U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13832895

Date: MAR. 3, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a boxer and kickboxer, 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 denied the petition and subsequently affirmed his decision on motion, concluding that the Petitioner had satisfied only one of the initial evidentiary criteria for this classification, of which he 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 his 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.

A. AAO Decision

The Director denied the petition after concluding that the Petitioner had satisfied only one of the ten criteria at 8 C.F.R. 204.5(h)(3)(i)-(x), related to judging the work of others.

In dismissing the appeal, we determined that the Petitioner established that he had received nationally recognized awards or prizes in the sport of kickboxing and therefore met the criterion at 8 C.F.R. § 204.5(h)(3)(i). We withdrew the Director's determination that the Petitioner had submitted sufficient evidence to satisfy the judging criterion at 8 C.F.R. § 204.5(h)(3)(vi). We also addressed the Petitioner's claim that he met three additional criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), including the criteria related to memberships in associations that require outstanding achievements, published material in major media, and original contributions of major significance. We concluded that because the Petitioner satisfied only one criterion, he did not meet the initial evidence requirements for this classification.

B. Motion to Reconsider

On motion, the Petitioner asserts that we misapplied the law, misinterpreted certain evidence, and incorrectly determined that the previously submitted evidence was insufficient to satisfy the criteria

relating to the membership, published materials and judging criteria at 8 C.F.R. § 204.5(h)(3)(ii), (iii) and (v). He does not contest our conclusion that he did not submit evidence to satisfy the original contributions criterion at 8 C.F.R. § 204.5(h)(3)(v). However, he requests that we reconsider the previously submitted letters of reference from experts in his field as comparable evidence under 8 C.F.R. § 204.5(h)(4).[1]

> *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.[2]

On motion, the Petitioner maintains that he satisfies this criterion based on his receipt of the designation "Master of Sport in WTKA Kickboxing."[3] In our appellate decision acknowledged that the Petitioner submitted a certificate documenting his receipt of this title and a letter from [ ] [ ] of the [ ] World Traditional Kickboxing Association (WTKA). We noted that, while [ ] described the achievements required for receipt of the designation, he "consistently refers to it as a title rather than a membership." We further emphasized that [ ] did not mention an association into which the Petitioner was granted entry as a result of being conferred this title.

The Petitioner asserts that we erred in determining that his Master of Sports designation "is not an association that requires outstanding achievement," noting that our decision "appears to concentrate on the semantic meaning of the word 'association' and its alleged opposition to the designation of 'title,' which admittedly is used throughout the translation of the corroborating letter of [ ]" The Petitioner contends that "the AAO misunderstands the plain meaning of the word 'association' as used in the statute" and states that '[c]learly the statute does not require that the alien is an actual members of a formal 'association' with by-laws, statutes and officers."

The Petitioner suggests that the meaning of the words "membership" and "association" should both be interpreted generously when evaluating whether a given individual is a "member of an association" in the field which requires outstanding achievements of its members. He refers to a non-precedent decision in which we determined that membership on a national team could satisfy the criterion at 8

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[1] The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if he or she is able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation.

[2] *See* USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 6 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html (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).

[3] The Petitioner previously claimed eligibility under this criterion based on his membership in the [ ] Sports Club, the World Traditional Kickboxing Association (WTKA) and the [ ] National Kickboxing Team. He has not pursued these claims on motion.

C.F.R. § 204.5(h)(3)(ii). This decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

Further, while we acknowledge that membership on a national team may, depending on the evidence presented in an individual case, be sufficient to satisfy this criterion,[4] the Petitioner has not adequately explained how his receipt of the "Master of Sport" title is equivalent to admission as a member to a national team or any recognized group or organization of athletes in his sport. There is insufficient evidence to support a determination that recipients of a "Master of Sport" title are granted membership to a group of any type. His claim that the athletes who have earned the "Master of Sport" title form "an association of people holding this title" is not corroborated in the record.

For the reasons discussed, the Petitioner has not demonstrated that we misapplied the law or USCIS policy in concluding that he did not meet this criterion.

