U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9069280

Date: JUNE 24, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, an attorney whose practice focuses on international law and policy, seeks classification as an alien 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, concluding that the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. We dismissed the Petitioner's appeal from that decision, as well as 13 subsequent combined motions to reopen and reconsider. The matter is now before us on the 14th combined motion.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion.

I. MOTION REQUIREMENTS

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Under the above regulations, a motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show

proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

By regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). Therefore, the filing before us is not a motion to reopen and reconsider the denial of the petition or the dismissal of the appeal. Instead, the filing is a motion to reopen and reconsider our most recent decision. Therefore, the Petitioner cannot use the present filing to make new allegations of error that occurred at prior stages of the proceeding.

II. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to aliens with extraordinary ability who have earned sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation; who seek to enter the United States to continue work in the area of extraordinary ability, and whose entry into the United States will substantially benefit prospectively the United States.

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 must submit evidence that either establishes a one-time achievement (that is, a major, internationally recognized award) or meets 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).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

III. ANALYSIS

As noted above, this decision is limited to the issues that the Petitioner raises in his most recent motion.

A. Motion to Reconsider

The Petitioner contends that his position as [redacted] of the American Bar Association (ABA) satisfies the evidentiary criterion at 8 C.F.R. § 204.5(h)(3)(viii), as it constitutes a leading or critical role for an organization with a distinguished reputation. In our most recent decision, we found that the Petitioner first assumed this position after the petition's filing date, and therefore it could not establish that the Petitioner met the eligibility requirements at the time of filing as required by 8 C.F.R. § 103.2(b)(1).[1]

[1] Evidence from after the filing date can properly be viewed in the context of showing that a given alien *remains* eligible for the benefit sought, but we need not take such evidence into consideration if the record does not show that the alien was *already* eligible at the time of filing.

On motion, the Petitioner acknowledges that his [redacted] began shortly after the petition's filing date, but he asserts that the position should have been considered because "the appointment process started" several months earlier. The regulatory criterion, however, requires "[e]vidence that the alien *has performed* in a leading or critical role for organizations or establishments that have a distinguished reputation." Even if we were to stipulate that his committee position constitutes a leading or critical role, which we do not, the Petitioner was not performing in such a role at the time his application was pending.

The regulation at 8 C.F.R. § 204.5(h)(3)(ix) calls for "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." The Petitioner states that we erred by not giving full consideration to his claimed exemption from the ABA's reimbursement limit. The Petitioner has not established that reimbursement for expenses qualifies as either a salary or remuneration for services.[2] Rather, it is repayment for expenses that the Petitioner incurred while on ABA business. As such, we need not revisit other elements of this claim (such as the lack of supporting evidence that predates the filing of the petition).

The Petitioner states that his "November 20, 2017 motion" included a discussion of his "election to and membership in the 'Fellows of the American Bar Foundation' . . . which recognizes the petitioner as one among one percent of all New York-licensed lawyers." That date corresponds to the Petitioner's 11th motion. We discussed that evidence in a decision dated May 15, 2018. At that time, we stated: "we explained in our most recent decision that since the Petitioner did not become a fellow of the American Bar Foundation until 2016, six years after the filing of his petition for the requested classification, this event cannot be considered in evaluating his eligibility." The Petitioner has provided no persuasive reason to revive this claim several motions later.

The Petitioner asserts that our prior "decision violated petitioner's constitutional rights, with depriving petitioner of constitutionally-protected liberty and property interests." The Petitioner cites 28 U.S.C. § 1331, which gives district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The Petitioner also cites *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

However, like the Board of Immigration Appeals, the Administrative Appeals Office has no jurisdiction to consider Constitutional claims. *See, e.g.*, *Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Even if we were to consider the Petitioner's argument as a procedural due process claim, the Petitioner has not established that any violation of the regulations resulted in prejudice. To bring a successful procedural due process claim, the Petitioner must establish: (1) the deprivation of a constitutionally protected liberty or property interest, and (2) the "denial of adequate procedural protections." *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir.), *cert. denied*, 139 S. Ct. 330 (2018). Furthermore, the Supreme Court has "recognize[d] that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). The regulation at 8 C.F.R. § 103.5 provides the procedures for

[2] Appointment letters from the ABA thank the Petitioner for "volunteering" to serve on the committees and do not indicate that the Petitioner receives any payment for that service. The Petitioner also has not shown that he paid income tax on his reimbursements.

motions to reopen and motions to reconsider and clearly states that we *may* reopen for proper cause shown. The Petitioner has not shown how our adjudication of the prior motion strayed from the regulations or violated a protected right or property interest; general statements about due process rights cannot suffice in this regard.

