U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25236619

Date: MAR. 27, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a software engineer, seeks second preference immigrant classification as an advanced degree professional and as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this employment-based, "EB-2" classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established eligibility for EB-2 classification and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We dismissed a subsequent appeal. The matter is now before us on a combined motion to reopen and 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 motions.

I. LAW

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits U.S. Citizenship and Immigration Services' (USCIS) authority to reopen or reconsider to instances where an applicant has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, an applicant must not only meet the formal filing requirements at 8 C.F.R. § 103.5(a)(1)(iii) (such as submission of a properly completed and signed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. Specifically, 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 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. § 103.5(a)(3).

II. ANALYSIS

The issue before us is whether the Petitioner has presented new facts to warrant reopening his appeal and/or established that our decision to dismiss his appeal was based on an incorrect application of law

or USCIS policy. The Petitioner must specify the factual and legal issues raised on appeal that were decided in error or overlooked in our initial decision.

A. AAO Decision

In dismissing the Petitioner's appeal, we noted that although the Petitioner initially claimed that he possessed a foreign equivalent of a United States baccalaureate degree, along with five years of progressive post-baccalaureate experience in the specialty, the Petitioner did not contest the Director's determination that the presented evidence did not demonstrate the Petitioner's possession of an advanced degree, either in response to the Director's request for evidence (RFE) or on appeal. Therefore, we deemed this issue to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009); *see also Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived).

Regarding his alternative claim that he meets at least three of the regulatory criteria for classification as an individual of exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F), we noted that the Director denied the petition, concluding that although the Petitioner satisfied at least three of those criteria, he did not demonstrate that he possessed a degree of expertise significantly above that ordinarily encountered. On appeal, we evaluated the evidence submitted in support of the five claimed evidentiary criteria and agreed with the Director's determination that the Petitioner fulfilled two of them, official academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A) and ten years of full-time experience at 8 C.F.R. § 204.5(k)(3)(ii)(B). We did not agree with the Director's finding relating to 8 C.F.R. § 204.5(k)(3)(ii)(E), and we determined the record did not show that the Petitioner meets the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) or 8 C.F.R. § 204.5(k)(3)(ii)(F). As the Petitioner did not establish that he meets at least three of the criteria, our prior decision noted that we need not provide a final merits determination to evaluate whether the Petitioner has achieved the level of expertise required for exceptional ability classification,[1] or reach a decision on whether, as a matter of discretion, he is eligible for, or otherwise merits, a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserved those issues.[2]

B. Motion to Reconsider

On motion, the Petitioner asserts that we misapplied law and USCIS policy to the facts presented in determining whether the Petitioner qualifies as a member of the professions holding an advanced degree, and did not give sufficient weight to reference letters and other relevant evidence submitted in support of the petition in evaluating the Petitioner's claims made under the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). We address his specific claims below.[3]

[1] See 6 USCIS Policy Manual, supra, at F.5(B)(2).

[2] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, n.7 (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).

[3] On motion, the Petitioner does not contest our determinations that he did not submit evidence that satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) and did not claim eligibility for the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). Therefore, we deem these issues to be waived. *See M-A-S-*, 24 I&N Dec. at 767 n.2; *see also Rizk,* 629 F.3d at 1091 n.3.

1. Member of the Professions Holding an Advanced Degree

On motion, the Petitioner asserts that he possesses a foreign equivalent of a U.S. baccalaureate degree, along with five years of progressive post-baccalaureate experience in the specialty. First, we note that the Petitioner does not acknowledge, as discussed above, that our appellate decision did not address this uncontested ground on appeal as we deemed it to be waived. The Petitioner has not demonstrated that we incorrectly applied the law or USCIS policy by declining to address an issue that was not raised on appeal. *See M-A-S-*, 24 I&N Dec. at 767 n.2; *see also Rizk,* 629 F.3d at 1091 n.3.

2. Individual of Exceptional Ability

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F).

