U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16666105

Date: JUL. 08, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, an information technology manager, 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 initially approved the petition but later revoked the approval after issuing a notice of intent to revoke. The Director concluded that the Petitioner did not establish, as required, that he meets at least three of the ten initial evidentiary criteria for this classification. We dismissed the Petitioner's subsequent appeal of that decision. The matter is now before us on a combined motion to reopen and motion to reconsider.

The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). Upon review, we will dismiss the combined 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

A. The Classification Sought

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).

B. Revocation of an Approved Petition

Section 205 of the Act states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition."

Regarding the revocation of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime* . . . , this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (quoting *Matter of Estime*, 19 I&N Dec. at 452).

III. ANALYSIS

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision" which, in this case, was our dismissal of the Petitioner's appeal. 8 C.F.R. § 103.5(a)(1)(i). Therefore, the issue in this matter is whether the Petitioner has submitted new facts supported by

documentary evidence sufficient to warrant reopening his appeal and/or established that our decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

A. Prior AAO Decision

We dismissed the Petitioner's appeal and affirmed the revocation decision, concluding that the Petitioner did not establish that he could satisfy at least three of the ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director determined that the Petitioner met only one criterion, at 8 C.F.R. § 204.5(h)(3)(ii), which requires documentation of memberships in associations that require outstanding achievements of their members as judged by recognized national or international experts in the field. We disagreed with the Director and withdrew his determination that the Petitioner had satisfied this criterion. We also determined, upon *de novo* review of the record, that the Petitioner had submitted sufficient evidence to demonstrate that he satisfied the criteria at 8 C.F.R. § 204.5(h)(3)(iv), which relates to judging the work of others in his field, and 8 C.F.R. § 204.5(h)(3)(vi), which relates to authorship of scholarly articles in professional publications.

Finally, we agreed with the Director's determination that the record did not support the Petitioner's claims that he had made original contributions of major significance in his field or that he has commanded a high salary or other significantly high remuneration in relation to others in his field. *See* 8 C.F.R. § 204.5(h)(3)(v) and (ix). As we determined that the Petitioner did not meet the initial evidence requirements by satisfying at least three of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), we did not proceed to a final merits determination.

In addition to addressing the merits of the Petitioner's extraordinary ability claim, we considered the Petitioner's argument that the Director's notice of intent to revoke (NOIR) provided inadequate notice of the proposed grounds for revocation. Specifically, the Petitioner claimed on appeal that "the Service based the majority of its analysis and reasons of revocation on their fraud or willful misrepresentation claim." He emphasized since the notice of revocation did not make any reference to fraud or material misrepresentation of a material fact, "there was not sufficient evidence of record at the time of the notice that would deem the intention to revoke 'good and sufficient cause.'"

We acknowledged that the Director raised concerns regarding the authenticity of the recommendation letters in the record in the NOIR. However, we observed that Director also explained in detail why the documentation in the record at the time the NOIR was issued did not satisfy at least three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), and addressed each of the claimed criteria independently. In addition, we determined that the notice of revocation explained the reasons for revocation, that it provided support for the conclusions reached regarding the Petitioner's eligibility based on the evidence of record, and that the Petitioner had adequate notice and an opportunity to respond prior to the written notice of revocation, as required by 8 C.F.R. § 205.2(b) and (c).

B. The Petitioner's Combined Motion

On motion the Petitioner, asserts that, based on the record before us at the time of the appeal, we incorrectly determined that he did not satisfy the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii). He also submits additional evidence relating to this criterion. In addition, he submits new evidence in support of the criterion at 8 C.F.R. § 204.5(h)(3)(ix), and asserts that, with this new evidence, he has

now demonstrated that he commands a high salary in relation to others in his field. We will address these two evidentiary criteria below.[1]

Before turning to the evidentiary criteria, we note that the Petitioner also repeats his previous claim that the Director did not have good and sufficient cause to revoke the approval of the petition. He asserts that the suspected fraud or willful misrepresentation mentioned in the Director's NOIR "formed the entire basis for the NOIR" and maintains that the Director should not have revoked the approval if there was ultimately no finding of fraud or willful misrepresentation of a material fact.

As discussed above, the Petitioner made this argument on appeal and we addressed the merits of his claim in our prior decision. Specifically, we determined that the NOIR provided the Petitioner with adequate notice of the deficiencies that formed the grounds for revocation and afforded him the opportunity to respond to those deficiencies as required by 8 C.F.R. § 205.2(b) and (c). The record does not support the Petitioner's claim that any suspected fraud or willful misrepresentation "formed the entire basis for the NOIR."