> *Published material about the individual in professional or major trade publications or other major media, relating to the individual's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii)

In our previous decision, we observed that three of the four published articles submitted in support of this criterion reported on the competition results of groups of athletes from the [redacted] region of [redacted] who participated in boxing and kickboxing competitions. We noted that one of the articles, titled [redacted] (published by the website www.galsports.com), includes multiple introductory and concluding paragraphs describing the competition in general, and devotes one sentence each to the Petitioner and eight other athletes, describing their results in the competition. Finally, we emphasized that since none of the articles provide details about the individual athletes beyond reporting their competition results, the articles were not "about" the Petitioner or any other individual athlete.

On motion, the Petitioner asserts that our decision mistakenly relied on *Noroozi v. Napolitano,* 905 F.Supp.2d 535, 545 (S.D.N.Y. 2012), in which the court determined that brief mentions of an athlete within articles about a team are not articles about the athlete. A review of our decision reflects that we did not indicate our reliance on *Noroozi*, although we acknowledged that the Director had cited to this district court case in his decision. Nevertheless, the Petitioner attempts to distinguish the articles submitted here from those mentioned in *Noroozi*, noting that the court emphasized that the articles submitted in that matter contained only a "brief mention" of the beneficiary or referenced him only "in passing." The Petitioner maintains that he was "afforded his own paragraph" in each of the articles but does not explain how a one-sentence paragraph reporting on his competition results supports his claim that these articles were "about" him. The submission of results from a sporting event without any discussion of the Petitioner and his work is not consistent with the meaning of "published material about the alien" pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

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[4] *See also* USCIS Policy Memorandum PM 602-0005.1, *supra* at 12 (stating that election to a national all-star or Olympic team mist serve as comparable evidence for evidence of membership in 8 C.F.R. § 204.5(h)(3)(ii)).

We also acknowledged that the Petitioner submitted one article that satisfies the regulatory requirement that the article be "about" him and relating to his work in the field. The article focuses on his victory in a boxing tournament in [redacted] in 2012, mentions the Petitioner in its title and includes two paragraphs in which his coach describes his fight and his prospects as a boxer. However, we determined that the Petitioner did not submit sufficient evidence to establish that the article, which was posted on the website www.sport.if.ua, appeared in a professional publication, major trade publication or other major medium. We emphasized that comparative circulation or similar data is most relevant to determining whether a particular publication qualifies under this criterion, and that the Petitioner did not provide comparative data showing this website's ranking in relation to similar websites based in [redacted] or focused on sports. We also noted that the evidence he submitted indicates that www.sport.if.ua is "a regional sporting Internet portal" and "targeted towards a smaller readership than media focusing on sports news at the national . . . level."

On motion, the Petitioner "repeats the assertion that the internet copies of articles fall under the category of 'other major media' required by the statute." He does not address the specific deficiencies we addressed in our decision, explain how we misapplied the law or USCIS policy in evaluating the article referenced above, or offer any support for his suggestion that any article published on the Internet qualifies as "major media."

For the foregoing reasons, the Petitioner has not established that our prior determination with respect to this criterion was based on a misapplication of law or USCIS policy.

> *Evidence of the individual's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv)

In our prior decision, we withdrew the Director's determination that the Petitioner had submitted evidence to satisfy this criterion. We acknowledged that the Petitioner submitted certificates indicating that he was conferred a second category judge rank in WTKA kickboxing in November 2015 and a first category judging rank in October 2016. While such evidence establishes that the Petitioner has been qualified to serve as a judge in this sport, it does not confirm or corroborate his participation as a judge in any specific WTKA event.

The Petitioner also submitted the above-referenced letter from [redacted] who discusses in detail the role of a judge in WTKA kickboxing matches and the different judging ranks or categories. However, we noted that certain statements he made regarding the Petitioner were not consistent with other information in the record. Specifically, he states that: (1) the Petitioner received his "first category" judging qualification in December 2017, more than a year after the date on his certificate; and (2) the Petitioner judged WTKA competitions beginning in 2012, three or more years prior to the issuance of his second category judging certification. Based on these unresolved inconsistencies and a lack of independent, objective evidence related to the Petitioner's judging activities, we found [redacted]s letter insufficient to document the Petitioner's participation as a judge in WTKA competitions.

