U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16965334

Date: JUL. 30, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a finance minority business coach, 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 Texas Service Center initially denied the petition and subsequently affirmed his decision on motion, concluding that the Petitioner had satisfied only two of the initial evidentiary criteria for this classification, of which she must meet at least three. We dismissed the Petitioner's subsequent appeal. The matter is now before us on a 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 conclude that the Petitioner has not met that burden. Accordingly, we will dismiss the motion to reconsider.

I. MOTION REQUIREMENTS

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 aliens with extraordinary ability. 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 his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that 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

The issue before us is whether the Petitioner has established that our decision to dismiss her appeal was based on an incorrect application of law or USCIS policy. The Petitioner must specify the factual and legal issues raised on appeal that were decided in error or overlooked in our initial decision. At the outset, the Petitioner did not include the required statement about whether or not the validity of the unfavorable decision has been, or is, the subject of any judicial proceeding. 8 C.F.R. § 103.5(a)(1)(iii)(C). As stated previously, a motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Moreover, for the reasons discussed below, the Petitioner's motion to reconsider does not establish that we erred in our prior decision.

A. AAO Decision

Because the Petitioner has not indicated or established that she has received a major, internationally recognized award, she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). In his decision on motion, the Director concluded that the Petitioner met the same two evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) as in his previous decision, relating to the Petitioner's participation as a judge of the work of others and her leading role for an organization having a distinguished reputation.

In dismissing the appeal, we agreed with the Director's determination that the Petitioner satisfied the criteria pertaining to judging and leading or critical role. We also addressed the Petitioner's claim that she met five additional criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), including the criteria related to nationally recognized awards or prizes, memberships in associations that require outstanding achievements, published material in major media, original contributions of major significance, and

high salary or other significantly high remuneration. We concluded that because the Petitioner satisfied only two criteria, she did not meet the initial evidence requirements for this classification.

B. Motion to Reconsider

On motion, the Petitioner asserts that we incorrectly determined that the previously submitted evidence was insufficient to satisfy the criteria relating to the lesser nationally or internationally recognized awards, membership, and high salary or other remuneration criteria at 8 C.F.R. § 204.5(h)(3)(i), (ii) and (ix). She does not contest our conclusion that she did not submit evidence to satisfy the criteria related to published materials at 8 C.F.R. § 204.5(h)(3)(iii) and original contributions at 8 C.F.R. § 204.5(h)(3)(v).

> *Documentation of the individual's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.* 8 C.F.R. § 204.5(h)(3)(i).

In order to fulfill this criterion, the Petitioner must demonstrate that her prizes or awards are nationally or internationally recognized for excellence in the field of endeavor.[1] On motion, the Petitioner submits a brief claiming that her award of restricted stock units (RSUs) from [redacted] as part of the Exceptional Contributor Program (ECP) or Long-Term Incentive Program (LTIP) award in 2009, 2011 and 2013 qualifies as a nationally or internationally recognized award in the field of endeavor.[2]

In our appellate decision, we specifically addressed her arguments and evidence and explained why her claims and documentation did not establish eligibility of [redacted] RSU awards as nationally or internationally recognized awards. We acknowledged the Petitioner's assertion that [redacted] is a large and well-known multinational corporation, and that letters issued by [redacted] officials at the time of the award indicate that the Petitioner was "part of a selected group of people who were recognized for their valuable contribution to the corporate results" and that the awards are "based on substantial contributions well above the expectations of the Company." We determined, however, that the Petitioner's arguments and evidence, although confirming that the [redacted] RSUs were given for excellence in the Petitioner's field of endeavor, do not show that the awards are nationally or internationally recognized in the fields of finance or minority business coaching. We found that there is no record in the evidence of recognition of these awards from others in the field of finance. Further, we noted that an email from an official of the current [redacted] confirms that it does not have "public announcements, photos or certificates documenting these awards," making it unlikely that others in the Petitioner's field recognized or were even aware of the [redacted] RSU awards.

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[1] *See* 6 *USCIS Policy Manual* F.2(B)(2), Appendix: Extraordinary Ability Petitions – First Step of Reviewing Evidence, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.

[2] The Petitioner previously claimed eligibility under this criterion based on her receipt of other awards from [redacted] (a certificate dated November 2010 from [redacted] acknowledging the Petitioner as "the reference point of the organization for her 'integrity' and 'compliance with standards and policies;'" service pins recognizing the Petitioner's employment with the company for 5, 15, 20 and 25 years) and a plaque and letter from the University of [redacted] confirming that she earned the highest grade point average in her graduating class of economics majors in April 1987. She has not pursued these claims on motion.

On motion, the Petitioner asserts that "RSU awards are extremely well known and recognized by others in the financial world" and "are granted to very high-level employees in the most important companies that are publicly traded in the different stock exchanges of the world." Although the Petitioner provides several websites that it asserts provide "[d]etailed explanations regarding this type of award," these do not mention or demonstrate the national or international recognition of excellence in the field of the [redacted] RSU awards. For the reasons discussed, the Petitioner has not demonstrated that we misapplied the law or USCIS policy in concluding that she did not meet this criterion.

> *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).

In order to satisfy this criterion, the Petitioner must show that membership in the association is based on being judged by recognized national or international experts as having outstanding achievements in the field for which classification is sought.[3] On motion, the Petitioner maintains that she satisfies this criterion based on her membership in The Venezuelan American Chamber of Commerce and Industry (VENAMCHAM).[4] In our appellate decision, we discussed the Petitioner's assertion that her membership on the Corporate Finance committee of this association qualifies under this criterion, and reviewed several documents submitted in support of this criterion.

Our appellate decision noted that the Petitioner provided a copy of an email from the association welcoming her to the Corporate Finance and Capital Market committee, which states that the committee's goal is to offer updated information and focuses on gathering company leaders into work groups. In addition, a document titled "Rules of the Work and Services Committees" states that members of committees should be nominated by the key contact of the VENAMCHAM enterprise member, and that the candidate's curriculum vitae and other documents are sent to the committee president for review. Another document, which appears to be from the association's website but does not include the webpage address, states that the committees "bring together professional executives of different positions," and indicates that the Corporate Finance and Capital Markets committee is "formed by 103 members that work as General Managers and Finance Directors" for member companies. It goes on to state that each member company may appoint up to two executives to participate in each committee. An additional document, titled "Requirements and Profile of Executives in Order to Join the Committees," repeats the requirements noted above, and adds that the member of the Corporate Finance committee should occupy "the highest position of your company" in that functional area.

Based on the documentation submitted we determined that although the membership rules of VENAMCHAM's Corporate Finance and Capital Markets committee require a candidate to have reached a certain level of professional achievement, namely the highest finance position within their

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

[4] The Petitioner previously claimed eligibility under this criterion based on her membership in the Controllers of Venezuela Group and the Economists Association of [redacted] She has not pursued these claims on motion.

company, the Petitioner has not demonstrated that reaching a certain position within a company's hierarchy is considered to be an outstanding achievement. Further, we concluded that there is insufficient information regarding the requirements of a committee chairman or president to establish that such an individual is inherently a nationally or internationally recognized expert within the field of finance.

On motion, the Petitioner asserts that we improperly analyzed the evidence under this criterion and utilized novel evidentiary requirements. She argues that "[t]he focus of inquiry on appeal should be on VENAMCHAM's membership requirements and processes, and the factors it takes into consideration in determining whether the Petitioner has the requisite level of achievement to become a member of the organization, rather than whether the position within [redacted]'s internal company hierarchy is considered an outstanding achievement." Here, in determining whether membership in VENAMCHAM's Corporate Finance committee requires outstanding achievements we examined its membership requirements and found that the Petitioner has not demonstrated they require outstanding achievement, but we did not utilize novel evidentiary requirements as the Petitioner suggests.[5] As the Petitioner has not demonstrated that having reached a certain position within a company's hierarchy is an outstanding achievement, as judged by recognized national or international experts within the field of finance, the Petitioner did not meet this criterion.

Finally, the Petitioner argues that we did not reference a letter from VENAMCHAM dated June 29, 2018, that confirms what the Committees of VENAMCHAM do and the Petitioner's membership in VENAMCHAM. While this letter states that the Petitioner was a member of VENAMCHAM's Corporate Finance and Capital Markets committee from June 2011 to November 2013, it does not show that membership in the association is based on being judged by recognized national or international experts as having outstanding achievements in the field of finance.