To meet the requirements for a motion to reconsider, the Petitioner must establish that we incorrectly applied the law or USCIS policy in our decision dismissing the appeal. Here, the Petitioner simply repeats his claims that the Director did not have good and sufficient cause to revoke the approval of his petition, rather than addressing the specific conclusions we reached in our appellate decision with respect to this issue. In fact, the Petitioner does not acknowledge that we addressed this issue in our decision. Accordingly, he has not established with the current motion that we incorrectly applied the law or USCIS policy in concluding that the Director complied with the regulations governing revocation of an approved immigrant petition.

C. Evidentiary Criteria

In our decision dismissing the Petitioner's appeal, we determined that he met only two of the ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) and therefore did not meet the initial evidentiary requirements for this classification. On motion, he asserts that he can meet the two criteria discussed below.

> *Documentation of the individual's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.* 8 C.F.R. § 204.5(h)(3)(ii)

[1] The Petitioner does not pursue his previous claim that he can satisfy the criterion related to original contributions of major significance at 8 C.F.R. § 204.5(h)(3)(v) and we consider this claim to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court determined the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

To satisfy this criterion, a petitioner must submit documentation of their membership in associations in the field for which classification is sought, which require outstanding achievements of their members as judged by recognized national or international experts in their disciplines.

The Petitioner claims that he can satisfy this criterion based on his admission as a "Senior Member" of the Institute of Electrical and Electronics Engineers (IEEE). He submitted proof of his membership as well as excerpts from the IEEE bylaws which address the requirements for Senior Members. According to the bylaws, "a candidate shall be an engineer, scientist, educator, technical executive or originator in IEEE-designated fields . . . The candidate shall have been in professional practice for at least ten years and shall have shown significant performance of a period of at least five of those years." The bylaws further specify that "significant performance" can take the form of "[p]ublication of papers, books, or inventions."

In dismissing the appeal, we determined that the IEEE's stated requirements for admission as a Senior Member (ten years of relevant experience and "significant performance" consisting of publication of papers, books or inventions) do not rise to the level of "outstanding achievements" consistent with this regulatory criterion. We also observed that the evidence indicated that the IEEE has a "Fellow" membership grade that appears to align more closely with the regulatory language at 8 C.F.R. § 204.5(h)(3)(ii). Specifically, we noted that, according to the submitted IEEE bylaws, Fellow membership requires "an outstanding record of accomplishments" that have "contributed importantly to the advancement or application of engineering, science and technology." In addition, we noted that one can apply for the Senior Member grade, whereas elevation to Fellow requires nomination and election at the highest levels of the association.

On motion, the Petitioner argues that we misconstrued the IEEE Senior Member requirements, asserting that it "does not just require '10 years of relevant experience in a particular field' and 'publication of papers, books and inventions.'" He emphasizes that "much more is required," and that he also had to demonstrate "professional maturity," "significant performance of at least 5 years," and provide three references from "other IEEE elite members." The Petitioner emphasizes some of his own professional achievements and asserts that the IEEE judging panel would have considered his professional positions, his publication in journals with international reputation, and his peer review service in determining his qualifications for senior membership. He maintains that only 9% of IEEE's 428,000 members reach the Senior Member level and that it is "an extremely elite group."

The Petitioner further argues that we placed undue weight on the phrase "significant performance," in the IEEE bylaws, "insinuating that 'significant' cannot mean the same type of achievement as that which USCIS calls 'outstanding.'" He emphasizes that "the actual Senior Member requirements, when looked at together, demonstrate that a member must have 'outstanding achievements' as used by USCIS." Further, the Petitioner notes that the examples of "significant performance" in the IEEE bylaws are not exhaustive and that judging panels "perform a rigorous review of a professional's entire record, looking at everything together, to determine if the individual has met the requirements to be allowed into the elite membership group."

The Petitioner also objects to our reference to the IEEE's stated requirements for Fellow membership, arguing that "[t]o suggest that Senior Member grade does not meet the requirements of this criteria because there is another membership class would take away from an objective analysis of the

requirements for the particular membership which the individual holds." He notes that, despite our observation that Fellow membership in the IEEE requires a nomination rather than an application, the regulation at 8 C.F.R. § 204.5(h)(3)(ii) contains no nomination requirement. The Petitioner maintains that "Senior Membership clearly does require outstanding achievements and it is not for AAO to guess as to why the IEEE has created additional membership grades."

