U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18334469

Date: NOV. 5, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a consultant, 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 denied the petition, concluding that the record did not establish, as required, that the Petitioner had satisfied at least three of 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 motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motion to reconsider.

I. MOTION REQUIREMENTS

A motion to reconsider must (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to 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

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 the 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).

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. 8 C.F.R. § 103.5(a)(3). The Petitioner must specify the factual and legal issues raised on appeal that were decided in error or overlooked in our decision.

Because the Petitioner did not indicate or establish that he has received a major internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). Prior to the denial of the petition, and on appeal, the Petitioner claimed that he could satisfy three of the ten criteria, relating to original contributions of major significance, leading or critical roles for organizations with a distinguished reputation, or high salary or other remuneration in relation to others in his field. *See* 8 C.F.R. § 204.5(h)(3)(v), (viii) and (ix). The Director determined that he did not satisfy any of the claimed criteria and denied the petition.

In dismissing the Petitioner's appeal, we concluded that he had demonstrated that he performed in a critical role with the [redacted] and established the distinguished reputation of that organization, thereby satisfying the criterion at 8 C.F.R. § 204.5(h)(3)(viii). However, we agreed with the Director's determination that the Petitioner did not submit evidence demonstrating that he satisfies the two remaining claimed criteria, and therefore he did not meet the initial evidentiary requirements for this classification.

On motion, the Petitioner maintains that the previously submitted evidence is sufficient to demonstrate that he satisfies up to five of the ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), including two criteria that he did not address or claim he could meet previously. Specifically, he now claims that he can meet the criteria relating to memberships in associations that require outstanding achievements,

and published materials in professional, major trade publications, or other major media. *See* 8 C.F.R. § 204.5(h)(3)(ii) and (iii).

These new eligibility claims are not properly before us on a motion to reconsider. A motion does not entail *de novo* review of the full record of proceeding. To warrant reconsideration, the Petitioner must specify the issues raised on appeal that were decided in error, by establishing errors of law or policy (as documented by any relevant precedent decisions or other cited law or policy) or errors of fact (through a showing the decision was incorrect based on the record as it stood at the time of the prior decision). 8 C.F.R. § 103.5(a)(3); *Cf. Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). The Petitioner has not established how we erred as a matter of fact, law, or policy by failing to consider eligibility claims that he did not make at the time of filing and that were not before us on appeal. Therefore, we will not address the Petitioner's claim that he can satisfy the criteria at 8 C.F.R. § 204.5(h)(3)(ii) and (iii).

The Petitioner also contests our determination that the previously submitted evidence was insufficient to demonstrate that he satisfies the criterion at 8 C.F.R. § 204.5(h)(3)(ix), which requires him to establish that he has commanded a high salary or other significantly high remuneration for services in relation to others in his field. In support of this criterion, the Petitioner submitted a letter from the [redacted] summarizing his financial terms of service as a senior representative of the [redacted] in [redacted] Russia between August 2009 and August 2015.[1] The letter indicates that he received monthly gross wages of $6000, as well as up to $300 in monthly representative fees, $2300 in monthly rent expenses, an "education fund," and "children education funding at the place of service." The Petitioner also provided evidence that his children's private school in [redacted] billed the [redacted] for their 2014-2015 school year tuition and fees. Finally, the Petitioner provided data regarding "Average Russian NGO Salaries" from *Simply Hired*, which indicates an average annual salary of $25,000.[2]

We determined that the evidence was insufficient to satisfy this criterion for several reasons. First, we emphasized that, in order to establish that he has commanded a high salary or other significantly high remuneration, the Petitioner must provide documentary evidence of his actual earnings. We noted that the letter from the [redacted] was insufficient to document his earnings for his period of employment in Russia. Specifically, we note that it was not accompanied by earnings statements, payroll or bank records, tax documentation or other evidence demonstrating the total salary or total remuneration he received from his employer during his period of employment in Russia.

We also concluded that, even if the Petitioner had adequately documented his total earnings from that period, he did not submit sufficient comparative data to establish that he had commanded a high salary or significantly high remuneration in relation to others. We reviewed the evidence he provided regarding

[1] We observed in our prior decision that the letter from the [redacted] indicates that the Petitioner received the stated compensation package as a senior representative in Russia from August 2009 until August 2015. However, other evidence in the record, including the Petitioner's résumé and the employment history he provided on his concurrently filed Form I-485, Application to Register Permanent Residence or Adjust Status, indicates that he worked for the [redacted] in [redacted] only from January 2014 until August 2015, and was based in other countries prior to 2014. The Petitioner has not attempted to resolve this apparent inconsistency on motion.

