U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32907648

Date: AUG. 28, 2024

Motion on Administrative Appeals Office Decision

Form I-129, Petition for a Nonimmigrant Worker (Extraordinary Ability – O)

The Petitioner, a restaurant, seeks to classify the Beneficiary as an executive chef of extraordinary ability. To do so, the Petitioner pursues O-1 nonimmigrant classification, available to individuals who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

The Director of the California Service Center denied the petition, concluding the Petitioner did not establish that the Beneficiary's satisfaction of the initial evidentiary criteria applicable to individuals of extraordinary ability in the arts: nomination for or receipt of a significant national or international award, or at least three of six possible forms of documentation. Afterwards, the Director dismissed the Petitioner's combined motion to reopen and motion to reconsider. We dismissed a subsequent appeal. The matter is now 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.

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.

On motion, the Petitioner argues that "the AAO states that we did not challenge the Director's criterion determination," and "[t]he Petitioner has indeed challenged the criteria in Response to the RFE [request for evidence] that forms a complete part of this record." As discussed in our prior decision, the Petitioner submitted an appellate brief that mirrored the previous motion brief without addressing the findings in the Director's motion decision. In addition, the Petitioner did not contest the Director's particular motion determinations or specifically identify any erroneous conclusion of law or statement of fact for the appeal of the Director's motion decision. Furthermore, the Petitioner references its response to the Director's RFE rather than its appellate response to the Director's decision dismissing

the motion. If the Petitioner intended to challenge the Director's decision relating to the regulatory criteria, then it should have done so on appeal. Accordingly, we will not now address previously waived arguments and claims in this motion.[1]

Moreover, our decision indicated that the Director's initial denial explained how the Petitioner did not demonstrate that the evidence either qualified for the regulatory evidence or established the Beneficiary's eligibility, including pointing out inconsistencies and credibility issues with the documentation submitted in response to the RFE, such as the insertion of the Beneficiary's name and other information into articles not included in the original articles. Further, some evidence related to events occurring after the filing of the petition.

Further, our decision highlighted the Director's thorough analysis and discussion of the Petitioner's motion arguments, including "knowledge" and misrepresentation under section 212(a)(6)(C)(i) of the Act, inappropriate application of case law pertaining to eligibility at time of filing, and consideration of "national or international recognition." Accordingly, we adopted and affirmed the Director's decision.[2]

With this motion, the Petitioner repeats the same claims and cites to the same case law that we have already addressed in our adoption of the Director's decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006 ("[A] motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior . . . decision. The moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in our initial decision . . . ."). The Petitioner also references the submission of new evidence on appeal and with this motion. As discussed in our prior decision, we will not consider new evidence for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). Moreover, 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).

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 motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reconsider is dismissed.

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[1] Issues not raised on appeal are waived. *See, e.g. Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

[2] *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 Fr.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted this issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight U.S. Court of Appeals in holding the appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).