U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20215028

Date: APR. 5, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a software developer, seeks second preference immigrant classification as a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or businesses, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not show that he qualifies for classification as an individual of exceptional ability or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We dismissed a subsequent appeal, concluding that the record did not establish the Petitioner qualifies as either a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts, or business. On a combined motion to reopen and motion to reconsider, the Petitioner asserts that he qualifies under both threshold criteria.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the combined motion.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, "new facts" are facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original application. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

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). We do not consider new facts or evidence in a motion to reconsider.

II. ANALYSIS

Although the Director concluded that the Petitioner had not established he is an individual of exceptional ability, the Director did not address whether the Petitioner qualifies as a member of the professions holding an advanced degree. Specifically, the Director found that the Petitioner satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(B) but that he did not satisfy at least one other criterion under 8 C.F.R. § 204.5(k)(3)(ii), of which a minimum of three are required to demonstrate exceptional ability. On appeal, the Petitioner reasserted that he also satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) but he waived the remaining eligibility criteria.[1] We concluded that the Petitioner had not satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) and that he also did not establish he is a member of the professions holding an advanced degree.[2] On a combined motion, the Petitioner reasserts that he satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) and that he is a member of the professions holding an advanced degree. We address the combined motion separately below.

A. Motion to Reopen

New evidence in support of the motion to reopen includes the following: (1) a letter from the Petitioner's accountant, explaining the Petitioner's manner of compensation for his work as a software developer; (2) a copy of the Petitioner's U.S. income tax return for 2020; and (3) a new academic credentials evaluation.

1. Exceptional Ability

We first note that the Petitioner filed the underlying petition in 2019. A petitioner must establish eligibility at the time of filing a visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The Petitioner's income in 2020, reported on his income tax return for that year, presents a set of facts related to his compensation that did not exist at the time of filing in 2019. Therefore, the copy of the Petitioner's U.S. income tax return for 2020 may not establish eligibility related to this issue and we need not address it further. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49.

Next, the letter from the Petitioner's accountant submitted on motion to reopen asserts that the monthly "guaranteed payments" the Petitioner receives "are not shares distributions or dividends" but rather "the only way [the Petitioner] can be paid since he is a member of the LLC" for which he works as a software developer. However, to satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), the evidence must show that the Petitioner has commanded a salary or remuneration for services developing software that is indicative of his claimed exceptional ability relative to others working in the field. *See* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. The Petitioner described his

[1] *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 *U.S. 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 (stating that a plaintiff's claims were abandoned as he failed to raise them on appeal to the Administrative Appeals Office).

[2] To satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), the record must contain "[e]vidence that the alien has commanded a salary, or other renumeration [*sic*] for services, which demonstrates exceptional ability."

endeavor as a "career plan . . . to use the knowledge I have acquired to work on large scale [s]oftware [d]evelopment projects. . . . I will contribute directly to the field of software development by designing and developing software for companies where it is most needed." The accountant's letter submitted on motion does not address the lack of evidence in the record comparing the Petitioner's earnings related to software development to those of others with comparable responsibilities in software development, in order to establish whether such remuneration "demonstrates exceptional ability" under 8 C.F.R. § 204.5(k)(3)(ii)(D), as we discussed in our decision.

We also note that the letter from the Petitioner's accountant informs that his annual income was R$321,700 and R$245,872.30 in 2018 and 2019, respectively. The significant decrease in the Petitioner's income from 2018 to 2019 does not support his claimed exceptional ability relative to others working in the field. Accordingly, the accountant's letter does not present a new fact that establishes the Petitioner satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D). *See* 8 C.F.R. § 103.5(a)(2).

