U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-T-

DATE: MAR. 24, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a lawyer, seeks classification as an individual 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 Texas Service Center denied the petition. The Director determined that the Petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R § 204.5(h)(3), which require documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). We upheld that decision on appeal and reaffirmed our findings in eight subsequent motion decisions.

The matter is now before us on a ninth motion, a joint motion to reopen and reconsider. In his current motion, the Petitioner offers new evidence and maintains that he performed a leading or critical role for a qualifying organization, and that the federal rules of civil procedure and the AAO's *de novo* review authority mandate consideration of his post-filing accomplishments.

Upon review, we will deny both motions.

I. LAW

Section 203(b) of the Act makes visas available to foreign nationals with extraordinary ability in the sciences, arts, education, business, or athletics as demonstrated by sustained national or international acclaim and achievements that have been recognized in the field through extensive documentation. The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can show sustained acclaim and the recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then he or she must provide sufficient qualifying items that meet at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i)-(x) (including items such as awards, published material in certain

media, and scholarly articles). Satisfaction of at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1]

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' definition of "new" at 8 C.F.R. § 1003.23(b)(3) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean 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 petition. 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). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

II. ANALYSIS

As an attorney, the Petitioner specializes in international law. We have previously concluded that he has served as the judge of others. Therefore, he meets one criterion.[2] The regulation at 8 C.F.R § 204.5(h)(3), however, requires that the Petitioner satisfy at least three of the ten regulatory criteria. In our prior decisions, we have explained why the Petitioner has not satisfied at least two of the remaining criteria.

On motion, the Petitioner presents additional evidence in support of his eligibility under the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii). In support of his contention, he points to a prior internship he had with the [redacted] of the [redacted] in 2007. He states that at the conclusion of his 10-month internship, the [redacted] "did promote and retain" him, on an "exceptional basis, in recognition and acknowledgment of the petitioner's achievement, contribution, and crucial role." He also describes how the "[redacted] cleaned" (*sic*) him for a "P-2 level professional officer position,

[1] *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); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that USCIS examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true").

[2] 8 C.F.R. § 204.5(h)(3)(iv).

responsible (focal point person) for the policy issue of the humanitarian consequence of global climate change."

As we discussed in our earlier decisions, the [redacted] issued a certificate of appreciation to the Petitioner in July 2007 recognizing his "completion of the [redacted] 2007 [redacted] in the [redacted] of the [redacted] for the [redacted] affirms that the Petitioner was employed as an intern with that branch. While there, the Beneficiary supported a project to strengthen the role of regional organizations in protecting civilians during armed conflict, researched various protection concerns, and supported other research tasks as assigned.[3] [redacted] explains that the Petitioner contributed to various research projects but does not suggest that the Petitioner had a significant impact on her office beyond their need for interns to complete assigned research.

With this motion, the Petitioner maintains that he performed in a critical role for an organization with a distinguished reputation when he was "retained" on an "exceptional basis" by the [redacted] following the completion of his internship. He provides the contact information for a member of the Executive Office of the [redacted] whom he states can confirm his appointment to the position of "professional officer." He maintains that his "critical role" is well demonstrated by this "highly unusual and exceptional promotion and retention."

We do not question that [redacted] offices are organizations or establishments with a distinguished reputation or that the [redacted] benefits from the organizations with which it coordinates. At issue is whether the Beneficiary performed in a leading or critical role for the [redacted] office as a "professional officer" as he claims. In general, a leading role is evident from the role, its duties, and how it fits within the overall hierarchy of the organization. A critical role is apparent from a petitioner's impact on the entity. The Petitioner asserts that in his "professional officer" role, he was responsible for the policy issue concerning the humanitarian consequences of global climate change.[4] He did not submit evidence, beyond his own affidavit, that he ever entered on duty in this position. Furthermore, he has not provided documentation explaining how this role would be considered a leading or critical role within the [redacted] or how his position fit within the overall hierarchy of the organization.

