U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20221656

Date: MAY 06, 2022

Motion on Administrative Appeals Office Decision

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

The Petitioner, a mechanical engineering technical specialist, 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 denied the petition, concluding that the Petitioner had not satisfied the initial evidentiary requirements set forth at 8 C.F.R. § 204.5(h)(3), which require documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria listed under 8 C.F.R. § 204.5(h)(3)(i)-(x). We summarily dismissed the Petitioner's subsequent appeal. The Petitioner then filed a combined motion to reopen and reconsider, which we dismissed because it was filed untimely. Subsequently, the Petitioner filed a second appeal, which we rejected as improperly filed, and three subsequent combined motions to reopen and reconsider, which we also dismissed. The matter is now before us on a combined motion to reopen and 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 combined motions.

I. MOTION REQUIREMENTS

A motion to reopen must state the new facts to be proved in the reopened proceeding 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, establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and demonstrate 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).

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 reopening or 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 individuals with extraordinary ability which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. 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 must either establish a one-time achievement (that is, a major, internationally recognized award) or 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).

III. ANALYSIS

The issues on motion are whether the Petitioner: (1) has established that we incorrectly applied the law or USCIS policy in dismissing his fourth combined motion to reopen and reconsider, and (2) has submitted new facts, supported by documentary evidence, to warrant reopening.

A. Procedural History

As noted, this matter is before us on a fifth motion to reopen and reconsider. To provide context for the Petitioner's claims regarding his previous filings, we summarize the procedural history below:

August 2018	The Director denied the Petitioner's immigrant petition, concluding that the Petitioner had not established eligibility for the classification sought.
September 2018	The Petitioner appealed the Director's decision to our office and stated that he would submit a brief and additional evidence within 30 days. The record does not show, and the Petitioner does not claim, that he submitted those materials within that period.
December 2018	We summarily dismissed the appeal, citing the regulation at 8 C.F.R. § 103.3(a)(1)(v), which requires summary dismissal of an appeal that does not identify specifically any erroneous conclusion of law or statement of fact in the decision being appealed.

January 2019	The Petitioner filed a combined motion to reopen and reconsider. On motion, the Petitioner did not contest the summary dismissal of the appeal. Rather, the Petitioner addressed the grounds for denial of the underlying petition.
June 2019	We dismissed the Petitioner's motion as untimely, because we received it after the expiration of the filing period defined at 8 C.F.R. § 103.5(a)(1)(i).
July 2019	The Petitioner appealed the denial of the motion, seeking to explain the delay in filing.
October 2019	We rejected the appeal, because the regulations provide no provision for a petitioner to appeal a decision by the Administrative Appeals Office.
November 2019	The Petitioner filed a second combined motion to reopen and reconsider, seeking both to explain the untimely filing of the January 2019 motion and to submit new evidence in support of the underlying petition.
July 2020	We granted the Petitioner's motion to reopen in part and dismissed it in part, and dismissed the motion to reconsider. We excused the delay in filing the January 2019 motion, under the regulation at 8 C.F.R. § 103.5(a)(1)(i), but we also determined that the Petitioner had not submitted new facts on motion to overcome our summary dismissal of his September 2018 appeal.
July 2020	The Petitioner filed a third combined motion to reopen and motion to reconsider.
February 2021	We dismissed the Petitioner's motions, concluding that he had not shown proper cause for the reopening or reconsideration of our July 2020 decision. In our decision, we also briefly addressed some of the evidence the Petitioner submitted in support of his claim that he is eligible for classification as an individual of extraordinary ability under section 203(b)(1)(A) of the Act, and explained why this evidence did not satisfy the regulatory criteria at 8 C.F.R. § 204.5(h)(3).
March 2021	The Petitioner filed a fourth combined motion to reopen and motion to reconsider.
July 2021	We dismissed the Petitioner's motions, concluding that he had not shown proper cause for the reopening or reconsideration of our February 2021 decision.

B. Motion to Reopen

The Petitioner's current motion includes several supporting exhibits: including a copy of his initial appeal filed in September 2018 (which consisted solely of a Form I-290B, Notice of Appeal or Motion and a check for the filing fee); a complete copy of his first combined motion to reopen and reconsider (a Form I-290B with a brief and supporting exhibits) filed in January 2019; a copy of our October 2019 decision rejecting the Petitioner's appeal of our June 2019 decision on jurisdictional grounds; copies of several USCIS receipt notices; and a copy of a letter from our office dated September 25, 2019, which indicates that it was sent in response to correspondence we received from the Petitioner

concerning our June 2019 decision. All of the submitted documents were already in the record of proceeding and therefore do not introduce new facts that would meet the requirements of a motion to reopen.

As discussed in our prior decisions, which we incorporate here by reference, the Petitioner has repeatedly requested that we reopen his appeal and address the merits of his claim that he meets the eligibility requirements for classification as an individual of extraordinary ability at section 203(b)(1)(A) of the Act. We summarily dismissed the appeal, citing the regulation at 8 C.F.R. § 103.3(a)(1)(v), which requires summary dismissal of an appeal that does not identify specifically any erroneous conclusion of law or statement of fact in the decision being appealed. In September 2018, the Petitioner filed an I-290B that was not accompanied by a statement identifying the basis for the appeal. Although he indicated on the Form I-290B filed that he would provide a brief and/or additional evidence to our office in order to meet this requirement, the record reflects that he did not do so. As we explained in our prior decisions, the only way the Petitioner may succeed on a motion and have his appeal reopened is to cure the deficiencies that led to the summary dismissal of his appeal. Absent evidence that he submitted a brief or other statement identifying the basis for his appeal of the Director's decision within 30 days of filing his appeal in September 2018, the Petitioner cannot establish proper cause to reopen that appeal.