2. Advanced Degree

The new academic credentials evaluation asserts that the Petitioner's Brazilian "[d]iploma awarding the *Grau de Tecnólogo* degree in Computer Science, showing completion in 2008 for the three academic years required for attainment of the *Grau de Tecnólogo*" and the Petitioner's Brazilian "*Lato Sensu* Specialization Certificate in Project Management showing award for the Certificate in 2011 following completion of one and one-half years of graduate study" combined amount to "the equivalent in time and content to the degree, Bachelor of Science in Computer Science with an additional major in Project Management, from a regionally accredited university in the United States." As noted in our prior decision, U.S. Citizenship and Immigration Services uses evaluations as advisory opinions only. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as "any United States academic professional degree *or foreign equivalent degree* above that of a baccalaureate" (emphasis added). The regulation further provides, "A United States baccalaureate degree *or a foreign equivalent degree* followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree" (emphasis added).

The regulation at 8 C.F.R. § 204.5(k)(2) contemplates a singular degree, whether a U.S. degree or a foreign degree equivalent to a U.S. degree. As we explained in our prior decision, the regulation at 8 C.F.R. § 204.5(k)(2) does not contemplate a combination of a degree that is not equivalent to a U.S. degree with a specialization certificate that also is not equivalent to a U.S. degree, in order to form "the equivalent in time and content to [a] degree." Accordingly, the new academic evaluation does not present a credible new fact that establishes that the Petitioner qualifies as a member of the professions holding an advanced degree. *See* 8 C.F.R. § 103.5(a)(2).

For the reasons discussed above, we will dismiss the motion to reopen.

B. Motion to Reconsider

Turning to the motion to reconsider, the Petitioner requests us to "reconsider [our] determination regarding [the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D)] and apply the burden of proof that 'it is more likely than not' that the Petitioner has commanded a high salary and other remuneration for his work as a [s]oftware [d]eveloper which shows exceptional ability as compared to others working in his field."

The Petitioner asserts on motion that the income inconsistencies are attributable to an average monthly income for an eight-year period beginning in 2011, R$28,500, compared to monthly income for the years 2018 and 2019, R$21,000 and R$25,200, respectively. Nevertheless, the record establishes that the Petitioner's monthly income is not only inconsistent but also below average in recent years. Moreover, despite requesting us to reconsider our determination, the Petitioner does not identify evidence in the record of proceedings at the time of our decision that provides a valid basis for comparing the Petitioner's earnings to those of others with comparable responsibilities, in order to establish whether such remuneration more likely than not "demonstrates exceptional ability" under 8 C.F.R. § 204.5(k)(3)(ii)(D). *See* 8 C.F.R. § 103.5(a)(3).

The Petitioner also urges us, again, to conflate the Petitioner's income for software development and business ownership, suggesting that "the occupation 'business owner' is an accompanying title that is regularly a job title that can be combined with another job title, such as [s]oftware [d]eveloper."[3] However, as we explained in our prior decision, the remuneration an individual receives for two separate job titles with two separate sets of skills and responsibilities is not to be conflated into an aggregate income for the purposes of 8 C.F.R. § 204.5(k)(3)(ii)(D). Moreover, as discussed above, even if we were to conflate the Petitioner's income, the Petitioner does not identify evidence in the record of proceedings at the time of our decision that provides a valid basis for comparing the Petitioner's earnings to those of others with comparable responsibilities, in order to establish whether such remuneration more likely than not "demonstrates exceptional ability" under 8 C.F.R. § 204.5(k)(3)(ii)(D). *See* 8 C.F.R. § 103.5(a)(3).

In summation, the Petitioner has not established on motion that we misapplied a law or policy and that our 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). Thus, we will dismiss the motion to reconsider.

III. CONCLUSION

As the Petitioner has not established by a preponderance of the evidence that he qualifies as either a member of the professions holding an advanced degree or as an individual of exceptional ability in the

[3] For example, the Petitioner asserts that an attorney who works in his or her own law firm receives income as a business owner that is "connected to said [a]ttorney's legal work" and, therefore, should be considered as total income. However, although the Petitioner addressed his entrepreneurial background in his career plan, as the Director noted, he "failed to clearly state [his] proposed undertaking or venture."

sciences, arts, or business, we conclude that the Petitioner has not demonstrated eligibility for second preference immigrant classification.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.