U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33767713

Date: SEP. 10, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a financial analyst, seeks classification seeks second preference immigrant classification (EB-2) as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.[1]

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not qualify for the underlying EB-2 classification as an individual of exceptional ability and did not merit a discretionary waiver of the job offer requirement, and thus a labor certification, under the analytical framework in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). We dismissed a subsequent appeal and a combined motion to reopen and reconsider, concluding that the Petitioner did not establish his eligibility for the EB-2 classification as an individual of exceptional ability.[2] The matter is now before us on a second combined motion 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 motion.

I. LAW

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). 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.

[1] *See also Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Third, Ninth, Eleventh, and D.C. Circuit Courts to conclude the national interest waiver determination is discretionary in nature).

[2] *See* In Re: 27674457 (AAO Sept. 13, 2023) and In Re: 30708335 (AAO Apr. 15, 2024).

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

But meeting at least three criteria 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.

II. ANALYSIS

On motion, the Petitioner claims that he disagrees with our prior decision and submits "pertinent facts and new evidence" regarding his eligibility for EB-2 classification as an individual of exceptional ability. In evaluating the new evidence and claims of error under each criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F), we conclude that the Petitioner's submission of new facts or evidence on motion does not establish his qualification for the EB-2 classification and warrant reopening of the proceeding. We further conclude that although we reconsider and withdraw our prior decision's determination under the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), the Petitioner still has not demonstrated that our prior decision was based on an incorrect application of law or policy for the remaining criteria. Therefore, the Petitioner still has not satisfied the threshold requirement of meeting three of the six categories as an individual of exceptional ability, as discussed below.

1. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A)

The Petitioner has the burden of showing by a preponderance of the evidence that his Titulo de Tecnólogo (Title of Technologist) diploma in system analysis and development is related to his claimed area of exceptional ability as a financial analyst. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner does not provide any new evidence or assert new facts on this issue. Instead, the Petitioner contends through his counsel that his "extensive knowledge in system analysis and development has been fundamental to his proficiency in utilizing advanced tools for financial data analysis." However, counsel's unsubstantiated assertions do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) (stating that "statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). As the Petitioner does not submit new evidence on motion to satisfy this criterion or assert that our prior decision was based on incorrect application of law or policy, we affirm our previous determination that the Petitioner has not met this criterion.

2. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B)

In our prior decision, we concluded that the Petitioner did not meet his burden of proof in demonstrating that he had at least ten years of full-time experience in the occupation for which he is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B). On second motion, the Petitioner contends that his employment at [redacted] from 2000 to 2019 in various positions (bank technician, bank branch treasurer, pledge appraiser, relationship manager, general manager) meets this criterion. The Petitioner explains that [redacted] is a large financial institution in Brazil and the duties performed during his employment are similar to duties of a financial analyst or a financial manager described in the Department of Labor's Occupational Information Network (O*NET). The Petitioner offers the following new documents on motion: an article discussing competitiveness in applying for jobs at [redacted] O*NET online documents describing duties of a financial analyst/manager; and a list of duties performed by a general manager/relationship manager at [redacted]

In comparing the Petitioner's duties at [redacted] and the descriptions of a financial analyst/manager in O*NET, we determine that they have similarities and commonalities, such as providing financial advice on investments and credit alternatives, maintaining financial accounts and records, and analyzing financial portfolios and market trends, overseeing sales of bank products such as loans, insurance, credit cards, checking and savings accounts.[3] Therefore, we conclude that the Petitioner has met this criterion under the preponderance of evidence standard.

3. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C)

We previously concluded that the Petitioner's "CPA-10" certification from ANBIMA (the Brazilian Association of Financial and Capital Market Entities) did not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). Specifically, we determined that the evidence did not show that such certification from ANBIMA indicated "governmental approval to practice as a financial analyst or that the

[3] We are cognizant that some descriptions of his duties during his employment at [redacted] as a new banking technician and a general manager correspond to duties of a general customer service position, but there are enough overlapping duties similar to those performed by a financial analyst and/or a financial manager.

certification was necessary to do the job." We also noted that the standards for obtaining "CPA-10" certification were ambiguous as the certification was open to students. The Petitioner contends that we "impose[d] novel requirements beyond those set forth in the regulation."[4]

We acknowledge that the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(c) does not require the Petitioner to demonstrate that the licensing or certification must come from a government entity or precludes students from earning such license or certification. Therefore, we withdraw our prior decision's statements on this issue. However, the Petitioner still has not demonstrated that a license or certification is required or necessary to practice his profession or occupation. The Petitioner submits on motion the bylaws of ANBIMA, a trade organization in Brazil representing institutions in the financial and capital markets. The bylaws demonstrate that ANBIMA's mission is to provide technical and legal assistance to its members in the matters of financial and capital markets, defining self-regulations codes, establishing ethical principles, and offering educational programs. However, the bylaws do not discuss the specific "CPA-10" certification as a requirement to practice the profession or occupation. Therefore, the record does not indicate the Petitioner is required to obtain this CPA-10 certification in order to practice his profession or occupation and we conclude that he has not met this criterion.

4. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D)

We affirm our prior decision that the Petitioner has not met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) of commanding a salary or other remuneration for services which demonstrates exceptional ability. On motion, the Petitioner does not provide new evidence but claims our prior decision erred because instead of evaluating whether his salary was sufficient to demonstrate that he has commanded a high salary, we focused on incompatibility of comparing a financial analyst's salary to a general manager's salary. The Petitioner's claims are unpersuasive as the regulation requires not only showing of commanding a high salary, but that the high salary is a result of one's exceptional ability. Here, the record does not reflect that the Petitioner's salary was a direct result of his exceptional ability, either as a general manager or as a financial analyst. Therefore, the Petitioner has not met this criterion.

5. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E)

The Petitioner has claimed that his membership in the Trade Union of Employees in Bank and Financial Establishments ("Trade Union") meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E). We concluded that the record did not contain sufficient evidence of the Trade Union's composition to evaluate whether it was a professional association and therefore, the Petitioner did not meet this criterion.

On motion, the Petitioner contends that the Trade Union is a professional organization as its bylaws contain the following language: "[the Trade Union] is constituted for the purpose of defending and legally representing the professional category of employees in bank establishments . . . aiming at

[4] The Petitioner reasons that although the criterion requires a license or certification to practice the profession, such license or certification may not require "a previous degree" which would allow a student to obtain a certification and "a bus driver [to acquire] a commercial driver's license."

improving the living and working conditions of its members, the independence and autonomy of union representation, as well as the expansion of social, economic, and political democracy in Brazil." However, the mere use of word "professional" in the translated version of the Trade Union's bylaws does not automatically establish that the Trade Union is a professional association, as required by the regulation. We note that the term "profession" is defined at 8 C.F.R. § 204.5(k)(2) as "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The Petitioner has not shown that his occupation requires a U.S. bachelor's degree or foreign equivalent or cited to any membership requirements in the bylaws requiring that a bachelor's degrees for the members. Consequently, the record does not sufficiently establish the Trade Union as a professional association as contemplated in the regulations, and we conclude the Petitioner has not met this criterion despite the submission of the new evidence. Furthermore, the Petitioner does not raise any claims of error by our prior decision based on incorrect application of law or policy.

6. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F)

Although the Petitioner submitted recommendation letters from his work colleagues or his workplace certificates and awards, we previously concluded that such evidence only demonstrate recognition for his performance by his previous employer, instead of showing the Petitioner's achievement or significant contributions and expertise significantly above that ordinarily encountered in the field of financial analysis. On motion, the Petitioner does not submit any new evidence for this criterion or contend that our prior decision erred as a matter of law. As the Petitioner has not met the requirements of a motion to reopen or a motion to reconsider, we affirm our prior decision that he has not met this criterion.

III. CONCLUSION

Based on the foregoing, we conclude that the Petitioner's submission of additional evidence in support of the motion to reopen does not establish his eligibility. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the combined motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.