The Petitioner contends that the prior decision violated his due process rights because we did not "review the record in the aggregate." We already considered the complete record, as it stood at the time, in our initial 21-page appellate decision issued in June 2013. The purpose of a motion, however, is not to "review the record in the aggregate." A motion to reconsider addresses legal error in the prior decision, and a motion to reopen adds new evidence to the record. The Petitioner's filing of 14 motions does not compel 14 top-to-bottom readjudications of the petition based on the entire record.

We have previously observed that the Petitioner's new evidence concerns events and developments that occurred after the initial petition's filing date. These materials are best considered in the context of a new petition, filed after those events took place. The Petitioner observes that "there is also a subsequently-filed EB-1 petition currently pending in petitioner's file" since 2013. The Petitioner asserts: "the record as a whole supports a conclusion that the petitioner's EB-1 petition(s) . . . are approvable." There is no provision for consolidating the two petitions into an aggregate whole, to be considered at one time. The 2013 petition has its own record of proceeding which must be considered independently, on its own merits. *See* 8 C.F.R. § 103.2(b)(1). A petitioner is, of course, free to submit the same supporting evidence with more than one petition.

In our prior decision, we cited *Matter of Katigbak*, 14 I&N Dec. 45 (Reg'l Comm'r 1971), which directly relates to 8 C.F.R. § 103.2(b)(1), cited previously. The Petitioner contends that *Katigbak* "already clarified that the only government purpose behind 8 C.F.R. § 103.2(b)(1) . . . was the 'priority date for visa issuance.'" The Petitioner further asserts: "Both the May 2010 Visa Bulletin and the January 2013 Visa Bulletin indicated that the visa category for [extraordinary ability] was 'current,' and thus the priority date was not an issue or concern at all."

We did not cite *Katigbak* with respect to priority dates. We cited it to support the finding that a petition for a not-yet-eligible alien cannot be prematurely filed in anticipation of the alien becoming eligible at a future date. Our prior motion decision does not refer to the issue of priority dates.

Furthermore, the decision in *Katigbak* refers to priority dates but does not limit the application of 8 C.F.R. § 103.2(b)(1) to backlogged classifications. Rather, the Regional Commissioner stated: "The issue in this case is to determine if the applicant was . . . qualified . . . at the time the petition was filed and eligible for the preference sought." *Id.* at 46. After consideration of the facts, the Regional Commissioner concluded:

> A petition may not be approved for a profession for which the beneficiary is not qualified at the time of its filing. . . .
>
> . . . It is clear that it was the intent of Congress that an alien be . . . fully qualified [for the benefit sought] . . . at the time the petition is filed. Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified

> be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts. To do otherwise would make a farce of the preference system and priorities set up by statute and regulation.

Id. at 49. The full discussion included mention of priority dates, but there is no indication that the priority date was the only consideration in requiring eligibility at the time of filing.

For the above reasons, we find that the Petitioner has not established that our prior decision was incorrect at the time of that decision. As such, the motion does not meet all the requirements of a motion to reconsider, and 8 C.F.R. § 103.5(a)(4) requires dismissal of the motion.

B. Motion to Reopen

The Petitioner submits 36 exhibits on motion, most of them concerning his activities with the ABA after the petition's filing date. As such, they do not establish new facts that are relevant to the underlying question of whether the Petitioner was eligible for the benefit sought at the time of filing. Because there has been no finding that the Petitioner was eligible at the time of filing, we need not consider the relevant but separate question of whether the Petitioner remained eligible after filing.

Two January 2010 email messages from the ABA predate the filing of the petition. Those messages indicated that the deadline for applying for committee positions was January 31, 2010. As noted above, a pending application does not establish a leading or critical role. This evidence would not have affected the outcome of the initial decision if it had been in the record at the time. The Petitioner has not shown proper cause for reopening the proceeding to incorporate this evidence.

For the above reasons, we will dismiss the motion to reopen.

IV. CONCLUSION

Throughout this lengthy proceeding, the Petitioner has presented evidence of professional activity and attainment of a terminal degree as evidence of sustained national or international acclaim. Reaching the highest level of education in his field, however, does not necessarily place him *above* his peers, at the top of his field, and activity with major organizations does not inherently cause, or result from, sustained national or international acclaim. The Petitioner's efforts in this regard after May 2010 are best considered in the context of a new petition rather than the further prolongation of this proceeding.

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration and has not overcome the grounds for dismissal of the prior motion. The motion to reopen and motion to reconsider will be dismissed for the above stated reasons.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.