On motion, the Petitioner argues that our appellate decision did not address his assertion on appeal "that he also met a fourth criterion — specifically, having been recognized for significant achievements and contributions to his field, by peers, organizations, or the government." Our decision reflects that we did not disregard the Petitioner's argument. Rather, we acknowledged his contention that the evidence "satisfied the applicable burden of proof, demonstrating by a preponderance of the evidence that [he] achieved such recognition and rendered vital contributions in his field."

Further, we considered and discussed the letters and article submitted in support of the petition and determined that they lacked the type of information needed to reach a favorable determination with respect to this criterion. Specifically, we found that although the letters praised the Petitioner for his professional abilities, they do not indicate how he has been recognized for his achievements, nor do they explain how his contributions rise to the level of "significant" consistent with this regulation.

For instance, we noted that a letter from [redacted], project manager at [redacted], and an article from sun-sentinel.com, show that [redacted] was selected for [redacted] program, rather than recognition of the Petitioner's achievements and significant contributions. In addition, we found that letters from [redacted], former employee of [redacted] credit the Petitioner for developing [redacted] but they do not further elaborate and sufficiently explain how [redacted] qualifies as a "significant contribution [] to the industry or field."

We emphasized that this regulatory criterion not only requires the Petitioner to demonstrate contributions to the industry or field but that those contributions be "significant," and noted that in this case the Petitioner did not establish the impact of [redacted] to the field rather than limited to [redacted]. The Petitioner also referenced a letter from [redacted], adjunct professor at the University of [redacted] who, while he summarized documentation presented to him by the Petitioner, does not explain how the Petitioner has received recognition for his achievements and made significant contributions to the field or industry, rather than repeating the Petitioner's employment history.

Similarly, we determined that letters from additional co-workers of the Petitioner do not satisfy this regulatory criterion. For instance, we noted that letters from, [redacted]

[redacted] respectively, indicated that the Petitioner "made the company increase their business as well distribute and make mobile the sales process, improving its revenue;" "helped bolster the creativity and technical tact of our IT management team;" and was "a professor at the [redacted] College on a part time basis" and "[a]lthough he worked as a software engineer for [redacted], he still made his time available to teach and share with youth who dreamed of entering the computer science profession." We determined that the above letters do not show how his contributions have somehow impacted or influenced the field or industry in a significant manner beyond his employers. We concluded that without detailed, probative information, the letters do not sufficiently demonstrate his recognition for achievements and significant contributions to the industry or field.

The Petitioner's brief in support of the motion to reconsider does not clearly address our specific reasons for determining that he did not meet this criterion or point to any particular evidence submitted in support of the criterion that we overlooked. Instead, it quotes extensively from the Petitioner's appellate brief regarding his arguments in support of this criterion. As discussed, our previous decision fully addressed those arguments and evidence. For these reasons, the Petitioner has not established that we made an incorrect determination with respect to this criterion.

Because he has not established that our prior decision was based on an incorrect application of law or policy, the Petitioner has not met the requirements for a motion to reconsider. As a result, we will dismiss the motion to reconsider.

C. Motion to Reopen

1. Individual of Exceptional Ability

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

In support of his motion to reopen, the Petitioner reasserts eligibility under this criterion based on his membership in [redacted] and for the first time claims eligibility through membership in two additional organizations, [redacted] He submits new exhibits regarding those organizations. Upon review, the evidence does not support the regulatory requirements.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations."[4] We determined that, although the Director concluded that the Petitioner met this criterion based on his membership with [redacted] the record did not support the regulatory requirements. We noted that in response to the Director's RFE, the Petitioner indicated his membership and stated that [redacted] is a global nonprofit member organization dedicated to promoting the concepts of [redacted] We acknowledged that the Petitioner also submitted screenshots from [redacted] org showing his membership status and background information about the organization, in which [redacted] describes itself as "a nonprofit member

[4] *See also* 6 *USCIS Policy Manual*, supra, at F.5(B)(2).

organization dedicated to promoting the concepts of [redacted] Software Development as outlined in the [redacted]

