U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30708335

Date: APR. 15, 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 as a member of the professions holding an advanced degree or of exceptional ability, Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this employment based second preference (EB-2) classification. See section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). 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 establish that he qualified for classification as an individual of exceptional ability and a discretionary waiver of the job offer requirement, and thus a labor certification, upon application of the analytical framework we announced in Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016).[2] We dismissed a subsequent appeal concluding that the Petitioner had not demonstrated he was a noncitizen of exceptional ability. See In Re: 27674457 (AAO Sept. 13, 2023). The matter is now before us on combined motions to reopen and reconsider. The Petitioner argues that we failed "to consider relevant evidence or provide factual [sic] accurate analysis" and that our decision was "incorrect." Aside from a brief by counsel, no new evidence was submitted.

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[1] See also Flores v. Garland, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[2] The Director concluded that the Petitioner's proposed endeavor has substantial merit but that he had not demonstrated the national importance of his endeavor, that he was well positioned to advance his endeavor, or that on balance it would be beneficial to the United States to waive the requirements of a job offer, and thus of a labor certification. In our dismissal of the Petitioner's appeal, we reserved our decision on these issues. As we need not reach a decision on whether, as a matter of discretion, the Petitioner is eligible for or otherwise merits a national interest waiver under the Dhanasar analytical framework, we hereby reserve these issues. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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 to reopen because the motion does not meet applicable requirements. Further, we will dismiss the motion to reconsider because the motion does not demonstrate our misapplication of law or policy, or the Petitioner's eligibility for the requested benefit.

I. MOTION TO REOPEN

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). 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. See Matter of Coelho, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

On motion, the Petitioner submits a brief from counsel. The Petitioner's motion to reopen does not state new facts and does not include new documentary evidence. See 8 C.F.R. 103.5(a)(2). Because the motion does not meet the applicable regulatory requirements, we must dismiss it. See 8 C.F.R. 103.5(a)(4).

II. MOTION TO RECONSIDER

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.

On motion, the Petitioner contests the correctness of our prior decision where following our de novo review, we concluded that the Petitioner had not demonstrated that he met any of the criteria requisite to show exceptional ability for EB-2 classification.[3] The Petitioner contends that we "erred in determining that Petitioner had not established the criteria required for a EB2-NIW petition by an erroneous conclusion of law and misconception of Matter of Dhanasar." The Petitioner asserts that we "imposed novel substantive requirements beyond those set forth at 8 CFR 204.5." Next, the Petitioner contends that we dismissed his appeal "due to a failure to consider relevant evidence or provide factual accurate [sic] analysis." Finally, the Petitioner states that "an officer may not exercise discretion arbitrarily, inconsistently, or in reliance on bias or assumptions."

Regarding the assertion that we denied the Petitioner's appeal based on "personal biases," the Petitioner does not adequately explain how the decision constitutes, or analysis of the different relevant regulatory criteria constitute personal bias. Accordingly, we cannot address this argument further.

[3] The Director of the Texas Service Center concluded that the Petitioner had met four of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). However, the Director concluded that the Petitioner had not demonstrated that he was a noncitizen of exceptional ability in the final merits analysis.

Next, the Petitioner argues that we failed to consider relevant evidence or provide an accurate analysis. We disagree. In the section titled "Analysis," we provided a thorough review of the Petitioner's eligibility for EB-2 classification under the regulatory framework. Specifically, we reviewed the Petitioner's eligibility for classification as a noncitizen of exceptional ability using the criteria found at 8 C.F.R. § 204.5(k)(3)(ii).

We addressed why the Petitioner had not established that he had earned a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning related to financial analysis. We determined that the Petitioner had not demonstrated that his Titulo de Tecnólogo (Title of Technologist) diploma was related to his area of exceptional ability as it was in the field of system analysis and development. The evidence in the record did not demonstrate the relationship between the fields. The Petitioner argues that his Title of Technologist diploma "not only relates to his field of work, but it also sets him apart from other professionals and makes him exceptional." The Petitioner has the burden of showing by a preponderance of the evidence that his diploma in system analysis is related to his claimed area of exceptional ability. See 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner quotes his former attorney's assertions in an attempt to demonstrate the required relationship between his diploma and his claimed area of exceptional ability. However, counsel's unsubstantiated assertions do not constitute evidence.[4] The Petitioner did not submit any additional evidence on motion to overcome this issue. Thus, the Petitioner did not meet this requirement.

