U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35941781

Date: FEB. 07, 2025

Motion on Administrative Appeals Office Decision

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

The Petitioner, a pianist, 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, concluding that the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. We dismissed a subsequent appeal. The matter is now before us on 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 motion.

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 these requirements and demonstrate eligibility for the requested benefit.

On motion, the Petitioner contests the correctness of our prior decision. He argues that we "did not apply the correct evidentiary standard," did not properly consider the submitted evidence, "unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations," and did not consider his "submission in its entirety."

The Petitioner asserts that we "applied a stricter standard of proof than permissible when evaluating the evidence of record." Except where a different standard is specified by law, a petitioner must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-76. Under the preponderance of the evidence standard, the evidence must demonstrate that a petitioner's claim is "probably true." *Id*. at 376. Here, the Petitioner expresses

disagreement with our findings regarding the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(iii), (vii), (viii), but he does not demonstrate how our specific conclusions applied a stricter standard of proof.

With respect to published material about the Petitioner in professional or major media submitted for the criterion at 8 C.F.R. § 204.5(h)(3)(iii), he contends that his articles were not properly "analyzed under the correct evidentiary standard." The Petitioner points to an article published in *Caretas* in 1985, when he was eight years old. The article stated that the Petitioner gave a well-received performance at a municipal auditorium in [redacted] Peru. Our appellate decision stated that "neither the article nor its English translation includes the required author credit." *See* 8 C.F.R. § 204.5(h)(3)(iii) (stating that "evidence shall include the title, date, and author of the material." In addition, the Petitioner mentions an excerpt from a 1991 report called *Latin American Journalism*, which called *Caretas* a "major publication[] in Peru" and "a national weekly." We noted, however, that the report cited no source for the assertion, and the Petitioner did not otherwise establish that the report is, itself, a sufficiently authoritative source to serve as primary evidence that *Caretas* is a major publication. Further, we agreed with the Director that the Petitioner had not submitted circulation data for *Caretas* or the other publications where the published material appeared. The Petitioner's motion does not demonstrate how our analysis of the evidence relating to *Caretas* was erroneous.

The Petitioner also argues that we did not address a [redacted] 2023 article about him in *Bloom Tampa Bay* provided in response to the Director's request for evidence.[1] This article, however, postdates the filing of the petition.[2] In our appellate decision, we explained that eligibility must be established at the time of filing. *See* 8 C.F.R. § 103.2(b)(1) (stating that a petitioner must establish that they are "eligible for the requested benefit at the time of filing the benefit request"). In addition, the regulation at 8 C.F.R. § 103.2(b)(12) provides that "[a] benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed." Subsequent developments cannot retroactively cause the Petitioner to have been eligible at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The Petitioner's motion does not establish that our statements relating to the material in *Bloom Tampa Bay* and *Caretas* were based on an incorrect application of law or policy, or that they were incorrect based on the evidence in the record.

Regarding our findings under the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii), the Petitioner states that the letters of support he submitted "were analyzed under the wrong evidentiary standard of proof." The Petitioner offers one example quoting at length from the letter from the director of the Music Program at [redacted] As explained in our appellate decision, the information in this letter does not demonstrate the Petitioner's leading or critical role. For example, the assertion that the Petitioner "met and exceeded the standards required by our school" attests to the quality of the Petitioner's work, which is not the same as a leading or critical role. The quoted passage ends with the sentence: "Thanks to his commitment, love and passion for this kind of teaching we are able to demonstrate that we are an inclusive univer[s]ity." We noted in our decision that this general praise for the Petitioner's dedication to his work did not point to a specific role or show how it was leading or critical for [redacted] The Petitioner has not established that our analysis of the director's letter or of the other evidence submitted for this criterion applied an incorrect evidentiary standard or was otherwise in error.

[1] The Petitioner has not provided circulation evidence indicating that *Bloom Tampa Bay* qualifies as a form of major media.
[2] The Petitioner filed the Form I-140 petition in June 2022.

With regard to the artistic display criterion at 8 C.F.R. § 204.5(h)(3)(vii), the Petitioner indicates on motion that he presented evidence of his music performances in Peru, Guatemala, Canada, and the United States. The Petitioner, however, did not claim to have satisfied this criterion until he filed the appeal. We explained in our appellate decision that the purpose of an appeal is to identify, specifically, erroneous conclusions of law or statements of fact. *See* 8 C.F.R. § 103.3(a)(1)(v). Because the Petitioner had never previously claimed to have satisfied the criterion at 8 C.F.R. § 204.5(h)(3)(vii), the Director did not discuss the criterion in the denial notice and cannot have erred with respect to it. The Petitioner has not demonstrated that our determination on this issue was in error.

Even if the Petitioner had claimed this criterion before the Director denied the petition, which he did not, the Petitioner has not shown that he meets at least two other criteria, and therefore discussion of the criterion at 8 C.F.R. § 204.5(h)(3)(vii) would not change the outcome of this proceeding. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam) (holding that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision). Here, the Petitioner has not shown that we erred in concluding he did not satisfy at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).[3] Accordingly, a final merits determination in this matter is unnecessary.

The Petitioner argues on motion that we should have provided a final merits determination and concluded that he "is one of that small percentage who has risen to the top of their field of endeavor and has sustained national or international acclaim." Our appellate decision advised that we reviewed the record in the aggregate and concluded that it did not support a determination that the Petitioner has established the acclaim and recognition required for the classification sought. We stated:

> We acknowledge the Petitioner's submission of letters and promotional materials calling him "world renowned," but these materials are not sufficient evidence that the Petitioner has, in fact, earned such a level of acclaim. The Petitioner has documented a small number of concert performances, but has not established that these performances have received the attention typically afforded to appearances by acclaimed musicians at the top of the field. We also acknowledge the 1991 report calling *Caretas* a major publication, but the Petitioner was eight years old when the article appeared in that magazine, with no indication that he had performed or earned recognition outside of [redacted]. The subsequent media coverage documented in the record appears to be predominantly local, and the employment prospects documented in the record involve restaurants and a training center. Letters in the record include high praise for the Petitioner's skills as a pianist, but the record does not establish the national or international acclaim that the statute demands.

The Petitioner's motion does not specifically address these statements or establish that we erred as a matter of law or USCIS policy in determining the totality of the evidence did not show that he has sustained national or international acclaim and that he is among the small percentage at the very top

[3] Once a petitioner has met these initial evidence requirements, the next step is a final merits determination, in which we 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) (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).

of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). Considering the petition in its entirety and the Petitioner's arguments on motion, we conclude that the record, including the evidence discussed above, does not establish the Petitioner's eligibility for the benefit sought.

The Petitioner has not established that our appellate 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 no basis for reconsideration of our decision. Accordingly, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4). The Petitioner's appeal therefore remains dismissed, and his underlying petition remains denied.

ORDER: The motion to reconsider is dismissed.