U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30413765

Date: APR. 19, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a pharmacist, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement that is 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.

The Director of the Texas Service Center denied the petition, concluding the Petitioner did not establish that a waiver of the required job offer and thus of the labor certification, would be in the national interest. We dismissed the subsequent appeal agreeing with the Director that the Petitioner did not demonstrate her eligibility for the requested national interest waiver. The matter is now before us again 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.

I. LAW

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.

II. ANALYSIS

As noted above, the Director denied the approval of this petition. In our decision dismissing the appeal, we determined that the Petitioner did not demonstrate the national importance of her proposed endeavor under the first prong of the analytical framework set forth in Matter of Dhanasar, 26 I&N

Dec. 884 (AAO 2016). We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion.

In our appeal decision, we considered the Petitioner's initially claimed proposed endeavor to work as a pharmacist in community clinics. We did not consider her later claimed proposed endeavor to establish a new medication management business for the elderly through a software application and bracelet device. Our decision explained that this new proposed endeavor was not raised in the initial petition but was raised for the first time in the Petitioner's response to a request for evidence notice. Therefore, we did not consider the Petitioner's materially changed proposed endeavor of opening and operating her own business, instead we considered her initially proposed endeavor to work as a pharmacist in community clinics.

Because the record did not demonstrate that her work as a pharmacist in community clinics would have broader implications, we determined that she did not establish its national importance. As stated in our prior decision, in determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on "the specific endeavor that the foreign national proposes to undertake." See id. at 889. Therefore, the importance of pharmacists and the pharmaceutical industry does not render the Petitioner's proposed endeavor nationally important. We also explained that a shortage of workers in her occupation does not establish the national importance of her proposed endeavor, instead "such shortages of qualified workers are directly addressed by the U.S. Department of Labor through the labor certification process."

On motion, the Petitioner contests the correctness of our prior decision relying on sections of the USCIS Policy Manual related to the national interest waiver of the job offer requirement. See generally 6 USCIS Policy Manual, F.5(D)(1) https://www.uscis.gov/policymanual. Because the USCIS Policy Manual was updated after filing the petition, the Petitioner contends our decision did not take into consideration the updated guidance specifically related to entrepreneurs and to persons with advanced degrees in the science, technology, engineering, or mathematics (STEM) fields. See generally 6 USCIS Policy Manual, supra, at F.5(D)(2) and (4). We acknowledge that the USCIS Policy Manual was updated providing evidentiary considerations for STEM graduates and entrepreneurs seeking national interest waivers. However, our prior decision did not consider her being an entrepreneur for her medication management business, instead we considered her initial intent to work as a pharmacist at a community clinic. Therefore, such guidance in the USCIS Policy Manual relating to entrepreneurs is not relevant to this motion.

To the extent the Petitioner contends that we erred by not considering the new policy guidance concerning the importance of STEM graduates and fields, the policy guidance relating to STEM professionals does not overcome our finding that the Petitioner did not establish that her proposed endeavor to work as a pharmacist for a community clinic has national importance. The guidance does not indicate that STEM professionals qualify for the waiver in all cases. Rather, it states "the analysis is the same regardless of endeavor" and a petitioner "must demonstrate that a STEM endeavor has both substantial merit and national importance . . . ." See generally 6 USCIS Policy Manual, supra, at F.5(D)(2). When considering national importance, the guidance states "[m]any proposed endeavors that aim to advance STEM technologies and research . . . have sufficiently broad potential implications to demonstrate national importance." See generally 6 USCIS Policy Manual, supra, at F.5(D)(2).

Here, the Petitioner has not established that her initial proposed endeavor to work as a pharmacist in community clinics aims to advance STEM technologies or research as set out in the guidance.

In her motion brief, the Petitioner also explains her reasons for submitting evidence about her new medication management business after her initial petition, noting that "[d]uring the time while awaiting the review and judgment of my application, I developed an application template and bracelet that would be geared towards medication management for the elderly population and presented in [the request for evidence's] response, this application will be administered by" the new business. The remainder of the Petitioner's motion brief reasserts contentions for the national importance of her proposed endeavor to establish and operate her new medication management business. In addition, she submits evidence supporting her arguments that her proposed endeavor has national importance, including a summary of the information technology and bracelet device for the business, a printout about JAPHA membership account information, a report relating to Florida's opioid overdose crisis, and a U.S. government report of strategies to address the synthetic drug overdose epidemic.

While the Petitioner explains that she developed the application technology and bracelet device after submitting her initial petition, she does not overcome the issue that the evidence of her medication management business materially changed her proposed endeavor after filing her petition. The Petitioner's materially changed proposed endeavor could not be considered when determining national importance. As explained in our earlier decision, a petitioner is required to establish eligibility for the immigration benefit from the time the petition is filed continuing through adjudication. See 8 C.F.R. § 103.2(b)(1). The Petitioner cannot materially change the proposed endeavor after submitting her petition. When responding to a request for evidence notice, a petitioner may not make material changes to the petition in an effort to make a deficient petition conform to USCIS requirements. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). If significant, material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record as at the time of filing.

On motion, the Petitioner does not contest the correctness of our prior decision or point to any error of law or policy in our analysis of finding she materially changed her proposed endeavor after filing the petition. Instead, she provides us with her reasons for submitting the new proposed endeavor with the reply to the request for evidence and asks us to reconsider our decision using the updated guidance in the USCIS Policy Manual for her materially changed proposed endeavor. As discussed above, the Petitioner has not established any error in our prior determination. As such, she has not met the requirements for a motion to reconsider.

II. CONCLUSION

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. Thus, we affirm our previous determination that the Petitioner has not established eligibility under the first prong of the Dhanasar analytical framework and is thus not eligible for and does not merit a national interest waiver. While

she also asserts on motion that she meets the second and third Dhanasar prongs, we will continue to reserve those issues.[1] The motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reconsider is dismissed.

[1] INS v. Bagamasbad, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make "purely advisory findings" and decisions unnecessary to the ultimate decision).