U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11119901

Date: JUN. 24, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, an orchestra concertmaster, 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 Petitioner had not demonstrated international recognition of her achievements in the field through a one-time achievement or satisfied any of the alternate initial evidentiary criteria, of which she must meet three. The Petitioner filed an appeal that we dismissed, determining that she had met one of the ten criterion, the artistic exhibitions criterion, but not the requisite three.[1] The Petitioner then filed a combined motion to reopen and reconsider which we dismissed, concluding that she had not met the criteria related to lesser awards, leading or critical role, and original contributions.[2] The Petitioner now submits 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. LAW

A motion to reopen must state new facts 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; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and shows proper cause for reopening the proceeding or reconsideration of the prior decision. 8 C.F.R. § 103.5(a)(1).

[1] *See Matter of A-G-M-*, ID# 2524769, 2019 WL 1556942 (AAO Mar. 20, 2019).
[2] *See In Re: 5690707,* 2020 WL 996542 (AAO Feb. 12, 2020).

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of 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 he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (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).

II. ANALYSIS

We dismiss the motions for the reasons set forth below.[3]

A. Motion to Reconsider

In the instant motion to reconsider, the Petitioner does not indicate or provide evidence demonstrating how our prior decision was based upon an incorrect application of law or policy. She therefore has not established that she meets the requirements of a motion to reconsider and we will dismiss it accordingly.

B. Motion to Reopen

On second motion, the Petitioner presents new evidence relating to the leading or critical role criterion found at 8 C.F.R. § 204.5(h)(3)(viii) and asserts for the first time that she satisfies the criterion relating to salary at 8 C.F.R. § 204.5(h)(3)(ix).

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii)

On this motion, the Petitioner does not specifically contest our conclusion that the [redacted] (Orchestra) does not enjoy a distinguished reputation.[4] Instead, she claims that

[3] The Petitioner does not contest the findings in our previous decision regarding the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i) and (v). We will therefore consider these issues to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

[4] We note that the Petitioner submits new evidence with respect to [redacted] but does not indicate that this is to address our previous ground for dismissal. Specifically, she does not explain or show how this evidence demonstrates that the Orchestra enjoys a distinguished reputation.

she meets this criterion as she served in a leading role for [redacted]. She asserts that her role as the concertmaster for the Orchestra is a leading one for [redacted] as "[t]he live orchestra is an indispensable part of every [redacted] performance." She contends that a live orchestra is "imperative and critical to the [redacted] shows in reviving traditional Chinese culture – which is the mission [redacted] seeks to accomplish...." However the Petitioner submits no new evidence on motion to corroborate this claim. She further asserts that her role as concertmaster in the Orchestra is critical to [redacted] as she "is leading the orchestra in over 100 performances every year," but again submits no new evidence supporting this contention on second motion. Rather, in her motion brief she refers us to previously submitted letters of recommendation and support to corroborate her assertion. As we have already reviewed and considered this evidence, we will not address it again in this proceeding. Absent the submission of new evidence, the Petitioner has not met the requirements for a motion to reopen or shown that she has performed in a leading or critical role for [redacted].

In order to meet the plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(viii), the Petitioner must show both that she has played in a leading or critical role for an organization *and* that the organization has a distinguished reputation. As previously discussed, she has not shown that she served in a leading or a critical role for [redacted]. Thus while we acknowledge that she has submitted new evidence relating to [redacted]'s reputation, we need not address whether or not this documentation establishes that the organization has a distinguished reputation.[5]

For the foregoing reasons, the Petitioner has not demonstrated that she meets this criterion.

> *Evidence that the alien 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)

The Petitioner claims for the first time on second motion that she meets this criterion and submits evidence related to her salary and non-salaried compensation from her employment with [redacted].

Here we note that a post-appellate motion to reopen is not the proper forum to advance new claims of eligibility that the Petitioner did not advance at any prior stage in the proceeding. We note as well that a petitioner abandons issues not raised on appeal. *See Sepulveda v. US. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *see also Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Notwithstanding the foregoing, for the reasons discussed below, the evidence submitted by the Petitioner on second motion is insufficient to demonstrate that she meets this criterion.

As it relates to her compensation, Petitioner provides an employment verification letter from [redacted] and a copy of her 2017 Form W-2, Wage and Tax Statement. She asserts that, in addition to her $48,800 salary, she receives non-salaried compensation totaling $17,760.[6] She claims therefore that her "**total equivalent yearly compensation/remuneration in 2017 was about $66,640**." (emphasis in original.) The Form W-2 and employment verification letter establish that the Petitioner

[5] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.")

[6] She calculates this remuneration by assuming that she will be on tour for 24 weeks, working 7 days per week, and receiving 3 meals per day at a value of $20 per meal.

commanded a salary of $48,800 at the time her petition was filed. The employment verification letter confirms that she received "non-salaried compensation, including board (2 to 4 meals each day, plus snacks and beverages, adjusted according to touring and performing schedules)." However, the Petitioner provides no independent corroborative evidence to support her assertion that the total value of her non-salaried compensation was $17,760 in 2017. The employment verification letter does not provide a dollar value for board, and the record lacks other evidence such as receipts, or other relevant materials, establishing that she earned this additional remuneration resulting in total compensation of $66,640 as claimed. The Petitioner must resolve this incongruity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988.) In the absence of evidence resolving whether the Petitioner earned $48,800 or $66,640 in 2017, the record is insufficient to allow for a comparison of her salary or remuneration with that of others in her field, or to otherwise establish that she has commanded a high salary or other significantly high remuneration for services, in relation to others in her field.[7]

For the foregoing reasons, the new documentation submitted on second motion does not overcome our previous decision, finding that evidence submitted on first motion did not demonstrate her eligibility for the additional criteria.

In addition, we will dismiss the motions because they do not include "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." *See* 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(4).

III. CONCLUSION

The assertions made by the Petitioner on motion do not establish that our previous decision was based an incorrect application of law or policy. In addition, the new evidence submitted on motion does not overcome the grounds underlying our previous decision or demonstrate the Petitioner's eligibility for this classification.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.

[7] We note that the Petitioner also provides salary documentation for others in the field. We have reviewed this evidence, but do not discuss it here as she has not established the salary or remuneration with which this evidence should be compared.