U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18671058

Date: AUG. 31, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, an administrative services manager, seeks classification as an individual of extraordinary ability. 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 initially denied the petition and subsequently affirmed his decision on motion, concluding that the Petitioner had not satisfied any of the initial evidentiary criteria, of which she must meet at least three. We dismissed the Petitioner's subsequent appeal of the denial. The Petitioner then filed a combined motion to reopen and motion to reconsider, which we also dismissed. The matter is now before us on a second combined motion to reopen and 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). 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

We dismissed the Petitioner's appeal after determining that she did establish that she meets any of the initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).[1] In the previous motion to reconsider, we observed that the Petitioner restated and described the evidence she submitted under the one-time achievement and the evidentiary criteria relating to awards, memberships, published material, judging, original contributions, and leading or critical role.[2] Although the Petitioner contended that we erred

[1] On appeal, the Petitioner argued eligibility for the one-time achievement under 8 C.F.R. § 204.5(h)(3), and, in the alternative, that she met eight criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to lesser nationally or internationally recognized awards or prizes, membership in associations, published material in major media, judging, original contributions of major significance in the field, scholarly articles, performance in a leading or critical role for organizations or establishments that have a distinguished reputation, and high salary. *See* 8 C.F.R. § 204.5(h)(3)(i), (ii), (iii), (iv), (v) (vi), (viii), and (ix). We noted that the Director determined that the Petitioner claimed, but did not establish, that she meets the criterion related to display at 8 C.F.R. § 204.5(h)(3)(vii), and that on appeal the Petitioner did not contest the Director's finding that she does not meet this criterion or offer additional arguments.

[2] We noted that the Petitioner's prior motion to reconsider did not address our decisions regarding the scholarly articles and high salary criteria.

in our dismissal of the appeal, she did not attempt to identify or rebut any specific errors in our decision or establish how we had misapplied the law or USCIS policy in adjudicating her appeal, as required for a motion to reconsider. We noted that the Petitioner did not even mention our appellate decision and address our specific conclusions, including our determinations on the Director's combined motion decision. We further noted that our appellate decision thoroughly analyzed and explained why every piece of evidence and arguments addressed in the motion did not meet the regulatory requirements. We concluded, therefore, that the Petitioner did not demonstrate that we erred in either misapplying law or policy or failing to address prior arguments or evidence. For these reasons, we dismissed the motion to reconsider.

With respect to the prior motion to reopen, the Petitioner submitted the following new evidence under the corresponding criteria: 1) a certificate from [redacted] dated December 8, 2011 (awards); 2) a letter from the [redacted] dated January 3, 2006 (memberships); 3) letters from [redacted] and [redacted] dated December 28, 2012 and January 8, 2003, respectively (judging); 5) letters from [redacted] and [redacted] dated March 11, 2017 and July 18, 2017, respectively (leading or critical role); and 6) 2005 Filipino income tax documentation (high salary). We determined that, as the Petitioner did not submit these documents before the Director, either at the time she filed the petition or in response to the Director's request for evidence, we would not consider these claims and documents in our adjudication of the motion. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose" and that "we will adjudicate the appeal based on the record of proceedings" before the Chief); *see also Matter of Obaigbena*, 19 I&N Dec 533 (BIA 1988). We found that, although the documents pre-date her initial filing, the Petitioner did not explain why she did not present these documents before the Director. Accordingly, we refused to consider this evidence to determine the Petitioner's eligibility under the applicable criteria for the first time on motion. As such, we dismissed her motion to reopen.

B. Judicial Proceeding Statement

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires the motion to be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceedings and, if so, the court, nature, date, and status or result of the proceeding." The Petitioner, however, did not include the required statement. Therefore, the Petitioner's motions do not meet the applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

C. Motion to Reconsider

The Petitioner maintains that we erred in dismissing the previous motion to reconsider but she does not specifically address our reasons for dismissal, nor does she attempt to identify or rebut any specific errors in that decision.[3] A motion to reconsider must specify the factual and legal issues that were decided in error or overlooked in our prior decision. *Cf. Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA

[3] The Petitioner's present motion to reconsider does not address our decisions regarding the one-time achievement and the evidentiary criteria relating to published material and original contributions.

2006).[4] ("[A] motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior . . . decision. The moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in our initial decision . . . .") Here, the Petitioner has not specifically addressed our most recent decision or stated any reasons for reconsideration of that decision. Nor does she contend that our prior decision was based on an incorrect application of law or policy, or that the decision was incorrect based on the evidence of record at the time of that decision. As such, the motion does not meet all the requirements of a motion to reconsider, and 8 C.F.R. § 103.5(a)(4).

Further, we acknowledge that the Petitioner's claim on motion includes a criticism of USCIS policy guidance related to the adjudication of extraordinary ability immigrant petitions.[5] 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 does not articulate a claim that we misapplied this policy in our adjudication of her prior motion to reconsider. Rather, she maintains that we erred in our adjudication of the prior motion by adhering to *Kazarian* and applicable USCIS policy and asserts we should have looked to the reasoning in *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994), a pre-*Kazarian* district court decision, and other pre-*Kazarian* federal district court decisions in adjudicating her prior motion.[6] Because we have already concluded that the Petitioner has not demonstrated that we misapplied the law or USCIS policy in concluding that she did not meet the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3)(i)–(x), we reserve this issue.[7]

In sum, although the Petitioner has submitted a brief in support of the current motion, she 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.

