U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33103789

Date: AUG. 13, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an entrepreneur and electrician, seeks employment-based second preference (EB-2) classification 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers, concluding that the Petitioner had not established eligibility for the underlying EB-2 classification or for a waiver of the job offer. We dismissed his subsequent appeal and agreed that the Petitioner did not establish that he qualifies as an individual of exceptional ability. We also dismissed the combined motion to reopen and motion to reconsider because his submission did not meet the requirements of a motion to reopen or a motion to reconsider. The matter is again before us on a combined motion to reopen and motion to reconsider.

The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). *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 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). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

As explained in our prior decision, our review on motion is limited to reviewing our latest decision, the February 2024 dismissal of the combined motion to reopen and motion to reconsider. In our prior decision, we concluded that the Petitioner did not present new facts supported by affidavits or other documentary evidence. Specifically, we noted that although the Petitioner indicated on his ETA 750 Part B that he worked for [redacted] as an electrician 40 hours per week from March 1996 to March 2006, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires evidence in the form of letters from

current or former employers showing that the noncitizen has at least 10 years of full-time experience in the occupation for which he or she is being sought.[1] In addition, we explained that the Petitioner did not provide the reasons why he believes our prior decision was based on an incorrect application of law or policy and he did not cite to laws, regulations, precedent decisions, or binding policies. We therefore dismissed the motions.

On motion, the Petitioner states that he initially submitted June 2021 letters from [redacted] and [redacted] and that in response to the Director's request for evidence (RFE), he provided a second set of letters from these companies from February 2023 that verified his dates of employment and whether he worked full-time or part-time. He now submits two more letters in support of this motion. The Petitioner contends that he has provided sufficient evidence to show that he has at least 18 years of full-time experience in the occupation and, therefore, he has met this criterion.[2]

However, the Petitioner did not provide any February 2023 letters from [redacted] in response to the Director's RFE. In fact, the RFE response is from November 2022, three months prior to the February 2023 letters.[3] Regardless, because the scope of a motion is limited to "the latest decision in the proceeding," we will only consider new evidence to the extent that it pertains to our latest decision dismissing the motion to reopen. 8 C.F.R. § 103.5(a)(1)(i), (ii). Here, the Petitioner has not provided new facts to establish that we erred in dismissing the prior motion. In addition, because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision. Furthermore, 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 prior decision. We will not re-adjudicate the petition anew and, therefore, the underlying petition remains denied.

Finally, we acknowledge the Petitioner's request to grant the motions, determine he qualifies for both the EB-2 classification as well as the NIW, and sustain the appeal to avoid filing a new Form I-485, Application to Register Permanent Residence or Adjust Status, because of a subsequently filed and approved NIW.

Here, we will not grant this motion and determine he qualifies for the NIW based on a separate record of proceeding. First, we generally will only consider evidence that is part of the record and associated with a single petition. In other words, we will not apply the claims and evidence to this petition that were submitted with a separate petition at a different time. Each case must be decided on its own facts regarding the sufficiency of the evidence presented. The regulation repeatedly reflects that an eligibility determination on a benefit request will be based on information contained in the record of proceeding. 8 C.F.R. §§ 103.2(b)(10), (11), (14), (16)(i)–(ii). Additionally, a determination on the facts properly rests on what is within the record. "Other cases presenting different allegations and

[1] *See also* 6 *USCIS Policy Manual*, F.5(B)(2), https://www.uscis.gov/policymanual.

[2] We note that the Director conducted a final merits determination and concluded that the Petitioner had not established that he is an individual of exceptional ability. Meeting three of the evidentiary criteria does not, in and of itself, establish eligibility for the EB-2 classification as an individual of exceptional ability.

[3] We also would not consider it for the first time on motion because the Petitioner was put on notice and given a reasonable opportunity to provide this evidence. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial").

different records may lead to different conclusions." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 507 (2023) (Jackson, J., concurring).

Second, the Petitioner does not offer any law, precedent, or policy that would support the position of allowing factors outside of a foreign national's eligibility for an immigrant classification to exert any sway on the decision of whether to approve or deny a petition. While an NIW petition encompasses a discretionary element, that discretion does not extend to or apply to the situation the Petitioner proposes.

And finally, we do not exercise jurisdiction over the Form I-485 the Petitioner references. That removes from our authority any means to decide how USCIS will treat that filing.[4]

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[4] Our analysis here does not prevent the Petitioner from making a similar request to the office holding jurisdiction over the Form I-485 in question. However, we offer no indication of whether that authority might comply with the request.