Moreover, the screenshots provided that [redacted] is a mindset informed by the values contained in the [redacted] and the 12 Principles behind the [redacted] and "[t]he [redacted] and the 12 Principles were written by a group of software developers (and a tester) to address issues that software developers faced." We determined that although the screenshots indicate that [redacted] promotes its software and principles, the Petitioner did not explain how this evidence demonstrates the professional status of the organization. The record does not show that [redacted] has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organizations otherwise constitute professional associations consistent with this regulatory criterion.[5]

On motion, the Petitioner claims that the professional status of the organization is demonstrated by the fact that the organization "includes members of all expertise levels, including many experts and other professional [redacted] technology practitioners, including software engineers and developers . . . ." He submits screenshots from [redacted] org showing the resumes of its interim managing director, global member engagement ambassador, and Community Developer for [redacted] two of whom possess a U.S. bachelor's degree or a foreign equivalent. He also provides an article about the organization from [redacted] .com which, like the screenshots we previously considered from [redacted] org, states that its philosophy is outlined in the [redacted] of "4 values and 12 principles." The Petitioner does not detail how this additional evidence shows that [redacted] has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or a foreign equivalent degree, or that the organization otherwise constitutes a professional association consistent with this regulatory criterion. The new exhibits do not overcome the conclusions we reached when we applied the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) to the facts presented.

With respect to [redacted] the Petitioner submitted evidence from [redacted] .org of his membership at the "Professional Membership" level, the association's bylaws, and background information about the organization indicating its mission is "to raise awareness of computing's important technical, educational and social issues around the world" through "860 professional and student chapters worldwide." The [redacted] Bylaws indicate that "[a] candidate for Professional Membership must have a bachelor's degree or equivalent level of education from an accredited educational institution *or at least two full-time years of experience in the arts and sciences of information processing or associated fields.*" (emphasis added.) The bylaws also describe other membership levels that do not require that a candidate possess at least a bachelor's degree. For instance, a candidate for "New Professional Member" may include those who are "a former [redacted] student member (with a Bachelor, Associate or equivalent degree)," while "a candidate for student membership must be registered full-time in an accredited four- or two-year educational institution, High School or equivalent." This additional evidence does not show that [redacted] has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or a foreign equivalent degree, or that the organization otherwise constitutes a professional association consistent with this regulatory criterion.

[5] The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation."

Regarding [redacted] we note that the record indicates the Petitioner worked for the organization part-time as a professor between March 2006 and July 2015. The record does not establish that the Petitioner continued to be a member of [redacted] at the time he filed the petition in July 2019. A petitioner must establish eligibility for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). Because the record does not establish that the Petitioner continued to be a member of [redacted] at the time of filing, it does not establish his eligibility under this criterion. Nonetheless, information about [redacted] from [redacted] indicates its mission is to "[e]ducate for work in activities of trade in goods, services and tourism" through "professional improvement" courses and technician training courses. Although this additional evidence indicates that [redacted] provides vocational training in the business sector, the Petitioner did not explain how it demonstrates the professional status of the organization.

Finally, the Petitioner submits his [redacted] certificate and information about the [redacted] framework, the role of [redacted] and the different levels of [redacted] certification, as evidence for our consideration under this criterion. The Petitioner has not provided sufficient evidence to establish the relevance and significance of his [redacted] certification. It appears this certification involves a two-day course. The documentation provided does not indicate that [redacted] certification is evidence of membership in a professional association, as the record does not demonstrate the required professional qualifications, if any, for that certification.

For the reasons discussed, the Petitioner's newly submitted evidence does not establish proper grounds for reopening. Therefore, we will dismiss the motion to reopen.

III. CONCLUSION

The Petitioner has not shown that we erred as a matter of law or USCIS policy in our prior decision, nor has he established new facts that would warrant reopening of the proceedings. Consequently, we have no basis for reconsideration or reopening of our appellate decision. The Petitioner's appeal therefore remains dismissed, and his underlying petition remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.