D. 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). With respect to the prior motion to reopen, the Petitioner maintains that we erred in not considering the aforementioned new evidence offered under the criteria relating to awards, memberships, judging, leading or critical role, and high salary.

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[4] As noted in our prior decision, *O-S-G-* relates to motions to reconsider before the Board of Immigration Appeals, governed by 8 C.F.R. § 1003.2(b)(1), which states: "A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority." These requirements are fundamentally similar to those found at 8 C.F.R. § 103.5(a)(3), and therefore the same logic applies.

[5] *See* 6 *USCIS Policy Manual* F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.

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

[7] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach). However, 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 support of the present motion, the Petitioner explains why she did not present these documents before the Director. In her brief, she asserts that these documents "could have been presented in the initial stage but because of the string [sic] typhoon that hit the Philippines at the time or before the initial filing, these documents were not previously available" and "these new evidences were hardly located and presented in the midst of COVID-19 pandemic." In addition, in an unsworn statement the Petitioner provides that the new documents "were unavailable during the initial submission for the reason that I have to ask my brother to dig and look into my old bunch of files in the garage." Here, however, we do not find that the Petitioner's new evidence overcomes our previous finding that she does not meet at least three of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

As it relates to the criterion for lesser nationally or internationally recognized prizes or awards for excellence in the field at 8 C.F.R. § 204.5(h)(3)(i), the Petitioner asserted on motion that she had received such an award, as demonstrated by a certificate from [redacted] dated December 8, 2011. USCIS policy guidance provides that relevant considerations regarding whether the basis for granting the prizes or awards was excellence in the field include, but are not limited to, the criteria used to grant the prizes or awards, the national or international significance of the prizes or awards in the field, and the number of awardees or prize recipients as well as any limitations on competitors.[8] The award certificate indicates it was an "Award for Excellence given to [the Petitioner] recognizes leaders who share the opportunity & mentor others to build their own successful [redacted] business," and was conferred by an [redacted] branch manager in [redacted] Philippines. However, the certificate was not accompanied by any information regarding the award or the national or international recognition associated with it, such as news media articles or other relevant documentation. In addition, the Petitioner does not provide evidence demonstrating that mentoring others in building a successful [redacted] business is in the same or an allied field of administrative services management, and therefore that this award was given for excellence in her field of endeavor. Therefore, this document does not overcome our previous finding that the Petitioner does not meet the criterion regarding lesser nationally or internationally recognized prizes or awards at 8 C.F.R. § 204.5(h)(3)(i).

Regarding the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii), in the Petitioner's prior motion she provided a letter from [redacted], a coordinator with the [redacted] dated January 3, 2006. [redacted] acknowledges the Petitioner's membership in [redacted] which he indicates "helps our members become more effective on the job by teaching the human aspect of management via numerous career development forums and trainings." While this letter confirms that the Petitioner was a member of [redacted] and its mission, the record lacks documentation, such as bylaws, membership requirements, or other appropriate evidence, establishing that the organization requires outstanding achievements of its members, as judged by recognized national or international experts in their disciplines or fields.[9] For the reasons discussed, the Petitioner's additional evidence on motion does not demonstrate that she satisfies the regulatory requirements of the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii).

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[8] *See* 6 *USCIS Policy Manual* F.2 appendix, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2 (providing guidance on the review of evidence submitted to satisfy the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x)) (indicating that an award limited to competitors from a single institution, for example, may have little national or international significance).

[9] *Id.* (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).

As it pertains to the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix), in support of the Petitioner's prior motion she submitted 2005 Filipino income tax documentation. The burden is on the Petitioner to provide appropriate evidence, including, but not limited to, geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data, demonstrating that she meets this criterion.[10] Further, a petitioner working in a different country must be evaluated based on the wage statistics or comparable evidence in that country.[11] Here the income tax documentation reflects that in 2005 [redacted] paid the Petitioner a gross annual salary of ₱420,000 while she was working in [redacted] Philippines. Therefore, appropriate evidence may be compensation surveys reflecting the wages for administrative service managers in the Petitioner's geographic area in the Philippines, or other appropriate materials.

The Petitioner provided 2005 Filipino income tax documentation for a colleague, [redacted], reflecting that [redacted] received a gross annual salary of ₱137,400.00 while working in [redacted] Philippines, and an undated identification badge indicating her position as an administrative manager. The Petitioner claims that "due to my advanced level of expertise and extensive experience, I am grateful to have commanded a higher amount in salary compared to her." However, salary information obtained from only one individual does not reliably represent industry salaries. Without appropriate evidence of the average salary earned by administrative service managers in the Petitioner's geographic area in the Philippines, the Petitioner has not provided documentation sufficient to establish whether she has commanded a high salary in relation to others in her field. Therefore, the Petitioner has not overcome our previous finding that she does not meet the regulatory criterion at 8 C.F.R § 204.5(h)(3)(ix).

As discussed above, we find that the Petitioner's new evidence does not overcome our previous determination that she does not meet the regulatory criteria relating to awards, membership, or high salary. Although in the present motion the Petitioner also claims that she meets the criteria related to judging and leading or critical role, we need not reach these issues. We reserve them, as the Petitioner cannot meet the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3).[12]

IV. CONCLUSION

For the reasons discussed, the Petitioner's motion to reconsider has not shown that our latest decision was based on an incorrect application of law or USCIS policy, and the evidence provided in support of the motion to reopen does not overcome the grounds underlying our previous decision. 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.

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[10] *Id.*
[11] *Id.*
[12] *See Bagamasbad*, 429 U.S. at 25-26.