U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34163361

Date: OCT. 29, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a squash club, seeks to classify the Beneficiary as a squash pro of extraordinary ability. This O-1 nonimmigrant visa classification is 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 that the Beneficiary had not satisfied the initial evidentiary criteria applicable to individuals of extraordinary ability in athletics: either receipt of a major, internationally recognized award or at least three of eight possible forms of documentation. 8 C.F.R. § 214.2(o)(3)(iii)(A)-(B). We summarily dismissed the Petitioner's subsequent appeal. The matter is now before us on combined motions to reopen and 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 motions.

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). Because the scope of a motion is limited to the prior decision, we will only review the latest decision in these proceedings. 8 C.F.R. § 103.5(a)(1)(i), (ii). We may grant motions that satisfy the aforementioned requirements and demonstrate eligibility for the requested benefit.

In our May 2024 summary dismissal decision, we stated that the Petitioner's appeal did not identify specifically any erroneous conclusion of law or statement of fact in the Director's decision. We noted that on Form I-290B, Notice of Appeal or Motion, the Petitioner generally indicated that the Director "erred in finding that the Beneficiary has not satisfied at least three (3) of the eight (8) criteria," but did not further elaborate and address the particular findings of the Director or specifically identify any erroneous conclusion of law or statement of fact in the Director's decision.

In addition, while the Petitioner indicated that a brief and/or additional evidence would be submitted to the AAO within 30 calendar days of filing the appeal, the record did not show that the AAO received those materials within that period. Instead, the Petitioner's motion indicates that the Petitioner incorrectly sent its supplemental appeal brief to the U.S. Citizenship and Immigration Services (USCIS) Phoenix Lockbox rather than the AAO, along with additional exhibits and a duplicate of the Form I-290B appeal.[1] Any brief and/or evidence submitted after filing the Form I-290B, Notice of Appeal or Motion, must be sent directly to the AAO as required by the regulation at 8 C.F.R. § 103.3(a)(2)(viii) and the filing instructions for the Form I-290B. Because the AAO did not receive the supplemental appellate brief, and the Petitioner's appellate submission did not identify specifically any erroneous conclusion of law or statement of fact, we summarily dismissed the appeal. *See* 8 C.F.R. § 103.3(a)(1)(v).

On motion, the Petitioner, through counsel, asserts, that "[a]lthough Petitioner selected Box 1.b at Page 2, Part 2 of their initial I-290B Appeal, they actually submitted the Appeal Brief, along with an index of exhibits as well as the corresponding supporting exhibits, in their initial I-290B Appeal. These documents were in the possession of the AAO at the time of submission of the I-290B Appeal filing . . . ." Counsel's unsubstantiated assertions do not constitute evidence. *See, e.g.*, *Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). Counsel's statements must be substantiated in the record with independent evidence. The Petitioner does not support it's contention with, for example, a copy of the cover letter accompanying the supplemental appeal brief and a tracking receipt, or other evidence, showing that the brief was sent to the AAO and its delivery date.

Further, the Petitioner asks that we consider the arguments presented in the supplemental appellate brief challenging the Director's October 2023 decision. The only decision properly before us on motion is our May 2024 appellate decision, and not the Director's October 2023 denial of the petition. *See* 8 C.F.R. § 103.5(a)(1)(i), (ii), requiring that motions pertain to "the prior decision" or "the latest decision" which in this case is our May 2024 decision. Though the Petitioner asserts that the brief and supplemental evidence were submitted within the allotted time frame of the initial appeal, the record does not support this assertion. Moreover, the Petitioner has not established that the statement included on the Form I-290B it submitted for its appeal specifically identified any erroneous conclusion of law or statement of fact in the Director's decision.

The Petitioner has not offered new evidence or facts on motion to overcome the stated grounds for dismissal in our appellate decision. In addition, the Petitioner has not demonstrated that our summary dismissal decision was based on an incorrect application of law or USCIS policy and that our decision was incorrect based on the evidence in the record at the time of the decision. Consequently, we have

[1] The Petitioner's motion provides a copy of a rejection notice dated January 2024 for the resubmitted I-290B appeal [redacted] package received by the USCIS Phoenix Lockbox on December 18, 2023. The rejection notice indicated that the resubmitted I-290B appeal and any supporting documentation were being returned because "[t]he payment amount is incorrect, or has not been provided." *See* 8 C.F.R.§ 103.2(a)(7)(ii) (a rejected benefit request, such as one not submitted with the correct fee, will not retain a filing date). According to the Petitioner's undated supplemental appellate brief and its letter to the USCIS Phoenix Lockbox in response to the rejection notice, it appears that the Petitioner resubmitted the Form I-290B appeal because it had not yet received a receipt notice; government records indicate the Form I-290B appeal was filed with the correct fee on November 17, 2023. The Petitioner's motion shows that a receipt notice for the appeal was issued to the Petitioner in April 2024.

no basis for reopening or reconsideration of our decision. Accordingly, the motions will be dismissed. 8 C.F.R. § 103.5(a)(4). The Petitioner's appeal therefore remains dismissed, and the underlying petition remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.