In addition, the Petitioner submits additional evidence in support of his claim that his Senior membership in IEEE satisfies this criterion, including e-mail correspondence from [redacted] the IEEE's [redacted] and a screenshot of the "Requirements for IEEE Senior Member Grade" from the association's website.

[redacted]'s e-mail describes the application process for the Senior Member grade, noting that applicants must have three references from current IEEE members who have a grade of Senior Member or higher. He explains that applications are evaluated by a Senior Member Panel (usually local IEEE section members who have a Senior Member grade or higher) of at least two panelists, who evaluate applications to determine if an applicant meets the 10 years of Professional Experience and 5 years of Significant Performance requirements. He refers to the IEEE website for additional information regarding what constitutes "significant performance."

The IEEE's website states that "[m]any prospective applicants make the mistake of assuming that 'significant performance' requires special awards, patents, or other extremely sophisticated technical accomplishments, but that is not the case." The IEEE's description of significant performance indicates that "[s]ubstantial job responsibilities such as team leader, task supervisor, engineer in charge of a program or project, engineer or scientist performing research with some measure of success (papers) or faculty developing and teaching courses . . . are all indications of significant performance."

The new evidence submitted on motion does not support the Petitioner's claim that admission as a Senior Member in IEEE requires outstanding achievements as judged by recognized national or international experts in the field. The additional evidence sheds additional light on what the IEEE regards as "significant performance" but does not demonstrate that the IEEE's standards for meeting that threshold rise to the level of "outstanding achievements" as contemplated by the plain language of 8 C.F.R. § 204.5(h)(3)(ii). While this membership level does not appear to be available to all professionals with 10 years of experience in the field, we cannot conclude that holding a team leader position, a project manager position, a faculty position, or a research position that results in publications amounts to exhibiting "outstanding achievements" in one of the IEEE-designated fields. These are certainly noteworthy professional accomplishments and some persons who are elevated to Senior Member likely exceed the minimum requirements. However, to demonstrate that his membership satisfies the requirements of this criterion, the Petitioner must establish that IEEE requires Senior Members to have "outstanding achievements" as an essential condition of membership.

As noted by the Petitioner, we observed in our prior decision that the IEEE has another membership level, Fellow Member, which requires "unusual distinction" and an "outstanding record of accomplishments." We agree with the Petitioner that the existence of this higher-level membership grade does not automatically lead to a conclusion that the Senior Member grade does not satisfy this criterion. However, the evidence contained in the IEEE bylaws provides useful context regarding how the association views a prospective member's qualifications. The existence of two different elevated

levels of membership with different stated requirements indicates that the IEEE does not consider the "significant performance" required for Senior membership to be equivalent to the "outstanding accomplishments" required for Fellow membership. As discussed above, the additional information from the IEEE website regarding what it deems to be "significant performance," does not support a conclusion that "significant performance" in an IEEE-designated field equates to "outstanding achievements" in the field as contemplated by 8 C.F.R. § 204.5(h)(3)(ii).

Further, based on [redacted]'s description of the application review process for Senior membership, the record does not establish that prospective Senior Members are admitted only after having their achievements judged by "recognized national or international experts in the field" as required by 8 C.F.R. § 204.5(h)(3)(ii). The only stated requirement for participation in a Senior Member Panel is to be a Senior Member of the IEEE. While the Petitioner refers to Senior Members as an "elite group," the record does not establish that admission to a Senior Member grade is reserved solely for experts who are recognized at the national or international level.

For all the reasons discussed above, the Petitioner has not established that we incorrectly applied the law or USCIS policy in determining that he does not meet the membership criterion, nor does the new evidence submitted on motion establish that he meets this criterion.

> *Evidence that the individual has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix)

To satisfy the requirements of this criterion, the Petitioner must establish that his salary, or total remuneration, is high or significantly high, respectively, based on a comparison with others in his field in similar positions and geographic locations.[2]

The Petitioner documented his earnings for the years 2013 and 2016. Specifically, he provided evidence that he received an annual salary of $101,923 for a [redacted] Minnesota-based position as a "Systems Accounting Manager," in 2013. In addition, he provided evidence that he received an annual salary of $115,000 while working as an "ERP functional business manager" in [redacted] Florida in 2016. In dismissing the appeal, we observed that the Petitioner did not provide position-appropriate comparative wage evidence to establish that his salary in one or both years was high in relation to others in the same geographic area and occupation. Specifically, we noted that he provided screenshots from the O*Net online database and Foreign Labor Certification Data Center (FLCDC) for "Computer Occupations, All Other," but did not provide comparative wage data applicable to his occupational title as a manager in the IT field.

