on our appellate decision, which is not before us in this proceeding.

The Petitioner cannot meet the requirements of a motion to reconsider by broadly disagreeing with our conclusions; the motion must demonstrate how we erred as a matter of law or policy. *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 submit in essence, the same brief and seek reconsideration by generally alleging error in the prior decision.)

Moreover, the Petitioner does not argue that we incorrectly applied law or USCIS policy by dismissing his motion to reconsider. Most of the Petitioner's brief in support of the current motion is devoted to a criticism of USCIS policy guidance related to the adjudication of extraordinary ability immigrant petitions.[1] This criticism includes a rejection of USCIS' reliance on *Kazarian* as a basis for conducting a multi-part analysis that includes a final merits determination. The Petitioner nevertheless acknowledges that the referenced guidance is established agency policy and does not articulate a claim that we misapplied this policy in our adjudication of his prior motion to reconsider. Rather, the Petitioner maintains that we erred in our adjudication of the appeal by adhering to *Kazarian* and applicable USCIS policy.

Specifically, the Petitioner argues that "it is an abuse of discretion for USCIS to rely on *Kazarian* for the final merits analysis," particularly because the petitioner in *Kazarian*, unlike the Petitioner here, did not satisfy at least three of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), and because "*Kazarian* mentions the concept of a final merits determination merely in passing and does not explain or provide a structural framework for such a determination." He further argues that "[i]nstead, the weighing of the quality and credibility of evidence should be guided by prior federal court decisions." The Petitioner specifically highlights *Buletini v. INS*, 850 F. Supp. 1222 (E.D. Mich. 1994), noting that "the nature and scheme of the analysis articulated by *Buletini* most closely adheres to the plain

[1] *See* 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* (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

meaning of the statute and regulations."[2] The Petitioner therefore maintains that we should have applied *Buletini*, a pre-*Kazarian* district court decision, in adjudicating his appeal.

We note, however, that in contrast to the broad precedential authority of the case law of a United States circuit court (such as with *Kazarian*), we are not bound to follow the published decisions of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. *Id*. at 719.

Regardless, the *Buletini* decision does not clearly conflict with the *Kazarian* court's characterization of the adjudication process as including a final merits determination. The *Buletini* opinion indicates that the court considered the possibility that a petitioner can submit evidence satisfying three criteria and still not meet the extraordinary ability standard if USCIS provides specific and substantiated reasoning for its conclusion. *See Buletini*, 860 F. Supp. at 1234. The court in *Buletini* did not reject at any time the concept of examining the quality of the evidence presented to determine whether it establishes a Petitioner's eligibility for this highly restrictive classification. Further, as already discussed, the Petitioner's assertion that we should have relied on *Buletini* and other pre-*Kazarian* federal district court decisions rather than *Kazarian* and binding USCIS policy guidance is not persuasive.

In sum, although the Petitioner has submitted a brief in support of the current motion, he does not contend that we misapplied the law or USCIS policy in dismissing the previous motion to reconsider. The Petitioner's statement in support of the current motion does not directly address the conclusions we reached in our immediate prior decision or provide reasons for reconsideration of those conclusions.

As such, the motion does not meet all the requirements of a motion to reconsider, and 8 C.F.R. § 103.5(a)(4) requires dismissal of the motion.

C. Motion to Reopen

As noted, a motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Although the Petitioner indicated on the Form I-290B, Notice of Appeal or Motion, that he was filing a combined motion to reopen and motion to reconsider, the Petitioner has neither presented new facts in his brief nor submitted any documentary evidence in support of the instant motion.

Accordingly, we will dismiss the motion to reopen.

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[2] In addition to *Buletini*, the Petitioner cites *Muni v INS*, 891 F Supp. 440 (N.D. Ill. 1995), *Racine v. INS*, 995 U.S. Dist. LEXIS 4336, 1995 WL 153319 (N.D. Ill. Feb. 16, 1995), *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996), *Russell v. INS*, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan. 4, 2001) and *Gulen v. Chernoff*, 1980 U.S. Dist. LEXIS 54607 (E.D. Pa. Jul 16, 2008), noting that "[h]ad AAO in this case incorporated the correct analysis from cases that preceded *Kazarian*, AAO would be bound to conclude that the Petitioner . . . has met the 'preponderance of the evidence' standard." As discussed in this decision, we are not bound to follow the published decisions of a district court.

IV. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration and has not overcome the grounds for dismissal of his prior motion to reconsider. The motion to reopen and motion to reconsider will be dismissed for the above stated reasons.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.