U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29081240

Date: MAY 16, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner is a geologist who seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver (NIW) 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 Nebraska Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that the record did not establish that the Petitioner met the initial evidentiary requirements for EB-2 classification as an individual of exceptional ability. The Director further concluded that the Petitioner did not establish his eligibility for a national interest waiver. We dismissed a subsequent appeal concluding the Petitioner did not satisfy the EB-2 requirements, and we reserved our analysis relating to his NIW claims. The Petitioner now files a motion to reopen our appellate dismissal. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motion to reopen.

I. LAW

To establish eligibility for an NIW, 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. Section 203(b)(2)(B)(i) of the Act.

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. 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F). If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. We will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field. USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context

of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

Once a petitioner demonstrates eligibility for the EB-2 classification, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating NIW petitions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 warrant reopening the matter, a filing party must demonstrate that the new facts supported by evidence are likely to alter the case's outcome. *Matter of H-Y-Z-*, 28 I&N Dec. 156, 158 (BIA 2020) (citing *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007) and *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992)); *see also Matter of German Santos*, 28 I&N Dec. 552, 560–01 n.4 (BIA 2022).

II. ANALYSIS

Before the Director, the Petitioner claimed eligibility for and offered evidence under three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F). The Director determined the Petitioner satisfied the official academic record criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), but that he either did not offer evidence for, or his evidence did not meet the requirements of any of the remaining criteria.

We agreed in our appellate decision that the Petitioner satisfied the official academic record criterion and we determined he met one additional criterion regarding his membership in a professional association at 8 C.F.R. § 204.5(k)(3)(ii)(E). But we concluded he did not establish that he met the only other criterion he claimed relating to evidence of recognition for achievements and significant contributions to the industry or field under 8 C.F.R. § 204.5(k)(3)(ii)(F). That meant he did not meet the requisite minimum of at least three criteria, and it was unnecessary that we perform a final merits determination to evaluate whether he had demonstrated a degree of expertise significantly above that ordinarily encountered in the field.

We first address the criteria the Petitioner previously claimed before us. As we noted above, the only criterion the Petitioner claimed before the Director that was not granted related to his recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F). In this motion, the Petitioner includes the following recognition in his industry or field: a first-place finish in his eighth grade Geography Olympiad; certification and successfully completing a HarvardX course; and building and launching two web applications.

Aside from his eighth grade Geography Olympiad, the Petitioner presented these same factors in the appeal. As he simply identifies these factors without offering any new facts relating to them, they are not considered new facts for this motion. Also, he does not explain in the motion how a first-place finish in an eighth-grade competition amounts to recognition for achievements and significant

contributions to the industry or field from his peers, governmental entities, or professional or business organizations. The Petitioner does not identify the evidence from his "peers, governmental entities, or professional or business organizations" that illustrates his first-place finish equated to an achievement and a significant contribution to the industry or to the field. This claim will not satisfy the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(F).

Next, the Petitioner asserts new bases for eligibility as an individual of exceptional ability that he did not offer before the Director, nor did he advance those claims in the appeal. Specifically, he claims to qualify under one additional criterion as the license or certification criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C)), and he now attempts to qualify relying on comparable evidence (8 C.F.R. § 204.5(k)(3)(iii).

As it relates to a motion to reopen, the requirement for "new facts" pertains to new information associated with the eligibility claims a filing party presented to us in their most recent filing; in this case, in the Petitioner's appeal brief. New bases for eligibility are distinct from the type of "new facts" the regulation references for this type of filing. A post-appellate motion to reopen is not the proper method to advance new claims of eligibility that the Petitioner did not introduce at any prior stage in the proceeding. New eligibility claims advanced for the first time to an administrative appellate body, even at the motion to reopen stage, are not properly before us. *Matter of M-F-O-*, 28 I&N Dec. 408, 410 n.4 (BIA 2021) (refusing to consider an appellant's humanitarian claims that were presented for the first time to the appellate body).

Based on the facts of the present case, this Petitioner is precluded from presenting the issues he offers for the first time during the appeals process, to include in any motion filed in response to our dismissal of his appeal. *See Philipp v. Stiftung Preussischer Kulturbesitz*, 77 F.4th 707, 709–10 (D.C. Cir. 2023). If the Petitioner would like USCIS to consider these new eligibility claims, he should present them within a newly filed NIW petition.

For the reasons discussed above, the documentation submitted on motion does not overcome our original decision, finding that the Petitioner did not satisfy the recognition for achievements and significant contributions criterion.

The Petitioner has not demonstrated that we should reopen the proceedings.

ORDER: The motion to reopen is dismissed.