U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23473811

Date: JAN. 10, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a writer and filmmaker, 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 Nebraska Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding the Petitioner did not establish he met the initial evidence requirements of this classification through either evidence of a one-time achievement (a major, internationally recognized award) or meeting three of the evidentiary criteria under 8 C.F.R. § 204.5(h)(3). We agreed with the Director and dismissed his appeal, which is now before us on a motion to reopen. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motion.

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 he or she 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).

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). According to the Instructions for Notice of Appeal or Motion (Form I-290B, Notice of

Appeal or Motion), any new facts and documentary evidence must demonstrate eligibility for the required immigration benefit at the time the application or petition was filed. A motion to reopen that does not satisfy the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

We do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean those that are relevant to the issues raised on motion and that have not been previously submitted in the proceeding, which includes within the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

On motion, the Petitioner addresses the judging criterion at 8 C.F.R. § 204.5(h)(3)(iv) and the contributions criterion at 8 C.F.R. § 204.5(h)(3)(v). In support of those claims, he either: (1) offers new eligibility claims that were presented to the Director but that were not advanced in his appeal filing; (2) presents new claims that he never previously asserted before the Director or on appeal; or (3) submits evidence that came into being after the petition filing date. Each of these actions are prohibited within the current proceedings, as we explain below.

Our review of the record reveals the Petitioner collectively asserted his claims before the Director, but he failed to offer all of those same claims in his appeal. When he failed to assert any previous claims within his appeal, he abandoned or waived those claims.[1] *See Matter of Valdez*, 27 I&N Dec. 496, 496 n.1 (BIA 2018) (concluding that an issue is deemed waived when it is not challenged). This means we will not factor those abandoned claims into this or any future motion decision based on this particular petition. He is, however, eligible to reintroduce these claims in any future petition filing (i.e., a new Form I-140).

Also, as it relates to a motion to reopen, the requirement for "new facts" pertains to new information associated with the eligibility claims a filing party presented to us in their most recent filing; in this case, in the Petitioner's appeal brief. A motion to reopen should not act as a vehicle—as a Trojan horse of sorts—to introduce new eligibility claims for the first time. These two concepts (new facts versus new eligibility claims) are distinct and are not interchangeable. New eligibility assertions advanced for the first time to an administrative appellate body are not properly before us. *Matter of M-F-O-*, 28 I&N Dec. 408, 410 n.4 (BIA 2021) (refusing to consider an appellant's humanitarian claims that were presented for the first time on appeal).

We offer two examples. First, the Petitioner claimed on appeal that he was a member of the jury of [redacted] during the tenth edition of the Festival, and this should serve as one basis for satisfying the judging the work of others criterion. The Petitioner may present new facts that are supported by evidence relating to that judging role, but he may not now introduce new instances in which he may have judged the work of others that he did not present in his appeal brief, and that was not a part of our decision on that appeal. To illustrate, on motion the Petitioner provides claims and evidence that he was a member of the final round jury for the [redacted] category at the [redacted] Film Festival. Because this is the first time he asserts this claim, it would not be appropriate

[1] For instance, in his filing before the Director under the contributions criterion, the Petitioner claimed his novel [redacted] was commonly regarded as a major milestone of contemporary Chinese Literature. However, he did not advance this same claim within his appeal, and we consider it abandoned here.

for us to factor this material into our decision within these proceedings. The Petitioner, however, is free to submit this material in any new petition filing.

Our second example relates to the Petitioner's claims on motion that his writing was featured in the book, [redacted] The Petitioner did not assert this claim in his appeal, nor did he address it before the Director. Therefore, even though he raises it in this motion to reopen, we will not factor it into these proceedings.

Finally, the Petitioner presents evidence on motion to support his new facts, but that material postdates the petition filing date (March 30, 2020). For instance, a [redacted] 2022 article titled, [redacted] was created after he filed the petition. A request for an immigration benefit "must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be through adjudication." 8 C.F.R. § 103.2(b)(1); *Ahmed v. Mukasey*, 519 F.3d 579, 582 (6th Cir. 2008); *Karakenyan v. U.S. Citizenship & Immigr.*, 468 F. Supp. 3d 50, 52 (D.D.C. 2020).

U.S. Citizenship and Immigration Services (USCIS) may not approve a visa petition if the Petitioner was not qualified at the priority date but attempts to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Any additional evidence submitted in connection with a benefit request at a later date must also establish "eligibility at the time the benefit request was filed." 8 C.F.R. § 103.2(b)(12). "Under this rule, USCIS will deny [an immigration benefit] if the [filing party] becomes eligible only after the [benefit] was filed." *Tingzi Wang v. United States Citizenship & Immigr. Servs.*, 375 F. Supp. 3d 22, 27 (D.D.C. 2019); *Doe v. United States Citizenship & Immigr. Servs.*, 410 F. Supp. 3d 86, 100 (D.D.C. 2019).

Here, the Petitioner has not satisfied the requirements for a motion to reopen. Specifically, he has not offered new facts—associated with his previous eligibility claims—that are also supported by evidence demonstrating he satisfied either the judging criterion at 8 C.F.R. § 204.5(h)(3)(iv), or the contributions criterion at 8 C.F.R. § 204.5(h)(3)(v) as of the date he filed the petition. The result of this shortcoming is that the Petitioner has not demonstrated that we should reopen the proceedings.

ORDER: The motion to reopen is dismissed.