U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30538892

Date: APR. 08, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a pilot, seeks second preference immigrant classification (EB-2), as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant 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 that the Petitioner did not establish eligibility for the underlying EB-2 immigrant visa classification as a member of the professions holding an advanced degree or an individual with exceptional ability.[1] We dismissed the Petitioner's subsequent appeal and motion to reopen concluding that he had not overcome the Director's adverse conclusion regarding his eligibility for the underlying EB-2 immigrant visa classification as an individual of exceptional ability. We then dismissed the Petitioner's second motion as it did not meet the requirements. The matter is now before us on a combined motion to reopen and reconsider.[2]

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.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). 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.

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification. Section 203(b)(2)(B)(i) of the Act. In order to qualify as an individual of exceptional ability in the sciences, the arts, or business, an individual must meet at

[1] The Director also found that the Petitioner did not establish that a waiver of the classification's job offer requirement would be in the national interest.

[2] We decline the Petitioner's request for oral argument. *See* 8 C.F.R. § 103.3(b)(2) (the AAO has "sole authority to grant or deny a request for oral argument").

least three of the six criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. 8 C.F.R. § 204.5(k)(2); *see also Kazarian* v. *USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

On motion to reconsider, the Petitioner does not claim that our prior decision issued on August 30, 2023, was decided in error. Instead, the Petitioner asserts that his attorney failed to provide the required evidence to meet two additional evidentiary criteria, 8 C.F.R. 204.5(k)(3)(ii)(B) and (D), to qualify him as an individual of exceptional ability. However, the Petitioner has not indicated that he is claiming ineffective assistance of counsel and does not cite to any precedent law or regulations or provide relevant evidentiary documents under *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988) (setting forth the framework and documentary requirements for claims of ineffective assistance of counsel).[3] Therefore, we conclude that the Petitioner has not demonstrated 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.

On motion to reopen, the Petitioner offers as new evidence an employment letter (to demonstrate that he has at least ten years of full time experience in the occupation) and paystubs from [redacted] (to demonstrate that he has commanded a salary) to meet other initial evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) and (D). However, we will only consider new evidence to the extent that it pertains to our latest decision as the scope of a motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). We have already determined that the Petitioner has met the required three out of the six initial evidentiary criteria at 8 C.F.R. 204.5(k)(3)(ii)(A), (C), and (E). Meeting additional two other criteria does not materially change the outcome of his exceptional ability claim, as the issue is whether the Petitioner established in the final merits determination that he has a degree of expertise significantly above that ordinarily encountered in his field pursuant to 8 C.F.R. § 204.5(k)(2). Here, the Petitioner's new evidence offered on motion to reopen, the employment letter and paystubs,[4] does not pertain to the final merits determination. Therefore, the Petitioner has not established new facts that would warrant reopening of the proceeding and we will not re-adjudicate the petition anew.

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[3] Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) a written affidavit of the noncitizen attesting to the relevant facts, setting forth in detail the agreement that was entered into with former counsel, the specific actions actually taken by the former counsel, and any representations that former counsel made about his or her actions; (2) evidence that the noncitizen informed former counsel of the allegation of ineffective assistance and was given opportunity to response, along with any response by prior counsel; and (3) evidence that the noncitizen filed a complaint with appropriate disciplinary authorities (e.g. with a state bar association) with respect to any violation of counsel's ethical or legal responsibilities or an explanation why the noncitizen did not file a complaint. *Lozada*, 19 I&N Dec. at 639.

[4] We note here that the paystubs from [redacted] cover the period from June 2023 to September 2023. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of filing. *See* 8 C.F.R. § 103.2(b)(1). As this petition was filed back in October 2019, we cannot consider "facts that come into being only subsequent to the filing of a petition." *Matter of Izummi*, 22 I&N Dec. 169, 176 (Comm'r 1988) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981)).

Based on the foregoing, we conclude that the Petitioner's submission of additional evidence in support of the motion to reopen does not establish 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, the combined motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.