U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30133979

Date: FEB. 26, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an entrepreneur and an electrician, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability 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 he qualifies for the EB-2 visa classification as an individual of exceptional ability and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We dismissed a subsequent appeal, concluding that because the Petitioner has met only two of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii), he cannot fulfill the initial evidentiary requirement of three criteria and, therefore, he is ineligible for the EB-2 visa classification. 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 motions.

I. LAW

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).

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.

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.

"Exceptional ability" means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). 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).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] 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.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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[3], 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.

II. ANALYSIS

A review of any motion is narrowed to the basis for the prior adverse decision. Accordingly, we will examine any new facts and arguments to the extent that they pertain to our most recent decision, the dismissal of the appeal. As such, our analysis for these combined motions is limited to the following: whether we erred in concluding that the Petitioner has met only two of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) and, therefore, he is ineligible for the EB-2 visa classification.

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. While we may not address each piece of evidence individually, we have reviewed and considered each one.

A. Motion to Reopen

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

[3] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

Initially, we note that motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial based on newly discovered evidence. *INS v. Doherty,* 502 U.S. 314, 323, (1992) (citing *INS v. Abudu,* 485 U.S. 94, 108 (1988)); *see also Selimi v. Ashcroft,* 360 F.3d 736, 739 (7th Cir. 2004). There is a strong public interest in bringing proceedings to a close as promptly as is consistent with giving both parties a fair opportunity to develop and present their respective cases. *INS v. Abudu,* 485 at 107.

Based on its discretion, USCIS "has some latitude in deciding when to reopen a case" and "should have the right to be restrictive." *Id.* at 108. Granting motions too freely could permit endless delay when noncitizens continuously produce new facts to establish eligibility, which could result in needlessly wasting time attending to filing requests. *See generally INS v. Abudu,* 485 U.S. at 108. The new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho,* 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder,* 738 F.3d 1230, 1239-40 (10th Cir. 2013). Therefore, a party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu, 485* at 110. With the current motion, the Petitioner has not met that burden.

We previously determined that the Petitioner has satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) (an official academic record) and (C) (a license to practice the profession), but the Petitioner has not demonstrated eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(B) (at least 10 years of full-time experience in the occupation), (D) (a salary for services that demonstrates exceptional ability), and (E) (membership in professional associations).

In order to demonstrate that the Petitioner has at least 10 years of full-time experience in the occupation for which he is being sought under 8 C.F.R. § 204.5(k)(3)(ii)(B), the Petitioner submitted letters from an electrical engineer at [redacted] and a partner and an administrator of [redacted] The letter from [redacted] states that the Petitioner worked 44-hours per week as an electrician from June 2006 to June 2010 and as head electrician from July 2010 to February 2015, for a period of 8 years and 8 months. The letter from [redacted] states that the Petitioner provided services in the company's electricity sector as a self-employed electrician from March 1996 to March 2006 but does not indicate that this was full-time employment. Therefore, we determined that the Petitioner has not demonstrated that he has at least 10 years of full-time experience in the occupation of an electrician or an entrepreneur.

On motion, the Petitioner contends that he provided two letters that amount to over 26 years of experience and that although the letter from [redacted] does not state whether the Petitioner's work was full-time or part-time, he has attested under penalty of perjury on his ETA 750 Part B that he worked full-time from March 1996 to March 2006.

The Petitioner's ETA 750 Part B was submitted to USCIS at the time of filing his petition. Although he 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.[4] Further, the regulation at 8

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

C.F.R. § 204.5(g)(1) provides that evidence relating to qualifying experience or training shall be in the form of letters from current or former employers or trainers and shall include a specific description of the duties performed by the individual or of the training received.

On motion, the Petitioner does not present new facts supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). Therefore, we conclude that the Petitioner has not shown proper cause for reopening the proceeding.

B. Motion to Reconsider

On motion, the Petitioner contends that the appeal dismissal decision is deficient because it did not evaluate all the arguments presented by the Petitioner in the appeal that would lead to a different conclusion, providing that the Petitioner not only qualifies for the requested classification but also meets all requirements for the national interest waiver. The Petitioner further claims that the denial of this petition is contrary to law or policy and unsupported by the evidence on record.

In our prior decision, we indicated that because the Petitioner cannot fulfill the initial evidentiary requirements of three criteria, we need not provide a final merits determination as to whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. We also indicated that 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 and reserved these issues. We are not required to make findings on issues the decision of which is unnecessary to the results we reach.[5]

As indicated above, to have established merit for reconsideration of our latest decision, a petitioner must both state the reasons why he or she believes the most recent decision was based on an incorrect application of law or policy and specifically cite laws, regulations, precedent decisions, or binding policies that the petitioner believed we misapplied in that prior decision. Thus, to prevail in his motion to reconsider, the Petitioner cannot merely disagree with our conclusions but rather must demonstrate how we erred as a matter of law or policy in that immediate prior decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit, in essence, the same brief and seek reconsideration by generally alleging error in the prior decision.)

While we acknowledge the Petitioner's claims on motion, the Petitioner does not provide the reasons why he believes our prior decision was based on an incorrect application of law or policy. Nor does he cite laws, regulations, precedent decisions, or binding policies. Likewise, the brief in support of the current motions lacks any cogent argument as to how we misapplied the law or policy in dismissing the appeal.

The Petitioner has not shown that our prior decision contained errors of law or policy or that the decision was incorrect based on the record at the time of that decision. *See* 8 C.F.R. § 103.5(a)(3).

[5] *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 alternate issues on appeal where an applicant is otherwise ineligible).

Therefore, we determine that the instant motion does not meet the requirements of a motion to reconsider.

III. CONCLUSION

On motion to reopen, the Petitioner has not provided new facts supported by affidavits or other documentary evidence to establish that we erred in dismissing the appeal. Because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision. 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 prior decision. Therefore, the motions will be dismissed. *See* 8 C.F.R. § 103.5(a)(4). We will not re-adjudicate the petition anew, and the underlying petition remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.