Non-Precedent Decision of the Administrative Appeals Office

In Re: 28128980

Date: SEP. 01, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a sound engineer and technical director, 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 Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that he met the initial evidence requirement for the classification through evidence of a major, internationally recognized award or, in the alternative, meeting at least three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3). We dismissed a subsequent appeal, as well as a combined motion to reopen and reconsider. The matter is again before us on a motion to reconsider.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion.

In our previous decision, we concluded that the Petitioner did not meet the requirements of either a motion to reopen or a motion to reconsider. Regarding the motion to reopen, we determined that while the documents intended to address the criteria at 8 C.F.R. §§ 204.5(h)(3)(viii) and (ix) had not been previously submitted, they were not new since they presented the same information contained in evidence already in the record. In addition, we acknowledged the submission of evidence related to membership in the Russian Music Union, but explained that the Petitioner had not previously claimed he met the criterion at 8 C.F.R. § 204.5(h)(3)(ii) and it was, therefore, not appropriately considered on motion. Regarding the motion to reconsider, we determined that "broadly disagreeing with our conclusions" was insufficient to meet the requirements of the motion.

A motion to reconsider must establish that our prior 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

Relying on the instructions to Form I-290B, Notice of Appeal or Motion,[1] and Chapter 3.8 of the AAO Practice Manual, the Petitioner argues that neither one "restricts [the] definition of 'additional evidence'" and, thus, we should have addressed the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv), (viii), and (ix). He contends that not considering this material was contrary to AAO policy and asserts that our analysis in the previous decision "does not make sense."

However, Chapter 3.8 of the AAO Practice Manual concerns appeals, whereas our most recent decision dismissed the Petitioner's combined motion to reopen and reconsider. The portion of our decision discussing the evidence submitted in support of these three evidentiary criteria focused not on whether this additional evidence should be accepted on appeal, but on whether it constituted "new" facts per 8 C.F.R. 103.5(a)(2), the regulation concerning motions to reopen. The Petitioner does not contest our conclusion that since these previously unsubmitted documents only restated facts that were already in the record, they did not constitute "new" facts and, therefore, did not meet the requirements for a motion to reopen.

The Petitioner also asserts that our reliance upon two precedent decisions of the Board of Immigration Appeals ("the Board") was inappropriate because they did not involve the "processing of petitions for benefits." Citing to *Matter of M-F-O-*, we explained that he had not only failed to address the evidence of his membership in the Russian Music Union in his brief, but he also had not previously claimed eligibility for the criterion at 8 C.F.R. § 204.5(h)(3)(ii).[2] Regardless, any new facts submitted on motion must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1); *see also Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm'r 1971).[3]

While he acknowledges that the Board's precedent decisions are binding on U.S. Citizenship and Immigration Services in cases involving the same issues, he argues that our reliance upon *Matter of Valdez*, 27 I&N Dec. 496, 496 n.1 (BIA 2018), to confirm our conclusion that issues not discussed on appeal were deemed to be waived, was also inappropriate since that decision also involved removal proceedings and not the adjudication of petitions. The Petitioner asserts that we should have considered the exceptions he presented to the waiver of issues on appeal found in decisions from the Ninth Circuit Court of Appeals, which has jurisdiction due to his place of residence. The Petitioner does not, however, cite to precedent decisions supporting his contention that the waiver of issues on appeal in removal proceedings should be treated differently than the same issue in the adjudication of petitions. Therefore, he has not established that our citation to Board precedent decisions in support of our conclusion was contrary to law or policy.

Further, the general rule in the Ninth Circuit is that issues not raised in an appeal brief are deemed to be waived. *See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) (finding that matters not specifically and distinctly argued in an opening brief are not ordinarily considered on appeal); *Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived). The Petitioner generally states that he renews his arguments from his previous motion

[1] The Petitioner does not, however, further explain how our decision was inconsistent with the instructions.
[2] *See Matter of M-F-O-*, 28 I&N Dec. 408, 410 n.4 (BIA 2021), in which the Board refused to consider an appellant's humanitarian claims presented for the first time on appeal.
[3] The petition was filed on August 11, 2020 and the Petitioner did not become a member the Russian Music Union until October 28, 2020.

regarding exceptions to the waiver of issues found in Ninth Circuit decisions. But while he previously cited to decisions supporting exceptions to this general rule, based upon prejudice to the opposing party and manifest injustice, he did not explain in his previous motion, nor does he in this motion, how or why they should apply here.

On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy and was incorrect based upon the record of proceedings at the time we issued our decision. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reconsider is dismissed.