We reviewed the evidence and addressed why the Petitioner had not established that he had at least ten years of full-time experience in the occupation. The Petitioner submitted an employment verification letter and statement from their prior employer. We concluded that the Petitioner had not met his burden of proof. While the evidence showed that the Petitioner had ten years of experience, that experience was not exclusively in the occupation of financial analyst. Because the Petitioner's work experience did not show that his prior experience related to his planned employment as a financial analyst, we concluded that he had not met this criterion. The Petitioner argues on motion that we "failed to clarify the position of financial analyst." However, the burden of production is always the Petitioner's. See Matter of Chawathe, 25 I&N Dec. at 375-76. Further, the Petitioner argues that it is "undisputed that [he] has at least 10 years of full-time experience in the field." While the evidence in the record does show that the Petitioner has over 10 years of experience, that evidence does not demonstrate that his experience was in the occupation being sought. For instance, experience gained as a banking technician and as a general manager is substantially different than experience gained as a financial analyst contrary to what the Petitioner argues. As the Petitioner has not put forward sufficient evidence to demonstrate that his prior employment related to his planned employment as a financial analyst, we cannot conclude that he has shown eligibility under this criterion.

Concerning evidence of a license to practice the profession or certification for a particular profession or occupation, we concluded that the Petitioner had not demonstrated that the "CPA-10" certification from ANBIMA (the Brazilian Association of Financial and Capital Market Entities) he submitted was either a license or sufficient certification under the regulation. The evidence did not show that ANBIMA exercised authority over the financial analyst occupation. Further, the record also did not

[4] See, e.g., Matter of S-M-, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

show that ANBIMA was related to financial analysis occupations. We concluded that the Petitioner had not met this criterion as he did not put forward sufficient evidence to demonstrate his eligibility.[5]

On motion, the Petitioner through counsel asserts that we "arbitrarily understand[] that a Finance Certificate is not related to the Financial field."[6] Further, the Petitioner argues that "the Certificate tells for itself that it is an award for Financial and Capital Market Entities." We are not so persuaded. As noted in our decision, the record did not establish that the certificate indicated governmental approval to practice as a financial analyst or that the certification was necessary to do the job. We noted that it appeared the certification was open to students and the standard for obtaining the certification were ambiguous. Therefore, it was not clear the certification met the regulatory requirements. See 8 C.F.R. § 204.5(k)(3)(ii)(c) requiring "A license to practice the profession or certification for the profession or occupation." On motion, the Petitioner does not address our concern that students could obtain the proffered certification. Likewise, the Petitioner does not address the requirements to obtain the CPA-10 certification besides noting that an "examination with an approval rate of at 70%" is required. The evidence in the record does not establish that we erred.

Next, we examined the Petitioner's claim that he has commanded a high salary, or other remuneration for services, which demonstrates exceptional ability. Upon review of the Petitioner's proof of income from his previous employment, we concluded that he had not established that his salary or remuneration was at the level commensurate for a noncitizen of exceptional ability. We concluded that the Petitioner had not put forward evidence that allowed us to adequately compare the salary or remuneration of a financial analyst of exceptional ability with that of an average financial analyst. On motion, the Petitioner asserts that he "chose to use the occupation of general manager as a reference point...because the role of a financial analyst is a subset of the responsibilities and duties of a manager." We conclude this argument is unavailing as the two positions are not equivalent. According to O*Net Online, a general's manager's main duties are to "[p]lan, direct, or coordinate operations...overseeing multiple departments or location." Contrarily, O*Net Online states that a financial analyst's main duties are to "[c]onduct quantitative analysis of information involving programs or financial data...including valuation of businesses." A general manager's duties are too general compared to those of a financial analyst for use as a comparison. For that reason, the Petitioner's argument is not persuasive.