In our appellate decision, we specifically addressed the Petitioner's arguments and evidence and explained why her claims and documentation did not establish that membership in VENAMCHAM's Corporate Finance and Capital Markets committee requires outstanding achievements of its members, as judged by recognized national or international experts in the field of finance. For the reasons discussed, the Petitioner has not demonstrated that we misapplied the law or USCIS policy in concluding that she did not meet 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).

In our appellate decision, we noted that the documentation submitted under this criterion included letters from [redacted] evidencing the Petitioner's salary and remuneration, a number of receipts and other documents relating to non-cash benefits such as a mobile phone and a company car, and the Petitioner's Forms DPN-99025, Income Tax Final Statement and Payment for Resident Natural Persons and Unvested Inheritances, issued by the government of Venezuela for 2011, 2012, and 2013.

[5] USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008).

Regarding the letters from [redacted] we noted that a letter dated April 2011 discussing the Petitioner's salary and benefits indicates that her "total annual fixed remuneration" as of May 1 was Bs. 660,705.20, and that she would receive a variable performance-based bonus of anywhere between 0-50% of her "annual base salary." In addition, the letter stated that her "non-cash benefits" included a company car, along with maintenance and repair expenses; health, auto and life insurance; a mobile phone, and a pension plan. A letter dated June 18, 2018, states that at the time of her departure from the company in 2013, she was earning a "basic monthly salary" of Bs. 71,271.00, and an annual salary at the rate of Bs. 1,313,524.53. The Petitioner also submitted a number of receipts and other documents relating to "non-cash benefits," and asserted that when considered together, her total remuneration in 2013 was the equivalent of $336,165.64.

In examining the above evidence, we noted that the Petitioner's Forms DPN-99025 indicate that in 2011, 2012, and 2013 the Petitioner earned "Salary, Wages & Other Similar Income" of Bs. 308,675.84, Bs. 405,144.00 and Bs. 475,768.00, respectively. We found that the Petitioner does not explain, or provide evidence sufficient to show, why these figures differ substantially from those in the letters from her employer. In addition, we noted that the employer letter regarding the Petitioner's 2013 salary does not explain the difference between the basic monthly rate, which when annualized is equivalent to Bs. 855,252, and the annual salary rate of Bs. 1,313,524.53. We determined that the Petitioner also does not explain whether the "total annual fixed remuneration" figure shown in the 2011 employer letter is an annualized basic monthly rate or equivalent to the annual salary figure listed in the 2018 letter. Further, neither letter explains whether the benefits listed in the 2011 letter (and presumably carried over to the same position in 2013) were already figured into the annual figures given in both letters.

For the purpose of comparison of her salary and total remuneration to that of others in her field, the Petitioner provided a survey conducted by VENAMCHAM in May 2013, partial results of which are included in and summarized by a slide presentation from "the PGA Group" and an article in a magazine called *Business Venezuela*.[6] We noted that the slides indicate that 187 companies were surveyed, and the results were grouped by five position levels, three company sizes, and eight functional areas. We found that the article differentiates between basic monthly salary and total annual salary or compensation, which includes commissions, bonuses and other performance-based incentives, as well as benefits such as "direct payments, company profit sharing, paid vacations and other sundry variable payments." We noted that the article also states that Venezuelan workers essentially receive "around 19 or 20 (monthly) salaries per year," which appears to account for the difference in the monthly versus annual amounts stated in the article as well as the Petitioner's 2013 employer letter, and we found that the ratio of her stated salary to her total compensation is close to the expected ratio indicated in the article. We also noted that the article does not specifically indicate whether other benefits received by the Petitioner such as a company car and insurance premiums are typically received by directors. We concluded that, based on the ambiguity in both the employer letters and the data provided in the VENAMCHAM survey, we considered the annual salary listed in the 2013 letter in the amount of Bs. 1,313,524.53 to represent the Petitioner's total remuneration for purposes of comparison to the survey data, and not consider the values suggested by the receipts

[6] The Petitioner previously claimed that salary surveys from a number of additional sources, including a company called Mercer, the websites glassdoor.com and payscale.com, and the U.S. Bureau of Labor Statistics' *Occupational Outlook Handbook*, established her eligibility under this criterion. She has not addressed these sources on motion.

relating to non-cash benefits.

