U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16816380

Date: APR. 29, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, an assistant professor of computer science and information systems, 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 meets at least three of the ten initial evidentiary requirements for this classification. We dismissed the Petitioner's subsequent appeal of that decision. The Petitioner then filed a combined motion to reopen and motion to reconsider, which we dismissed as untimely.

The matter is now before us on a second combined motion to reopen and reconsider. On motion, the Petitioner seeks reconsideration of our decision to dismiss the prior motion as untimely filed. She also submits new evidence in support of her motion to reopen.

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 grant the motion to reconsider, in part, and dismiss it in part, and we will dismiss the motion to reopen. The dismissal of the Petitioner's appeal will not be disturbed, and the petition will remain denied.

I. LAW

Section 203(b)(1)(A) of the Act makes visas available to immigrants with extraordinary ability if an individual has 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. Section 203(b)(1)(A)(i) of the Act.

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 international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If a petitioner does not submit this evidence, then they must provide sufficient qualifying documentation that meets at least three of the ten criteria 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).

II. MOTION REQUIREMENTS

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other 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 reopening or 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).

III. ANALYSIS

The issue in this matter is whether the Petitioner has submitted new facts supported by documentary evidence sufficient to warrant reopening the previous motion and/or established that our decision to dismiss that motion was based on an incorrect application of law or USCIS policy.

A. Procedural History

The Director of the Nebraska Service Center denied the petition concluding that the record did not establish, as required, that the Petitioner meets at least three of the ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Petitioner claimed to meet four criteria, relating to memberships in associations that require outstanding achievements, judging the work of others in her field, original contributions of major significance, and authorship of scholarly articles. *See* 8 C.F.R. § 204.5(h)(3)(ii), (iv), (v), and (vi). The Director determined that the Petitioner met the criteria relating to judging and authorship of scholarly articles but did not satisfy either of the other two criteria. We dismissed the Petitioner's appeal on May 27, 2020, after reaching the same conclusion. The Petitioner filed her previous combined motion to reopen and reconsider on July 29, 2020, 63 days after we issued our decision.

The applicable regulations state that a motion on an unfavorable decision must be filed within 33 days of the date USCIS mails the decision. *See* 8 C.F.R. §§ 103.5(a)(1), 103.8(b). During the coronavirus (COVID-19) pandemic, USCIS issued guidance that Form I-290B, Notice of Appeal or Motion, would be accepted if filed within 60 days of the unfavorable decision. We dismissed the Petitioner's prior motion as untimely in accordance with 8 C.F.R. § 103.2(a)(2)(v)(B)(*1*) because it was not filed within 60 days of the issuance of our decision on May 27, 2020.

On motion, the Petitioner asserts that, since our decision dismissing the appeal was served by mail, the deadline for filing the motion should have included three additional days beyond the 60 calendar day deadline set forth in USCIS' guidance, in accordance with the regulation at 8 C.F.R. § 103.8(b). Specifically, she states "the guidance issued by USCIS in recognition of the coronavirus pandemic made absolutely no mention 8 C.F.R. § 103.8(b) was invalidated or not going to be recognized." The Petitioner therefore maintains that her motion, received 63 days after we issued our appellate decision, should be considered timely filed.

The Petitioner's assertions regarding the timeliness of her prior motion are persuasive. We will therefore grant the motion to reconsider, in part, to address the merits of her previous combined motion to reopen and reconsider. With the current motion, the Petitioner also submits new evidence, discussed below. The Petitioner has not, however, submitted new evidence that overcomes the grounds for dismissal of her appeal, nor has she demonstrated that our decision dismissing the appeal involved an incorrect application of the law or USCIS policy.

B. Motion to Reopen

The Petitioner's motion to reopen includes the following evidence related to the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii):

- Evidence that she was elevated to the grade of Senior Member in the Institute of Electrical and Electronics Engineers (IEEE) in [redacted] 2020;
- Evidence that she was elected as a Full Member in Sigma Xi in 2020;
- An email confirming her approval for membership as a Scientific and Technical Committee & Editorial Review Board member of the World Academy of Science, Engineering and Technology in [redacted] 2020; and
- A letter, dated November 5, 2020, welcoming her to the International Research Conference (IRC) Scientific and Technical Committee & Editorial Review Board on Computer and Information Engineering.

The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). While the referenced evidence is new, it relates to her recent professional achievements as of 2020. Therefore, this evidence cannot establish that the Petitioner had a qualifying membership in an association that requires outstanding achievements in her field when she filed this petition in August 2018. At the time of filing, the Petitioner provided evidence that she was a professional member of the IEEE. She does not contest our determination that she did not satisfy the requirements of 8 C.F.R. § 204.5(h)(3)(ii) based on that membership.