[2] The record also contains documentation of the Petitioner's earnings in the United States for 2017; however, we determined that the record did not demonstrate that he earned a high salary or other significantly high remuneration based on this evidence. He does not address his U.S.-based earnings on motion.

"average Russian NGO salaries" from *Simply Hired* and noted that the publisher of the data acknowledged that such salaries "can vary greatly." We also emphasized that the data from *Simply Hired* did not include information regarding high salaries in the field as a point of comparison, noting that it is not sufficient for the Petitioner to demonstrate that his salary was "above average" compared to all persons working in any type of position for an NGO in Russia.

On motion, the Petitioner maintains that the letter from the [redacted] is sufficient to establish that he received a total monthly remuneration of $13,425 per month or $161,100 annually, for a period of six years, from August 2009 until August 2015. He cites to an unpublished AAO decision in support of his assertion that a letter from an individual's employer has been deemed sufficient to document earnings under this eligibility criterion. The decision he references 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, although the Petitioner asserts that we deemed a letter from an employer to be acceptable evidence of a petitioner's earnings, we ultimately determined that the petitioner in the cited matter had not adequately documented her actual salary. The Petitioner has not demonstrated that we erred as a matter of law or USCIS policy by finding the letter from the [redacted] to be insufficient to document his salary or total remuneration for the period in question.

The Petitioner also contests our determination that the evidence he provided regarding "average Russian NGO salaries" did not provide sufficient comparative data to establish that he earned a high salary or significantly high total remuneration relative to others in his field. The Petitioner emphasizes that he was not able to locate any other source of data regarding NGO executive salaries in Russia, noting that "[u]nlike the United States, Israel and most European countries, Russia does not have a Department of Labor that publishes government-sourced information on salaries in various fields or industries." He states that it was "not reasonable or equitable" for USCIS to make an adverse decision regarding this criterion based on the lack of quality data on comparable salaries. Finally, the Petitioner maintains that his annual remuneration of $161,000, as reflected in the letter from his employer, "is a high compensation for an NGO executive anywhere in the world."

If a petitioner claims to meet this criterion, then the burden is on that petitioner to provide appropriate evidence. The plain language of this regulatory criterion requires evidence of "a high salary or other significantly high remuneration for services, in relation to others in the field." Therefore, it is reasonable to expect the Petitioner to submit objective earnings data showing that he has earned a "high salary" or "significantly high remuneration" in comparison with those performing similar work. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a 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). Further, persons working in different countries should be evaluated based on the wage statistics or comparable evidence in that country. *See* 6 *USCIS Policy Manual* F(2) appendix, https://www.uscis.gov/policy-manual.

While the Petitioner maintains that he submitted the only salary information available for "NGO executives" in Russia, the information he provided is not for executive positions, but rather appears to

be an average salary that is based on all data available for NGO positions, including lower-level positions. Further the data is accompanied by a note from the publisher indicating there is great variation in salaries within the Russian NGO field based on company, location, industry, and experience. The Petitioner has not cited to any law, USCIS policy or precedent decision that would require us to compare his total remuneration of $161,000 (most of which was paid in benefits) as an NGO executive to an average base salary that includes every type of NGO position. While the base salary figure provided in the letter from the [redacted] ($72,000 annually) is higher than the average salary figure provided in the data from *Simply Hired*, that data is not specific to experienced professionals working in senior positions in the Petitioner's field and does not provide an appropriate basis for comparison.

Further, the Petitioner claims that he earned total compensation of $161,000 for a period of six years and that this is a high compensation for a comparable position in his field "anywhere in the world." This broad assertion is not supported by sufficient evidence and does not satisfy the Petitioner's burden to demonstrate that he meets the criterion at 8 C.F.R. § 204.5(h)(3)(ix). As noted above, there are inconsistencies in the record as to where the Petitioner worked between 2009 and 2015. If he did in fact work in countries other than Russia during this period, as stated in his résumé and on his Form I-485, he could have submitted comparative salary data from those countries. The comparative salary data provided for Russia was inadequate to demonstrate that his salary or total remuneration was high compared to similarly employed workers in his field.

For the reasons discussed above, we conclude that the Petitioner has not established that we incorrectly applied the law or USCIS policy in determining that he did not satisfy the eligibility criterion at 8 C.F.R. 204.5(h)(3)(ix).

Finally, we acknowledge that the Petitioner contests our determination that the previously submitted evidence was insufficient to establish that he meets the criterion related to original contributions of major significance at 8 C.F.R. § 204.5(h)(3)(v). However, even if we determined that he meets that criterion, he could not establish that he meets the initial evidence requirement for this classification by satisfying at least three of the ten criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), and therefore would not overcome the grounds for dismissal of his appeal. Accordingly, we will reserve this issue. *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).

IV. CONCLUSION

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

ORDER: The motion to reconsider is dismissed.