U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35853408

Date: JAN. 15, 2025

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this classification. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding the Petitioner did not establish his qualification for the underlying visa classification as an individual of exceptional ability, or that he merits a discretionary waiver of the job offer requirement in the national interest. We dismissed the Petitioner's subsequent appeal and two combined motions to reopen and to reconsider. The matter is now before us again on a third combined motion to reopen and reconsider. 8 C.F.R. § 103.5.

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.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

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).

The scope of any motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). Thus, our analysis for these combined motions is limited to the following: (1) whether the Petitioner establishes that the dismissal of the previous combined motions was based on an incorrect application of law or policy; or (2) whether the Petitioner presents a new fact, supported by evidence, that shows proper cause to reopen our decision on the previous combined

motions. We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. See Matter of Coelho, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome). Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See INS v. Doherty, 502 U.S. 314, 323 (1992) (citing INS v. Abudu, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." See INS v. Abudu, 485 U.S. at 110.

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

8 C.F.R. § 204.5(k)(3)(ii).[1]

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 that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

in the field. 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).

II. ANALYSIS

The Petitioner proposes to work in the United States as a financial analyst. Specifically, he intends to work as a branch manager for a mortgage company in [redacted] Florida. As noted above, the Director denied the approval of this petition. In our decision dismissing the appeal, we agreed with the Director's decision that the Petitioner did not qualify for the underlying EB-2 classification as an individual of exceptional ability, finding he did not meet any of the six criteria under 8 C.F.R. § 204.5(k)(3)(ii).[2] We dismissed the Petitioner's two subsequent motions as they did not meet the applicable regulatory requirements. 8 C.F.R. § 103.5(a)(4).

In our immediate prior motion, we concluded the Petitioner did not submit new facts supported by sufficient evidence to demonstrate his qualification as an individual of exceptional ability. We further determined that the Petitioner did not demonstrate our prior decision was based on an incorrect application of law or policy. We incorporate our prior decisions by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion.

A. Motion to Reopen

In his current motion brief, the Petitioner disagrees with our previous motion decision, contends his eligibility as an individual of exceptional ability has been met by a preponderance of the evidence, and provides "pertinent facts and new evidence" to show his eligibility. However, the Petitioner's new evidence does not support new facts demonstrating his eligibility for the EB-2 classification.

For the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C), the Petitioner submits a foreign language resolution from the [redacted] accompanied with an English translation to establish that his CPA-10 certification from the Brazilian Association of Financial and Capital Market Entities (ANBIMA) is a certification for his occupation or profession. However, the English translation document does not include the required certification of competence. See 8 C.F.R. § 103.2(b)(3). Because the Petitioner did not submit a properly certified English language translation of the resolution, we cannot meaningfully determine whether the translated material is accurate and thus supports his claims in support of this criterion.

Furthermore, we note points of concern in the English translation. For instance, the foreign language resolution has seven articles while the English translation has only six articles, and the end of the foreign language resolution states [redacted] as Presidente while the English translation states [redacted] as President of the [redacted] Such incorrect transcriptions detract from the credibility of the English translation.

[2] We reserved our review of the Petitioner's eligibility for the national interest waiver. See INS v. Bagamasbad, 429 U.S. 24, 25-26 (1976) (per curiam) (holding that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision).

In addition, it is not clear that the Petitioner's claimed occupation of financial analyst performs the services indicated in the resolution and requires CPA-10 certification for such occupation. While the resolution from the [redacted] states that the resolution "[p]rovides for the certification of employees of financial institutions and other institutions authorized to operate by the [redacted] Article 1 of the resolution sets limitations stating, "This Resolution provides for the certification of employees of financial institutions and other institutions authorized to operate by the [redacted] who work in serving the institution's customers in the activities of distribution and mediation of securities, securities and derivatives." Further limitations on the application of the resolution are noted in its subsections. The Petitioner has not sufficiently demonstrated how his occupation of financial analyst corresponds to the description contained in the resolution from the [redacted] and requires certification for the occupation.

Moreover, the resolution indicates it came into force on April 1, 2022, which is after the date of filing this petition in 2020, and after the Petitioner earned his CPA-10 certification in 2018. A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). Evidence that the Petitioner's claimed occupation required certification two years after the filing of the petition cannot be used to establish eligibility for the visa classification.

For the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), the Petitioner's motion brief indicates he is submitting new documents to support his claims he received remuneration that shows his exceptional ability. However, his motion does not include the new documents.

The Petitioner contends that he received a monthly salary of approximately R$20,000, as indicated in the pay stubs included with his petition, while paylab.com indicates the average monthly salary for a bank technician in Brazil ranges from R$1,418 to R$5,292 and for a financial analyst in Brazil ranges from R$1,733 to R$6,692 per month. He also maintains that payscale.com indicates a financial analyst median yearly salary is R$44,000, which is only two months of the Petitioner's salary. In addition, he claims that payscale.com shows that top earners in the field have a yearly salary of R$210,000, while the Petitioner makes a minimum of R$240,000 per year. With respect to the Petitioner's claims about paylab.com and payscale.com, this motion and the record do not include evidence to support his claims. Counsel's unsubstantiated assertions do not constitute evidence. See, e.g., Matter of S-M-, 22 I&N Dec. 49, 51 (BIA 1998) (stating that "statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

The Petitioner has not stated any new facts or submitted additional evidence to establish that we erred in dismissing our prior motions. Because the Petitioner has not established new facts that would warrant the reopening of the proceeding, we have no basis to reopen our prior decision. The motion to reopen will be dismissed. 8 C.F.R. § 103.5(a)(4).

B. Motion to Reconsider

The purpose of a motion to reconsider is to show error in the most recent prior decision. Here, the Petitioner's current motion to reconsider does not 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, as discussed below.

Our previous decisions correctly found the Petitioner's evidence did not demonstrate eligibility for the requested benefit and therefore, did not warrant reconsideration of our prior decision. The Petitioner cannot meet the requirements of a motion to reconsider by broadly disagreeing with our conclusions; instead, the motion must demonstrate how we erred as a matter of law or policy. See Matter of O-S-G-, 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit in essence, the same brief and seek reconsideration by generally alleging error in the prior decision). The Petitioner has not identified our immediate prior decision was based on an incorrect application of law or policy. See 8 C.F.R. § 103.5(a)(3).

In this motion, the Petitioner essentially restates assertions from his prior motions and appeal. For example, the Petitioner reasserts that for the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), his technical certificate in system analysis and development is related to his claimed area of exceptional ability, financial analysis. To support his argument, he points out, "according to O*Net Online, one of the occupational requirements of a Financial Analyst is to analyze business or financial data and develop financial or business plans." However, the Petitioner does not explain how his technical certificate in system analysis and development relates to a financial analyst's occupational requirement of analyzing business or financial data and developing financial or business plans, as set out by the U.S. Department of Labor. See U.S. Department of Labor, O*NET Summary Report for "Financial and Investment Analysts," https://www.onetonline.org/link/summary/13-2051.00.

In addition, to support his argument, he points to our previous decision's analysis of his work experience for a different criterion, 8 C.F.R. § 204.5(k)(3)(ii)(B). He argues that we found commonalities between his job duties with his previous employer and the job duties of a financial analyst as described by the U.S. Department of Labor in the O*NET Summary Report for Financial and Investment Analysts. See id. However, the commonalities between the Petitioner's previous work experience and his intended occupation expressed in our prior decision relate to the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), instead of this criterion for his academic credentials.

Similarly, for the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), the Petitioner repeats claims that he has membership in professional associations, namely the Trade Union of Employees in Bank and Financial Establishments (Trade Union). He takes issue with our prior motion decision using the definition of "profession" under 8 C.F.R. § 204.5(k)(2), which he claims is used for individuals holding advanced degrees and is distinguishable from the term "professional" for this criterion. He references the Merriam-Webster definition of professional to show the Trade Union is a professional association under this criterion. We disagree with the Petitioner's interpretation of the term "professional" under 8 C.F.R. § 204.5(k)(2). The regulations at 8 C.F.R. § 204.5(k)(2), including the definition of "profession", relate to individuals who are members of the professions holding advanced degrees and individuals of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(2) defines the term "profession" and uses the term "professional" to identify an individual as a member of a profession.

For the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), the Petitioner asserts that our prior decision incorrectly determined the evidence only demonstrates "recognition" of his performance, as opposed to his achievements or significant contribution. He maintains that our analysis of the evidence contradicts the Oxford English dictionary definition of "award", "a prize or other mark of recognition given in honor of an achievement" and "a distinction given to a recipient as a token of recognition of

excellence in a certain filed [sic]." But the Petitioner has misconstrued our prior decision's analysis of the evidence to the regulation. We acknowledge that the Petitioner has received recognition for his achievements and contributions; however, as pointed out in our prior decision, such recognition is not for achievements and significant contributions to the field of financial analysis, but instead for his achievements and contributions to his employer. While the Petitioner claims his "awards and recognition are a direct consequence of his distinction and contribution to the field," evidence in the record does not support his assertion.

In sum, the Petitioner's motion to reconsider mainly disagrees with our prior conclusions without identifying any misapplication of law or policy or demonstrating our decision was incorrect based on the evidence in the record of proceeding. We have already considered and analyzed the Petitioner's evidence in the petition under the preponderance of evidence standard and found it insufficient to demonstrate eligibility for the requested benefit. See Matter of Coelho, 20 I&N Dec. at 473.

III. CONCLUSION

Although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has not established eligibility. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, we will dismiss the combined motions. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.