The Petitioner's prior motion to reopen also included a July 2020 letter from her employer, [redacted] University, indicating that she had recently been promoted and received tenure "as a result of her strong performance in the areas of teaching, scholarship and service." The letter describes a "rigorous vetting process" that included evaluations by peers and department colleagues, review by the university's Professional Practices Committee, and approval by the university's Board of Control. The Petitioner indicates that she is submitting the evidence for consideration under the evidentiary criterion related to original contributions of major significance at 8 C.F.R. § 204.5(h)(3)(v). She states that her promotion provides evidence of "additional recognition of [her] major significant contributions to her field" and "supports the notion that [her] original scientific work has been of major significance in her field."

Although this evidence, like the evidence related to the membership criterion, is new, it cannot establish the Petitioner's eligibility at the time she filed the petition, as her promotion occurred nearly two years later. Nevertheless, the letter from her employer does not adequately support her claim that she received the promotion based on recognition for her original contributions of major significance in the field. The letter indicates that she was promoted based on her "strong performance" in "teaching, scholarship and service."

For the reasons discussed, the new evidence submitted on motion does not establish that the Petitioner satisfied either the membership criterion or the original contributions criterion at the time she filed the petition. Accordingly, she has not overcome the grounds for dismissal of her appeal, and we will dismiss the motion to reopen.

C. Motion to Reconsider

In her brief in support of the prior motion to reconsider, the Petitioner argues that "the AAO has erred in concluding that [her] original scientific work has [not] made contributions of major significance in the field." She contends that we "mistakenly overlooked a significant portion of [redacted]'s expert opinion letter" regarding that original work, "specifically the proposed [redacted] solution she created." The Petitioner quotes a partial paragraph of one of [redacted]'s letters in which he describes this [redacted] solution and notes that her "[e]xtensive simulation results showed that the [redacted] solution exhibits a superior performance over existing methods."

In dismissing the appeal, our analysis of the evidence the Petitioner submitted under the original contributions criterion at 8 C.F.R. § 204.5(h)(3)(v) included a full-page discussion of a letter provided by [redacted], who had previously served as the Petitioner's Ph.D. advisor. While we did not quote directly from the portion of the letter emphasized by the Petitioner on motion, our decision reflects that we considered [redacted]'s statements regarding the Petitioner's development of [redacted] techniques and her publication of this work in conference proceedings in her field. Specifically, we acknowledged that [redacted] described the work in technical detail, indicated that the work was original and that it has generated some interest from others in the field as evidenced by the Petitioner's invitations to present it at conferences. However, we concluded that his letter did not demonstrate how the Petitioner's work has already impacted or influenced the field. We emphasized that [redacted] referred in general terms to the promise and potential of the research and how it might be of future benefit. On motion, the Petitioner has not specifically addressed how we misapplied the law or USCIS policy in our analysis of [redacted]'s letter or other expert opinion testimony

submitted in support of the original contributions criterion, or how we failed to give adequate consideration to this evidence.

The Petitioner also maintains on motion that "because [her] scientific contribution is not a physical or patented discovery, where someone would specifically require her consent to utilize, it is quite difficult to obtain evidence to corroborate that someone is actively utilizing the solution she created to solve their [redacted] issues." She also states that since "there is no readily available evidence to prove . . . [her] work is actively being implemented or utilized in her field, the fact that her work was presented at least four prestigious conferences . . . is a clear indicator that this major discovery warranted being shared with her peers."

In our decision dismissing the appeal, we considered evidence that the Petitioner had been invited to present her work at conferences, as well as evidence of her publication and citation record from *Google Scholar*. We noted that journal and conference publications alone are not sufficient to satisfy the original contributions criterion at 8 C.F.R. § 204.5(h)(3)(v) absent evidence that the research the Petitioner published and presented was demonstrated to be of "major significance." While the Petitioner claimed that her record of five publications and 23 total citations provided "direct evidence that her original scientific/scholarly work is a contribution in her field," we emphasized that she did not provide comparative evidence to show that any of her published articles is highly cited by others in the field, or otherwise shown the work has had an influence or impact consistent with an original contribution of major significance. Although the Petitioner emphasizes her conference presentations again on motion, she does not argue that we overlooked this evidence or contend that we misapplied the law or USCIS policy in our evaluation of it.

For the reasons discussed, the Petitioner has not established that our previous determination with respect to the original contributions criterion was incorrect based on the evidence of record at the time of our decision, or that it involved an incorrect application of the law or USCIS policy to the facts presented. Accordingly, the Petitioner has not established grounds for reconsideration of our decision dismissing her appeal.

IV. CONCLUSION

We have granted the Petitioner's motion to reconsider, in part, in order to evaluate the merits of her initial combined motion to reopen and reconsider. We have also considered new evidence submitted in support of the instant motion to reopen. For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration of our appellate decision or otherwise established eligibility for the immigration benefit sought. The dismissal of the Petitioner's appeal will not be disturbed, and the petition will remain denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is granted in part and dismissed in part.