On motion, the Petitioner acknowledges our *de novo* review of matters before us on appeal but asserts that "the decision to revoke a prior determination of the Director without allowing the Petitioner to respond to the alleged inconsistencies is patently inequitable." He argues that he "would have been

able to present additional evidence or explanation to rebut the alleged inconsistencies" if he had the opportunity. He further contends that we erred by citing to *Matter of Ho*, I&N Dec. 582 (BIA 1988) in addressing the inconsistencies in the record, noting that "the holding of *Matter of Ho* with regard to inconsistencies and contradictions applies to situations where the prior record clearly indicates such problems and the Respondent is given opportunity to clarify them." With respect to the inconsistencies discussed in our decision, the Petitioner states:

> That the Petitioner began judging kickboxing competitions in 2012 but only received his judging certificate in 2015 can be explained simply and sufficiently be the fact that not all competitions require judges to hold judge certificates. The erroneous date provided in the [redacted] letter can be attributed to simple clerical error, however, without input from the letter writer . . . the precise reason for this discrepancy remains unknown."

The Petitioner maintains that the discrepancies we noted were minor, that he presented primary evidence of his qualifications as a judge, and that [redacted]'s letter is sufficient to establish "that the Petitioner did indeed participate as a WTKA kickboxing judge and was not merely granted judging certificate." In the alternative, he requests that we remand this matter to the Director for issuance of a request for evidence would allow him to address this criterion and the inconsistencies addressed in our decision.

As acknowledged by the Petitioner, we exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). This means that we look at the record anew and are not required to defer to findings made in the initial decision. Furthermore, an application or petition that does not comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd, 345 F.3d 683 (9th Cir. 2003). The Petitioner has not established that we misapplied the law or any USCIS policy by withdrawing the Director's determination that he had met the judging criterion.

While we acknowledge the Petitioner's new claim that "not all competitions require judges to hold judge certificates" this unsupported statement does not adequately resolve the apparent inconsistencies in [redacted]'s letter. Further, we note that, in addition to the inconsistencies discussed in our decision, we determined that the Petitioner did not meet this criterion, in part, due to a lack of other independent, objective evidence of his participation in any WTKA kickboxing or other events in his field of expertise.

In response to the Petitioner's request that we remand this matter for issuance of a request for evidence so that he can supplement the record, we emphasize that a petitioner filing a motion to reconsider must establish that our decision was incorrect based on the evidence in the record at the time of our initial decision. 8 C.F.R. § 103.5(a)(3). The Petitioner cannot meet this burden by requesting an opportunity to submit additional evidence.

For the reasons discussed, the Petitioner has not established that our determination with respect to this criterion was based on an incorrect application of law or USCIS policy, or that our decision was incorrect based on the evidence in the record at the time of our decision.

Finally, we acknowledge the Petitioner's new claim that that "some of the enumerated categories do not readily apply to extraordinary ability in the field of boxing and kickboxing" and his request that we reconsider previously submitted testimonial evidence as "comparable evidence" under the regulation at 8 C.F.R. § 204.5(h)(4). The record reflects that the Petitioner did not previously claim that USCIS should consider comparable evidence in this matter and he does not argue that we overlooked such a claim in our prior decision. As he alleges no error or incorrect application of law or policy in our prior decision in this regard, his new comparable evidence claim does not meet the requirements of a motion to reconsider at 8 C.F.R. § 103.5(a)(3).

Nevertheless, we note that the regulation at 8 C.F.R. § 204.5(h)(4) allows for comparable evidence if the listed criteria do not readily apply to the Petitioner's occupation.[5] A petitioner should explain why he has not submitted evidence that would satisfy at least three of the criteria set forth in 8 C.F.R. § 204.5(h)(3) as well as why the evidence he has included is "comparable" to that required under 8 C.F.R. § 204.5(h)(3).[6] Here, the Petitioner initially claimed to meet at least five of the ten criteria at 8 C.F.R. 204.5(h)(3)(i)-(x). General assertions that any of the ten objective criteria do not readily apply to an occupation are not probative. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive.[7] The fact that the Petitioner did not submit evidence that satisfies at least three criteria does not mean that it is impossible for a kickboxing or boxing athlete to do so.

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.

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[5] *See also* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 12.
[6] *Id.*
[7] *Id.*