On motion, the Petitioner submits an O*Net Online Summary Report for the occupation of "Information Technology Project Manager," as well as O*Net Online local wage reports for this occupation for the [redacted], Minnesota and [redacted] Florida metropolitan areas. The Petitioner emphasizes that this new evidence demonstrates that the Bureau of Labor Statistics (BLS) includes the "Information Technology Project Manager" occupation under "Computer Occupations, All

[2] *See* 6 USCIS Policy Manual F.2 appendix, https://www.uscis.gov/policy-manual (noting that it is the petitioner's burden to provide geographical and position-appropriate evidence to establish that a salary is relatively high).

Other," and therefore the evidence he submitted previously did in fact provide an appropriate basis for comparison.

The evidence does not establish, however, that all managerial occupations in the information technology field are "project managers" that fall under the "Computer Occupations, All Other" category. In fact, the "IT project manager" is the only managerial title that falls under this category, which also includes web administrators, geographic information systems (GIS) technicians, information security engineers, and document management specialists.[3] For example, Computer and Information Systems Managers are classified separately, with separate wage data reported by BLS.[4]

As noted, the Petitioner provided evidence that he earned an annual salary of $101,923 in 2013 for the position of "Systems Accounting Manager" while working for [redacted] in [redacted] The new evidence submitted on motion shows that, according to BLS 2019 wage data, the median salary for an "IT Project Manager" in [redacted] is $84,940, the 75th percentile wage is $113,130, and the 90th percentile wage for this occupation is $135,680. He also provides a document labeled "May 2013 OES Estimates" for "Computer Occupations, All Other," showing estimated statewide Minnesota wages for 2013. This document indicates a mean annual salary of $74,230, a 75th percentile salary of $92,020, and a 90th percentile salary of $113,500.[5]

The record does not contain a description of the duties the Petitioner performed as "Systems Accounting Manager," so we cannot determine to what extent his duties were consistent with those of an "IT Project Manager" as described in the O*Net summary report. Even assuming that this is the appropriate occupational classification, his 2013 earnings fell somewhere between 75th and 90th percentile when compared to estimated statewide figures for Minnesota for 2013, which were likely lower than [redacted] wages. While his 2013 salary is also above the median when compared to [redacted] figures for 2019, demonstrating that his salary is above the mean or median salary in the geographic area of employment is not sufficient to establish that he commanded a "high salary."

In 2016, the Petitioner earned a base annual salary of $115,000 as an "ERP functional business manager" while working for [redacted] in the [redacted] Florida region. On motion, he submits evidence that, in 2019, the median salary for an "Information Technology Project Manager" in this region was $65,680, the 75th percentile wage was $82,530, and the 90th percentile wage was $98,340. Because the Petitioner seeks to rely on his earnings from 2016, the relevant comparative data would be data from that year. With respect to that data he states, "[l]ooking at historical BLS data from 2016 in Florida, we find that for "Computer Occupations, All Other" the mean annual salary for the relevant region was actually higher at $74,910." He provides a link to the source of this information, but the source does not include any additional data from 2016. While it appears that his salary was higher than the 2016 average salary for an "Information Technology Project Manager," the regulation

[3] *See* Summary Report for 15.1299.00 - Computer Occupations, All Other, https://www.onetonline.org/link/summary/15-1299.00, last accessed on Jul. 7, 2021.

[4] *See* Summary Report for 11-3021.00 – Computer and Information Systems Managers, https://www.onetonline.org/link/summary/11-3021.00, last accessed on Jul. 7, 2021.

[5] The record reflects that in 2019, the Minnesota statewide salaries reported on O*Net Online were lower than those reported for the [redacted] region.

requires that the Petitioner demonstrate a "high salary" rather than an "above average" salary. There is insufficient evidence to support his claim that his salary was high in relation to others.

Accordingly, the new evidence submitted on motion does not establish that the Petitioner meets the criterion at 8 C.F.R. § 204.5(h)(3)(ix).

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 appeal. 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.