U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32194515

Date: AUG. 05, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a sound engineer technician, seeks second preference immigrant classification as an advanced degree professional and as an individual of exceptional ability, 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 had not established he was an individual of exceptional ability. Notably, the Director stated that the Petitioner submitted no evidence to show he has an advanced degree. The Director stated that because the Petitioner had not shown he met the EB-2 classification, the threshold requirement for a national interest waiver, she did not need to do a final merits determination or review whether he was eligible for a national interest waiver under the *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), framework. The Petitioner subsequently filed a combined motion to reopen and motion to reconsider, which the Director dismissed. The Petitioner now appeals the Director's dismissal of the combined motions.

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). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 8 C.F.R. § 204.5(k)(2). A United States baccalaureate degree or

a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. *Id.*

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.* A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *See* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. If a petitioner does so, 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. *Id.*

Once a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

Id.

II. ANALYSIS

As a preliminary matter, we emphasize that the Petitioner has not appealed the June 5, 2023, denial of the Form I-140 itself, but rather the Director's subsequent dismissal of his combined motions to reopen and reconsider dated January 2, 2024. In the January 2024 decision, the Director did not affirm the prior denial but rather, the Director concluded that the motions did not meet the applicable requirements. Therefore, the question before us on appeal is whether the Director erred in dismissing the combined motions. Although the June 2023 denial is not before us, we will refer to portions of that decision for a complete review.

The Petitioner initially claimed he satisfied all six of the categories of initial evidence to qualify for the EB-2 visa classification as an individual of exceptional ability. The Director, who issued a request for evidence before denying the petition, determined that the Petitioner had met only two of the criteria: 8 C.F.R. § 204.5(k)(3)(ii)(A), related to an official academic record and 8 C.F.R. § 204.5(k)(3)(ii)(C), related to a license to practice his profession. She then concluded that because

[1] *See 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).

the Petitioner had not met at least three of these categories of evidence, no purpose was served in a final merits determination or review of his eligibility for a national interest waiver.

The Petitioner then filed combined motions to reopen and reconsider on the Director's decision, which were dismissed. The Director dismissed the motion to reopen concluding that the Petitioner did not submit any new evidence, but only resubmitted the identical evidence submitted with his response to the request for evidence. The Director explained that this evidence had already been considered in the initial denial and thus the Petitioner failed to provide new evidence to overcome the reasons for denial. The Director also explained, regarding the motion to reconsider, that the Petitioner failed to state a reason for reconsideration supported by any pertinent precedent law.

On appeal, the Petitioner does not address the reasons for the Director's dismissal of his motion to reopen or motion to reconsider. He appears to submit the same evidence he provided with his combined motions, addressing the eligibility criteria for the EB-2 classification and the national interest waiver broadly, without any focus on the specific reasons for the Director's initial June 2023 denial or the dismissal of his January 2024 motions.

A. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). In the motion to reconsider, the Petitioner alleged no specific error in the June 2023 denial notice. The motion brief did not contend that the Director's decision was based on an incorrect application of law or policy, nor was it supported by any relevant caselaw, statute, or regulation. Since the motion did not meet the requirements identified above, the Director properly dismissed the motion to reconsider.

B. Motion to Reopen

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). A motion may be granted that satisfies these requirements and demonstrates 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).

Here, upon close review of the documentation submitted on motion and submitted in response to the request for evidence, we find that it appears the Petitioner did submit two new pieces of evidence to show he met the criterion under 8 C.F.R. § 204.5(k)(3)(ii)(E), evidence of membership in a professional association. The Petitioner submitted two membership cards showing he was a member of each association from 2016 and 2018. These were not considered by the Director and may change the outcome of the decision by establishing he meets three of the six criteria.

In addition, in his initial petition and on motion, the Petitioner asserts he is an advanced degree holder and presents evidence in support. However, the Director did not address this evidence, in either the initial decision or the motion decision, in the context of being an advanced degree professional for EB-2 visa classification. This evidence included his diploma, two course completion certificates, other

curriculum taken through a professional association, and his work experience. Instead, the Director states in his initial decision that the Petitioner submitted no evidence that he has an advanced degree.

What is required is that the previous trier of fact consider the issues raised and announce its decision in terms sufficient to enable an appellate body to perceive that it has heard and thought and not merely reacted. *Rodriguez-Jimenez v. Garland*, 20 F.4th 434, 435 (9th Cir. 2021) (citing *Najmabadi v. Holder*, 597 F.3d 983, 990 (9th Cir. 2010); *Farah v. U.S. Att'y Gen.*, 12 F.4th 1312, 1329 (11th Cir. 2021); *see also Osuchukwu v. INS*, 744 F.2d 1136, 1143 (5th Cir. 1984).

Here, there have been two significant oversights. First, the Director erroneously states that the Petitioner did not submit evidence of being an advanced degree professional. Second, the Director claims, in her motion to reopen analysis, that the Petitioner submitted no new evidence, which was incorrect because at least two new pieces of relevant evidence were submitted. Given these errors, we cannot be confident that the Director reviewed the entire record, and so we will withdraw the decision and remand this matter for further consideration and entry of a new determination. On remand, the Director should review the entire record and determine whether the Petitioner has established eligibility for both the underlying EB-2 classification as well as the *Dhanasar* framework.[2]

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[2] Although we will not reach an analysis of the national interest waiver *Dhanasar* framework here, the current record does not appear to show the Petitioner meets all prongs of this framework.