The Petitioner submitted evidence that he held membership in associations. Specifically, the Petitioner introduced evidence indicating that he was a member of the Trade Union of Employees in Bank and Financial Establishments ("Trade Union"). We found that such membership was insufficient under the regulation to show membership in a professional association. We reasoned that the record did not contain sufficient evidence of the Trade Union's composition for us to conclude that it was a professional association. Thus, we concluded the Petitioner did not meet this criterion. On motion, the Petitioner contends that our conclusion that the Petitioner's Trade Union membership was not of

[5] On motion, the Petitioner through counsel argues that we did not consider a "Mortgage Loan Originator License" that he argues is "totally aligned with his field." However, this argument fails for the same reason as the "CPA-10" certificate because the record does not establish how a mortgage loan originator license is related to the occupation of a financial analyst and the claimed field of exceptional ability.

[6] Counsel's unsubstantiated assertions do not constitute evidence. See, e.g., Matter of S-M-, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

the type that shows membership in a professional association was "ultra vires."[7] The regulatory criteria require, "Proof of membership in professional associations." 8 C.F.R. § 204.5(k)(3)(ii)(E). The Petitioner's argument that an "association formed by employees in bank and financial establishments…is a professional association" is unavailing. The Petitioner does not show how the Trade Union's membership is comprised of professionals. On motion, the Petitioner did not submit membership criteria to further explain the membership structure. Even if we concluded that the Petitioner had demonstrated his membership, he still would not have met three of the requisite criteria to reach an initial threshold determination prior to the final merits determination.

Finally, with regard to evidence of recognition of achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations, we concluded that the Petitioner did not submit sufficient evidence to demonstrate his eligibility under this criterion. The Petitioner submitted letters, certificates, and a picture of an award in attempt to show that he met this criterion. However, we concluded that although the letters contained complimentary statements about the Petitioner's performance in past jobs, the statements did not correspond to the Petitioner having expertise as a financial analyst above that ordinarily encountered. We note that the certificates and awards that the Petitioner submitted do not sufficiently indicate how the Petitioner is of exceptional ability or how they amount to being "significant" under the regulation.

On motion, the Petitioner argues that it "is indisputable that [the Petitioner's] records exhibit his exceptional expertise in the financial industry." While we again note the complimentary statements, the evidence does not rise to, and on motion, the Petitioner has not demonstrated that he met his burden of proof that the evidence amounted to "recognition for achievements and significant contributions to the industry or field."

On appeal, we concluded that the Petitioner had not established eligibility in any of the six criteria in the governing regulation. 8 C.F.R. § 204.5(k)(3)(ii). Therefore, the Petitioner could not surpass the initial evidentiary threshold of meeting three criteria under 8 C.F.R. § 204.5(k)(3)(ii). Because the Petitioner did not establish that they met the initial evidentiary requirement, we did not need to provide a final merits determination to evaluate whether the Petitioner had achieved the required level of expertise required for exceptional ability classification.[8] However, even if we considered the evidence in its totality in a final merits determination, we would find that the evidence does not rise to the level of exceptional ability. Additionally, we concluded that we need not reach the issue of whether the Petitioner, as a matter of discretion, was eligible for or otherwise merited a national interest waiver under the Dhanasar analytical framework.[9]

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[7] In a final merits determination, a petitioner's membership is further evaluated to determine whether it is indicative of having a degree of expertise significantly above that ordinarily encountered in the field. See also, generally, 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual.

[8] 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, generally, 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual.

[9] 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, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

The Petitioner has not established that our previous decision was based on an incorrect application of law or policy.[10]

III. CONCLUSION

The motion to reopen does not comply with the applicable regulatory requirements. Further, the motion to reconsider does not demonstrate that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the motions 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.

[10] Although the evidentiary standard in immigration proceedings is the lowest preponderance of the evidence standard, the burden is on the Petitioner alone to provide material, relevant, and probative evidence to meet that standard. Section 291 of the Act, 8 U.S.C. § 1361. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. Matter of Y-B-, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); also see the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion).