U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13020667

Date: FEB. 2, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a mechanical engineering specialist, 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had received a major, international recognized award or satisfied at least three of ten alternative evidentiary criteria, as required. After a series of appeals and motions (detailed below), the matter is now before us on a combined motion to reopen and reconsider.

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

I. 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 state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Under the above regulations, a motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

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).

By regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). Therefore, the filing before us is not a motion to reopen and reconsider the denial of the petition or the initial dismissal of the appeal. Instead, the filing is a motion to reopen and reconsider our most recent decision. Therefore, we cannot consider new objections to the earlier denial, and the Petitioner cannot use the present filing to make new allegations of error at prior stages of the proceeding.

II. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to aliens with extraordinary ability if:

> (i) the alien 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,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

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 must either establish a one-time achievement (that is, a major, internationally recognized award) or 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) (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

A. Procedural History

In order to provide context, we discuss, here, the procedural history of this matter.

July 2017	The Petitioner filed the petition.
August 2018	The Director denied the petition, concluding that the Petitioner had not established eligibility for the classification sought.
September 2018	The Petitioner appealed the Director's decision to us at the Administrative Appeals Office (AAO), and stated that he would submit a brief and additional evidence within 30 days. The record does not show, and the Petitioner does not claim, that he submitted those materials within that period.
December 2018	We summarily dismissed the appeal, citing the regulation at 8 C.F.R. § 103.3(a)(1)(v), which requires summary dismissal of an appeal that does not identify specifically any erroneous conclusion of law or statement of fact in the decision being appealed.
January 2019	The Petitioner filed a combined motion to reopen and reconsider. On motion, the Petitioner did not contest the summary dismissal of the appeal. Rather, the Petitioner addressed the grounds for denial of the underlying petition.
June 2019	We denied the Petitioner's motion as untimely, because we received it after the expiration of the filing period defined at 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*).
July 2019	The Petitioner appealed the denial of the motion, seeking to explain the delay in filing.
October 2019	We rejected the appeal, because the regulations make no provision for a petitioner to appeal a decision by the Administrative Appeals Office.
November 2019	The Petitioner filed a combined motion to reopen and reconsider, seeking both to explain the untimely filing of the January 2019 motion and to submit new evidence in support of the underlying petition.
July 2020	We granted the Petitioner's motion to reopen in part and dismissed it in part, and dismissed the motion to reconsider. We excused the delay in filing the January 2019 motion, under the regulation at 8 C.F.R. § 103.5(a)(1)(i), but we also determined that the Petitioner had not overcome the summary dismissal of his September 2018 appeal.

B. Motion to Reopen

The Petitioner's latest motion includes several documents, but all of them are copies of materials that he had submitted previously. None of them are new to the record, and therefore they do not introduce new facts. Furthermore, most of the submitted documents relate to events in 2018 and 2019, after the petition's July 2017 filing date. As such, they cannot establish eligibility at the time of filing, as

required by the regulation at 8 C.F.R. § 103.2(b)(2). *See also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (new facts cannot retroactively establish eligibility).[1]

We will dismiss the motion to reopen, because the Petitioner has not shown cause for reopening the proceeding.

C. Motion to Reconsider

For the motion to qualify as a motion to reconsider, the Petitioner must show that our most recent prior decision (issued July 2020, relating to the Petitioner's November 2019 motion) contained errors of fact, law, or policy that affected the outcome of that decision.[2] In that decision, we made the following determinations:

- We granted the motion to reopen in part, because the Petitioner had adequately explained the delay in filing the January 2019 motion;
- The only issue properly under consideration in the January 2019 motion was the summary dismissal, not the August 2018 denial or the merits of the underlying petition;
- The Petitioner did not show that we erred in summarily dismissing the original appeal; and
- The regulations make no provision to excuse the late filing of a motion to reconsider.

In the present motion, proper consideration is limited to these issues.

The Petitioner states, on motion:

> AAO erred by summarily dismissing the appeal and failed to consider petitioner's brief with newly submitted evidence. The AAO should not have summarily dismissed his appeal and overlooked the additional evidence previously submitted attached to beneficiary's motion.
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> Petitioner identified an error in the director's decision summarily dismissing petitioner's appeal without considering the evidence attached to the motion and new statement of facts and new evidence in support of his motion.
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> . . . .
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> Petitioner asserts that AAO erred in summarily dismissing the appeal since the petitioner provided numerous explanations in the form of motion and supplemental brief, affidavit and newly submitted evidences and basis for his appeal and additional evidence when the appeal was filed.

[1] To avoid conveying the false impression that these materials would have otherwise established eligibility, we briefly note that the submitted materials relate to the Petitioner's employment at an elder care facility and a student project involving the construction of an impact attenuator for a race car. On its face, this evidence does not establish or suggest that the Petitioner is eligible for classification as an alien of extraordinary ability.

[2] *See* 8 C.F.R. § 103.5(a)(1)(i).

The above statement alleges error in the December 2018 summary dismissal, but only by ignoring the chronology and conflating the appeal (filed in September 2018) with a subsequent motion (filed in January 2019), repeatedly referring to the motion as though it were an integral part of the appeal. When we reviewed the appeal in December 2018, the Petitioner had not yet filed the motion, and had not yet submitted any brief or evidence in support of that motion. The motion was the Petitioner's response to the December 2018 summary dismissal. The appeal that was before us in December 2018 did not specifically identify any erroneous conclusion of law or statement of fact.

In a new brief, the Petitioner cites various examples of case law concerning the limited scope of motions to reconsider. For example, he cites *Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991), which he paraphrases as follows: "A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings." This case law undermines, rather than supports, his argument on motion. The time to allege specific errors in the Director's denial decision was in the appeal filed in September 2018. At that time, the Petitioner filed only a skeletal appeal. He stated that more details would follow within 30 days, but he did not supplement the appeal during that time. The filing of the appeal afforded the Petitioner a time-limited opportunity to raise specific objections to the denial. It did not create or preserve any right for the Petitioner to dispute the denial in a motion that would be filed months later.

The Petitioner filed a timely appeal in September 2018, but he did not, at that time, identify any specific grounds for the appeal. Instead, he made the general statement that the denial contained unspecified errors which the Petitioner would address in a brief, to follow within 30 days. The record does not contain any timely supplemental brief from the Petitioner, and the Petitioner does not claim to have submitted one. The Petitioner's January 2019 motion could not, and did not, cure the deficiencies in his September 2018 appeal.

Because the Petitioner has not overcome the summary dismissal of his appeal, we will not address the merits of the petition in great detail. Nevertheless, in an effort to inform the Petitioner that the above-described technical and procedural issues are not the only obstacles to approval of the petition, we will discuss certain elements of the record.

The regulation at 8 C.F.R. § 204.5(h)(3) requires "evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." The same regulation provides that such evidence may take the form of "a one-time achievement (that is, a major international[ly] recognized award)." In the initial denial notice, the Director observed that the relevant legislative history named the Nobel Prize as an example of such an award. *See* H.R. Rep. 101-723, 59 (Sept. 19, 1990), reprinted in 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 at *6739. The Director also noted that the awarding of the Nobel Prize routinely attracts international attention.

The Petitioner claims to have received such an award, in the form of a "Certificate of Recognition" "[f]or being an outstanding individual" at the [redacted] 2016" event held by [redacted] The Petitioner also claims to have "received . . . international recognition for his contribution as Tech Specialist from [redacted]" We agree with the Director's conclusion that these accolades do not rise to the level of major, internationally recognized prizes or awards, on a par with the Nobel Prize.

One of the lesser regulatory criteria, at 8 C.F.R. § 204.5(h)(3)(vi), calls for evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media. The Petitioner states that he satisfies this criterion through customer reviews posted online on the website of a company that repairs ventilation and electrical systems. These reviews do not conform to any of the elements required by the regulation. The Petitioner is not the author of the reviews; the reviews are not scholarly articles; and the website is not a professional or major trade publication or other major media. The Director correctly determined that these customer reviews do not establish the Petitioner's authorship of scholarly articles.

The Petitioner seeks permanent immigration benefits in a classification that, by law, is reserved for individuals who have earned sustained national or international acclaim at the top of their fields. The caliber of evidence submitted to support the petition does not rise close to this highly rarefied level of achievement and recognition.

IV. CONCLUSION

The latest motion does not establish that our most recent decision was in error, and seeks to reach back to earlier stages of the proceeding that are no longer ripe for review on motion. The Petitioner has not overcome our determination that summary dismissal was the proper, and required, outcome when presented with an appeal that contained no specific allegations of error in fact or law.

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.