We found that the Petitioner has not sufficiently shown that the value of some of the services shown by the receipts was received by her, as the receipts for car maintenance and mobile phone services are not in her name. In addition, the Petitioner has not shown that under Venezuelan tax law, the value of benefits such as repairs and maintenance to company vehicles, mobile phone services, and insurance premiums are considered as part of an individual's total compensation, or how the value of those benefits is calculated. Further, regarding the RSUs awarded to the Petitioner based upon her performance, we stated that a fact sheet regarding the award program notes that in most countries, "the value of RSUs at vesting is reportable as taxable income," and the Petitioner has not demonstrated that the value of her vested RSUs should be considered in addition to the values reported in her tax returns or in the letters from [redacted]. We again noted that there is a large difference between the salary and wages reported on the Petitioner's income tax forms and those stated in the letters from her employer, and this difference has not been explained.

In comparing the Petitioner's total remuneration to the survey data, we found that the Petitioner has not met the requirements of this criterion.[7] We determined the relevant data from this survey indicates that directors, identified as those executives below the chairman or general manager level but above the managerial level, in large companies such as [redacted] earned an average total compensation of Bs. 948,000 in 2013. In comparison, the Petitioner's total compensation rate[8] in 2013 was Bs. 1,313,524.53, or approximately 138% of the average. We noted, however, that the survey data does not provide a range of salary and total compensation figures from low to high, and therefore does not provide a complete picture of the compensation received by others in the Petitioner's field. While her total remuneration was above the average in relation to others in her field, she has not established that it was "significantly high" as required by the plain language of this criterion.

On motion, the Petitioner argues that "the total annual remuneration of the Petitioner must be considered as per the [redacted] letter" to include "the RSUs plus the car benefit (use of a car plus maintenance) and use of a mobile phone." She claims that for 2013 her total annual remuneration was Bs. 2,265,066.05 (the equivalent of $359,534.17), which included "sub-total" annual remuneration of Bs. 1,313,524.53, "car and mobile benefit" of Bs. 511,691.72, and RSUs of Bs. 439,850.25. The Petitioner asserts that, pursuant to Venezuelan labor law, the RSUs, car allowance, and mobile phone benefits "were treated as non-taxable" but must be "included as part of her total annual remuneration." However, she has not shown, as explained in our previous decision, that under Venezuelan tax law, the value of benefits such as repairs and maintenance to company vehicles and mobile phone services are considered as part of an individual's total compensation, how they are calculated, or why the value

[7] We noted that average salary information for those performing work in a related but distinct occupation with different responsibilities is not a proper basis for comparison. Rather, a petitioner must submit documentary evidence of the earnings of those in his/her occupation performing similar work at the top level of the field. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

[8] We considered the rate at which she was paid in 2013, as the Petitioner states that she left [redacted] at some point in that year after the company was acquired.

of her vested RSUs should be considered in addition to the values reported in her tax returns or in the letters from [redacted] In addition, although the Petitioner acknowledges our concerns regarding the fact that the receipts for car maintenance and mobile phone services are not in her name, she does not address these concerns and, therefore, has not established that the value of those services was received by her.

Moreover, on motion, the Petitioner maintains that according to the VENAMCHAM survey her total annual remuneration in 2013 is a significantly high salary when compared to the average total compensation of Bs. 948,000 in 2013 earned by directors in large companies such as [redacted] The Petitioner, however, does not address our conclusion that the survey data does not provide a range of salary and total compensation figures from low to high and therefore does not provide a complete picture of the compensation received by others in the Petitioner's field. Although the VENAMCHAM survey data indicated her total remuneration was above the average in relation to others in her field, she has not established that it was "significantly high" as required by the plain language of this criterion.

In our appellate decision, we specifically addressed the Petitioner's arguments and evidence and explained why her claims and documentation did not establish that she has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. For the reasons discussed, the Petitioner has not demonstrated that we misapplied the law or USCIS policy in concluding that she did not meet this criterion.

Finally, we acknowledge the Petitioner's claim on motion that the Director misapplied *Kazarian*, 596 F. 3d at 1119-20 and, instead, should have looked to the reasoning in *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994). According to the Petitioner, this case held that the burden shifts to USCIS once it determines that the evidence is sufficient to meet three of the criteria listed in the regulation. 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.[9]

IV. CONCLUSION

The Petitioner has not established that our previous decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. Accordingly, the motion to reconsider will be dismissed.

ORDER: The motion to reconsider is dismissed.

[9] *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). We also 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, the analysis does not have to be followed as a matter of law. *Id.* at 719.