U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20234562

Date: MAR. 10, 2022

Motion on Administrative Appeals Office Decision

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

The Petitioner, a singer, seeks classification as an individual of extraordinary ability. 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, and we subsequently dismissed the 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 will dismiss the motion.

I. 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 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). 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.

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).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits U.S. Citizenship and Immigration Services' authority to reconsider to instances where an applicant has shown "proper cause" for that action. Thus, to merit reconsideration, a petitioner must not only meet the formal filing requirements at 8 C.F.R. § 103.5(a)(1)(iii) (such as submission of a properly completed and signed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. Specifically, a motion to reconsider must establish that our 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. 8 C.F.R. § 103.5(a)(3). In these proceedings, it is the petitioner's burden to establish by a preponderance of the evidence eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

At initial filing, the Petitioner claimed eligibility under seven categories of evidence: awards under 8 C.F.R. § 204.5(h)(3)(i), published material under 8 C.F.R. § 204.5(h)(3)(iii), judging under 8 C.F.R. § 204.5(h)(3)(iv), original contributions of major significance under 8 C.F.R. § 204.5(h)(3)(v), display under 8 C.F.R. § 204.5(h)(3)(vii), leading or critical role under 8 C.F.R. § 204.5(h)(3)(viii), and high salary under 8 C.F.R. § 204.5(h)(3)(ix). In response to the Director's request for evidence (RFE), the Petitioner maintained her eligibility for these seven criteria. In denying the petition, the Director determined that the Petitioner satisfied only one criterion relating to judging.

On appeal, as discussed in our decision, the Petitioner asserted that she met the other six claim criteria, but she only specifically addressed two of the criteria, published material and display. Because the Petitioner made no specific allegation of error regarding the awards, original contributions of major significance, leading or critical role, and high salary criteria, we considered those issues to be abandoned. Furthermore, although the Petitioner claimed that she "will submitted additional argument and supporting evidence within 30 days," the record did not contain such submission, more than eight months later from our decision.

As such, we considered the record to be complete and adjudicated the appeal based on the record in the proceeding. We determined that although the Petitioner demonstrated her eligibility for the display criterion, we concluded that she did not establish that she met the published material criterion. Because the Petitioner did not submit the required evidence of either a one-time achievement or documents that met at least three of the ten lesser criteria, we did not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. In addition, we reserved the issue relating to her intent to continue her work in her area of expertise in the United States under section 203(b)(1)(A)(ii) of the Act, 8 C.F.R. § 204.5(h)(5).

On motion, the Petitioner asserts that "[n]either AAO manual, Form I-290B instructions or the federal regulations in Code of Federal Regulations related to the adjudication by AAO cover the legal principle of abandonment of the issues on appeal" and claims that "[b]y imposing a new standard that is not explicitly stated in the regulations or instructions, the agency has violated due process." The *AAO Practice Manual* states:

> (f) Statement or Brief Identifying an Error
>
> An appeal must specifically identify any erroneous conclusion of law or statement of fact in the unfavorable decision on Form I-290B, in a written statement attached to Form I-290B, in a brief, or in another document submitted with the appeal.
>
> General assertions that fail to specifically identify any error may result in the AAO summarily dismissing an appeal. The appellant must state any arguments it wishes the AAO to consider on appeal, even if the arguments were previously raised in earlier filings before the field office.

(footnotes omitted). *AAO Practice Manual*, Ch. 3.7(f), https://www.uscis.gov/aao-practicemanual.

In addition, the instructions on page 4 of Form I-290, Notice of Appeal or Motion, as well as on the actual form on page 2, state: "Provide a statement that specifically identifies an erroneous conclusion of law or fact in the decision being appealed." *See* https://www.uscis.gov/i290b. Further, the regulation at 103.3(a)(1)(v) provides for appeals "to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

As discussed in our prior decision and indicated above, the Petitioner provided a statement accompanying her appeal that specifically challenged the Director's findings relating to only two criteria – published material and display. Her statement did not specifically identify any erroneous conclusion of law or statement of fact as it pertained to the other four claimed criteria. Moreover, the Petitioner did not submit additional arguments and supporting evidence subsequent to the filing of her appeal in which she indicated on Form I-290B and in her statement that she would do within 30 days.[1] Because the Petitioner did not allege such errors relating to the awards, original contributions of major significance, leading or critical role, and high salary criteria, we did not address those prior eligibility claims and considered them to be abandoned.

Furthermore, the Petitioner did not establish that we imposed a new standard in considering her prior eligibility claims not raised on appeal to be abandoned. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). *See also Sepulveda v. U.S. Att'y Gen.,* 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO). *See also Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (stating that passing references to issues are insufficient to raise a claim for appeal, and such issues are deemed abandoned). We note that although the Petitioner claims that these "cited cases referred to removal proceedings rather than administrative proceedings and do not share the same issues," *Hristov* involved an appeal of an AAO decision relating to an extraordinary ability petition. Regardless, we generally do not address issues

[1] Appellants may, but are not required to, submit a supplemental brief or additional evidence. If the appellant elects not to file a brief, the appeal must otherwise specifically identify any erroneous conclusion of law or fact. *AAO Practice Manual*, supra, at Ch. 3.8.

that are not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). *See also Getty Oil Co. v. Andrus,* 607 F.2d 253, 255–56 (9th Cir. 1979) (the court concluded that the law does not require the plaintiff to affirmatively waive claims; instead, he waives claims if he fails to assert them on appeal).

The Petitioner also contends that we "exercise *de novo* review," which "means that the AAO looks at the record anew and is not required to defer to findings made in the initial decision" and "may address new issues that were not raised or resolved in the prior decision." 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). However, the Petitioner has not demonstrated that our *de novo* review authority mandates or requires us to evaluate and address all previous eligibility claims or other prior arguments that were not raised or not contested on appeal. As in the case here, the burden remains with the Petitioner to establish eligibility and specifically identify any erroneous conclusion of law or statement of fact for the previously claimed four criteria. *See* 8 C.F.R. § 103.2(b).

For the reasons discussed above, the Petitioner did not establish that we erroneously applied law or policy. Accordingly, we will dismiss her motion to reconsider.

III. CONCLUSION

The Petitioner has not shown that we incorrectly applied law or policy in our previous decision based on the record before us.

ORDER: The motion to reconsider is dismissed.