U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33102586

Date: AUG. 07, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a civil engineer, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Petitioner had established eligibility for a national interest waiver. We dismissed a subsequent appeal. The matter is now before us on combined motions 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.

A motion to reopen must state new facts and be supported by 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).

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 refers to a statement outlining the Petitioner's [redacted] methodology, which was included with a subsequently-filed EB-2 petition. The Petitioner asserts that this documentation establishes eligibility, as it demonstrates that he was eligible for a national interest waiver at the time of initial filing. The Petitioner also contests the correctness of our prior decision, arguing that we incorrectly determined that the Petitioner had made a material change to his petition;

the Petitioner reiterates that the inclusion of a business plan and the focus on forming a construction company laid out in response to the Director's RFE were not a material change to his proposed endeavor. He argues that "changes in nationally important employment are possible and permissible within a same or similar field" and contends that our prior decision erred by analyzing the facts and law in a way that was incomplete. The Petitioner cites to an adjudication letter from 1995 and to regulatory language in support of these assertions.

The Petitioner also contends that the "only 'change' can more appropriately be termed an 'expansion' upon his stated (and already nationally important) intentions" and that his registration of a business was merely a means by which to advance his proposed endeavor. He asserts that registration of a business is neither a required piece of evidence nor inconsistent with the originally formulated proposed endeavor. He further contends that, because registering a business is not a regulatory requirement, it cannot be considered an attempt to overcome a disqualifying deficiency in the original filing.

After review of the motion, we affirm our prior decision finding the Petitioner ineligible for a national interest waiver. On appeal, we limited our analysis of the Petitioner's proposed endeavor to the information included with the original Petition. After assessing this evidence, we determined that the Petitioner had not demonstrated that his proposed endeavor had prospective national importance as required by prong one of our precedent decision in *Matter of Dhanasar*, 26 I&N Dec. 884 (2016). The arguments raised on motion are insufficient to overcome the conclusions reached on appeal.

For clarity, we will address the Petitioner's contention that we unduly limited the analysis to the evidence originally submitted and by not considering the additional evidence submitted in response to the RFE. The Petitioner is correct that registering a business is not a filing requirement. However, our analysis of the change in endeavor was not based solely on the registration of a business. Rather, our decision noted that the "Petitioner's plans to establish and direct a new company formed after the filing date of his petition cannot retroactively establish eligibility." We noted that this changed the fundamental character of the endeavor – the Petitioner initially proposed to work as a civil engineer within a U.S. company and did not mention starting a company, acting a director, or performing duties tied to the direction of a company.

The authorities offered by the Petitioner relating to changes of endeavor are inapposite. The first, an adjudication letter authored in 1995, indicates that a petition based on a national interest waiver for "the alien's contributions to an industry" may be valid if "another employer can utilize" it. *See* 72 NO. 36 Interpreter Releases 1274. This adjudicatory opinion is not related to the Petitioner's case, and the Petitioner has not argued that this letter is binding on subsequent adjudications. As we noted on appeal, this petition is governed by our precedent decision in *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016). The Petitioner has not explained to what extent, if any, this correspondence should impact our previous analysis of the material changes to the Petitioner's endeavor.

The Petitioner next argues that "an employer need not even be involved and a switch from one nationally important endeavor in a field to another nationally important endeavor in the same or similar field is permissible." The Petitioner contends that the EB-2 program only requires candidates to "intend to pursue work in the U.S. in the area of expertise." The Petitioner cites to a comment on a final rule clarifying whether individuals "granted EB-2 national interest waivers would be required to

file Supplement J." Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 FR 82398-01. This comment clarifies the process for national interest waiver recipients seeking to adjust status:

> An individual classified as an alien of extraordinary ability or *granted a national interest waiver* is not required to demonstrate a job offer at the time of adjudication of the Form I-485 application and therefore would not need to submit Supplement J (although they are not precluded from doing so). However, USCIS may inquire whether such applicants are continuing to work in the area or field that forms the basis of their immigrant visa eligibility.

Id. (emphasis added). [1]

The Petitioner has not been granted a national interest waiver; he is subject to an initial determination of eligibility. *Dhanasar* does not analyze whether an individual's area or field of work is nationally important. Rather, the decision focuses on "the specific endeavor that the foreign national proposes to undertake." *Id.* at 889. *Dhanasar* clarifies that meritorious endeavors may be "demonstrated in a range of areas," but nonetheless makes the final determination of eligibility by evaluating the specifics of the proposed endeavor, rather than evaluating the field or area. *Id.* The Petitioner has not established that our application of the *Dhanasar* framework, as applied to the original proposed endeavor, was in error.

Although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has not established eligibility; the evidence cited by the Petitioner was not included within the scope of the original proposed endeavor. 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 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.

[1] We note that portions of the specific language proffered by the Petitioner could not be located in the final rule. However, we have included the language from the cited sections of the Federal Register.