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[3] The Petitioner submitted copies of [redacted] press releases dated [redacted] and [redacted] 2007, concerning the protection of civilians in armed conflict, along with a report of the [redacted] on the protection of civilians in armed conflict dated [redacted] 2015. While the Petitioner claims that he was "solely responsible for drafting" this summary report, there is no evidence supporting his contention. It is not clear who authored these releases or how they support the Petitioner's contention that he served in a critical role with the [redacted]

[4] The Petitioner has previously described this role as "an additional representative beyond a three-year term." As we discussed in our previous decisions, an extension of his term may speak to the quality of his work; however, he provides no support for his assertion that he is only one of two that have ever been allowed to serve beyond a term limit, and that such an exception is demonstrative of his leading or critical role for this organization.

Finally, the Petitioner contends that his role as a staff member of the [redacted] qualifies as comparable evidence sufficient to meet the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ii) and 8 C.F.R. § 204.5(h)(4).[5] He submits a copy of the staff rules and staff regulations of the [redacted] dated January 2014. He does not provide evidence verifying his position on the [redacted] staff or explain how a staff position would be properly considered a leading or critical role. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). As such, the Petitioner has not established that he meets the plain language requirements of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ii), or that he has submitted qualifying comparable evidence for this criterion.

A. Motion to Reconsider

In support of his motion to reconsider, the Petitioner contends that Federal Rule of Civil Procedure 42(a) and the AAO Practice Manual require the AAO to "look at the record anew" and not defer to findings made in the initial decision. The Petitioner asserts that because he has filed a new petition and could file an even newer one, we have the discretion to waive the requirement to show eligibility at the time of filing. The Petitioner bases his legal argument on consolidation under the Federal Rule of Civil Procedure.[6] The rule permits a federal court, in its discretion, to join all actions before the court that have a common question of law or fact, in order to avoid unnecessary cost or delay. This rule does not guide our analysis, however, because each petition must be evaluated on its own merits, despite potentially common questions of law or fact. Furthermore, the Petitioner has not provided authority for his contention that the Federal Rules of Civil Procedure govern our proceedings or permit us to disregard the regulation at 8 C.F.R. § 103.2(b)(1), which states: "An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request."

Regarding our *de novo* review, we have previously stated that, even though we conduct *de novo* review, an unapprovable petition cannot be cured by post-submission changes. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm. 1998). Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the Petitioner has not shown that we erred as a matter of law by not considering his achievements after the date of filing. Rather, both regulations and precedent decisions support our legal conclusions.

Finally, the Petitioner again refers to *Tongatapu Woodcraft Hawaii Ltd. v. Feldman*, 736 F.2d 1035, 1308 (9th Cir.) for the proposition that our prior decisions were in error. Our review of motions like this filing involves determining whether the Petitioner has provided new facts corroborating eligibility[7] and whether the motion was supported by pertinent precedent decisions to establish that

[5] The regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows for the submission of "comparable evidence" if the standards "do not readily apply to the beneficiary's occupation."
[6] Fed. R. Civ. P. 42(a)
[7] 8 C.F.R. § 103.5(a)(2).

the prior decision was based on an incorrect application of law or USCIS policy.[8] In addition, it is the Petitioner's burden to document his eligibility.[9] Our responsibility when issuing an adverse decision is to explain in writing the specific reasons for that decision[10] and articulate a rational connection between the facts found and the choice made.[11] We have detailed our reasoning and considered all evidence relating to the time of filing. *Tongatapu Woodcraft Hawaii Ltd.* does not support a conclusion that we have the discretion to waive the requirement to show eligibility at the time of filing or that we previously erred in denying the motions.

III. CONCLUSION

In this matter, the Petitioner has not demonstrated that he meets at least three of the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3). As the evidence provided in support of the motion to reopen does not overcome the grounds underlying our previous decision, and the motion to reconsider is not supported by any pertinent precedent decisions or legal citations that demonstrate our latest decision was based on an incorrect application of law or USCIS policy, the motions are denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of H-T-*, ID# 169189 (AAO Mar. 24, 2017)

[8] 8 C.F.R. § 103.5(a)(3).
[9] Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).
[10] 8 C.F.R. § 103.3(a)(1).
[11] *Visinscaia*, 4 F. Supp. 3d at 130, (citing *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013)).