In the brief submitted in support of the instant motion, the Petitioner now states that he did in fact mail a brief to our office within 30 days of filing his initial appeal in September 2018. He does not submit any evidence, such as proof of mailing or a copy of the brief, in support of his claim. Instead, he submits a copy of his initial motion to reopen and reconsider filed in January 2019, asserting that his brief in support of the appeal was "reiterated" in the brief he submitted on motion. The Petitioner's unsupported claim that he timely submitted a brief in support of his September 2018 appeal does not provide proper cause for reopening his appeal. Even if we accepted his assertion that he timely submitted a brief, the record would still be deficient because he does not provide a copy of the brief that he claims to have mailed. Without a copy of the claimed brief, we cannot determine whether it identified an erroneous conclusion of law or statement of fact in the decision being appealed, and the regulations would still require summary dismissal of the appeal.

The Petitioner emphasizes that, in our decision summarily dismissing the appeal, we advised him that he could file a motion to reopen and/or reconsider. As reflected in the procedural history summarized above, he filed an untimely motion in response to the summary dismissal of his appeal. Although we initially dismissed the motion as untimely, we later reviewed the motion to reopen on its merits after exercising our discretion to excuse the late filing. *See* 8 C.F.R. § 103.5(a)(1)(i). However, as discussed in our July 2020 decision, the motion to reopen did not include evidence showing proper cause to reopen the appeal because it did not include new facts or evidence demonstrating that the Petitioner had filed a brief or other statement in support of the appeal, or otherwise demonstrating that the summary dismissal of the appeal was not warranted. The purpose of a motion following the dismissal of an appeal is to address issues raised in the appellate decision, not to revisit the Director's initial adverse decision.

Finally, the Petitioner addresses correspondence he received from this office, dated September 25, 2019. In that correspondence, we acknowledged receipt of a letter from the Petitioner relating to his first motion to reopen and reconsider with receipt number, which we had dismissed as untimely filed

in June 2019.[1] Our correspondence refers to the filing in question as an "untimely appeal" and indicates that it was being returned to the service center, which would determine whether it met the requirements of a motion, pursuant to 8 C.F.R.§ 103.3(a)(2)(v)(B)(*2*). Regretfully, this correspondence appears to have been issued in error. Although the Petitioner has filed two appeals since the denial of his immigrant petition, the first one was summarily dismissed for the reasons discussed above, and the second appeal (filed in response to the dismissal of the first combined motion) was rejected on jurisdictional grounds because there is no regulatory provision that allows us to review an appeal of one of our own decisions. The record reflects that the Petitioner has not filed an untimely appeal at any point in these proceedings, and we clarify that none of the Petitioner's previous filings have provided any basis to return this matter to the Nebraska Service Center for review.

We will dismiss the motion to reopen, because the Petitioner has not submitted new facts or evidence demonstrating proper cause for reopening the proceeding.

C. Motion to Reconsider

For the current motion to qualify as a motion to reconsider, the Petitioner must demonstrate that our immediate prior decision (issued July 14, 2021), contained errors of fact, law, or policy that affected the outcome of the decision.[2]

In his brief, the Petitioner does not assert that we incorrectly applied the law or USCIS policy in our decision dismissing his fourth combined motion to reopen and reconsider. Rather, he claims for the first time that he did in fact submit a brief in support of his initial appeal of the Director's decision. As discussed above, he has not submitted any evidence in support of this claim. He emphasizes, in the alternative, that he has since raised alleged errors in the Director's decision in his subsequent motions. However, as explained, the Petitioner's opportunity to allege specific errors in the Director's denial decision was in the appeal filed in September 2018 and the record reflects that he did avail himself of this opportunity when he filed his appeal. The filing of the appeal did not create or preserve any right for the Petitioner to dispute the Director's denial in subsequent motions.

The Petitioner's motion, because it does not demonstrate that we incorrectly applied the law or USCIS policy in dismissing his fourth motion, does not meet the requirements of a motion to reconsider.

IV. CONCLUSION

The current motion does not establish that our most recent decision was incorrect. Rather, the Petitioner seeks to reach back to earlier stages of the proceeding that are outside the scope of this fifth motion. The Petitioner has not submitted new facts or evidence sufficient to overcome our determination that summary dismissal was the proper, and required, outcome when presented with an appeal that contained no specific allegations of error in fact or law.

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[1] It appears that the correspondence from the Petitioner, dated July 18, 2019, was likely a statement he submitted in support of the appeal he filed on July 09, 2019. However, it contains no specific reference to his filing of that appeal. As noted, we rejected the Petitioner's second appeal as improperly filed in October 2019.

[2] *See* 8 C.F.R. § 103.5(a)(1)(i).

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.