U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23671992

Date: FEB. 1, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a software developer, seeks second preference immigrant classification as a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or businesses, as well as a national interest waiver of the job offer requirement attached to this 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 Nebraska Service Center denied the petition, concluding that the Petitioner did not show that he qualifies for classification as an individual of exceptional ability or 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, concluding that the record did not establish the Petitioner qualifies as either a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts, or business. We also dismissed the combined motion to reopen and motion to reconsider on the same grounds. The matter is now before us again on a combined motion to reopen and 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.

A motion to reopen must state new facts 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; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). Further, the review of any motion is narrowed to the basis for the prior adverse decision. Accordingly, we will examine any new facts and arguments to the extent that they pertain to our most recent decision, the dismissal of the prior combined motion to reopen and motion to reconsider.

On motion, the Petitioner submits a printout from SalaryExpert.com dated July 2022 as new evidence. The Petitioner contends that this wage survey shows that his annual income from 2018 and 2019 was greater than the average salary for software developers in Brazil and, thus, he meets the criterion at

8 C.F.R. § 204.5(k)(3)(ii)(D). To satisfy this criterion, however, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of his claimed exceptional ability relative to others in his occupation.

As noted in our prior decision, a petitioner must establish eligibility at the time of filing a visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Here, the wage survey from SalaryExpert.com is from July 2022 and, therefore, does not establish that, at the time the underlying petition was filed in 2019, the Petitioner commanded a salary or remuneration for services developing software that is indicative of his claimed exceptional ability relative to others in his occupation. Further, and as detailed by the Petitioner, his monthly guaranteed salary also reflects his role as owner of the company. The information from SalaryExpert.com is limited to the salary of a software developer, and therefore, the Petitioner has not established that it is an appropriate basis for comparison.

In light of the above, the Petitioner has not provided documentary evidence of new facts to establish his eligibility, and thus, we will dismiss the motion to reopen. Similarly, the Petitioner has also not demonstrated that we erred in our consideration of the submitted evidence regarding his salary.

In addition, the Petitioner asserts that we misunderstood the educational credential evaluation. However, the Petitioner has not established that he holds any degree that is the foreign equivalent of a U.S. baccalaureate degree. As explained by the evaluator, the *Grau de Tecnólogo* is equivalent to three years of undergraduate study and the *Lato Sensu* certificate is equivalent to one- and one-half years of graduate study. The evaluation specifically states that when his graduate studies are "taken with" the three years of university study, it is equivalent to a U.S. bachelor's degree in computer science with an additional major in project management. The regulation at 8 C.F.R. § 204.5(k)(2) contemplates a *singular* degree, whether a U.S. degree or a foreign degree equivalent to a U.S. degree.

The Petitioner has not established that we misapplied law or policy and that our prior decision was incorrect based on the evidence in the record of proceedings at the time of the decision. Thus, we will also dismiss the motion to reconsider.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.