U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29714222

Date: FEB. 27, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an operations manager of computerized cuts, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. See section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). 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 determining the Petitioner did not establish eligibility for the underlying EB-2 classification, and agreeing with the Director that the record did not demonstrate his eligibility for the requested national interest waiver. The matter is now before us again 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 documentary evidence. 8 C.F.R. § 103.5(a)(2). Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

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).

The scope of any motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). Thus, our analysis for these combined motions is limited to the

following: (1) whether the Petitioner establishes that the dismissal of the appeal was based on an incorrect application of law or policy; or (2) whether the Petitioner presents a new fact, supported by evidence, that shows proper cause to reopen our appeal decision. 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). Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See INS v. Doherty, 502 U.S. 314, 323 (1992) (citing INS v. Abudu, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." See INS v. Abudu, 485 U.S. at 110.

II. ANALYSIS

The Petitioner proposes to continue his work as an operations manager of computerized cuts for [redacted] in Texas. As noted above, the Director denied the approval of this petition. The Director determined that the Petitioner had not met the three prongs of the analytical framework set forth in Matter of Dhanasar, 26 I&N Dec. 884, 889 (AAO 2016). We dismissed the appeal affirming the Director's determination that the Petitioner did not meet *Dhansar's* first prong and reserving argument on the second and third prongs.[1] We also concluded that the Petitioner had not shown eligibility for the underlying EB-2 classification as an individual of exceptional ability. We incorporate our prior decisions by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion.

On motion, the Petitioner contests the correctness of our prior decision arguing that we erred by imposing "an incorrect and stricter" standard of proof when evaluating evidence of the Petitioner's exceptional ability and the national importance of his proposed endeavor. The Petitioner maintains that he qualifies for classification as an individual of exceptional ability in the sciences, the arts, or business and meets the Dhanasar requirements for the national interest waiver. With his motion brief, the Petitioner submits new evidence to show his eligibility for the underlying EB-2 classification and to demonstrate the national importance of his proposed endeavor.

A. Motion to Reopen

For the underlying EB-2 classification, the Petitioner claimed in the initial petition that he is an individual of exceptional ability based on meeting all six of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). In our appeal decision, we determined that the Petitioner met two of the six criteria, academic record under 8 C.F.R. § 204.5(k)(3)(ii)(A) and at least ten years of full-time experience in his occupation under 8 C.F.R. § 204.5(k)(3)(ii)(B). Since the Petitioner did not meet the initial evidentiary criteria by meeting three criterion, we determined he was not an individual of exceptional ability.[2]

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[1] See 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).

[2] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. 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. USCIS has

On motion, the Petitioner argues that we erred in our decision claiming he meets four additional criteria and submits new evidence to support his claims, including his new statement to supplement his previously provided personal statement; news articles relating to Linux certifications; the constitution and bylaws for the Institute of Electrical and Electrons Engineers (IEEE); and an article relating to Syracuse University faculty members attaining IEEE fellow recognition. We conclude that our decision correctly determined that the Petitioner does not meet the initial evidentiary requirements for classification as an individual of exceptional ability, and he did not overcome that determination on motion.

> A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C).

The record includes documentation indicating the Petitioner has been "acknowledged as" a certified junior Linux operator. In our appeal decision, we found, "Although the record included some basic information about the Linux computer operating system and what it is used for, it does not show that this certification is required for entry into the Petitioner's occupation or is specifically tailored for that occupation." On motion, the Petitioner disagrees with our analysis of evidence submitted arguing our dismissal of the evidence "goes beyond the regulation established on 8 C.F.R. section 204.5(k)(3)(ii)(C), which indicates that the Petitioner must demonstrate the possession of '[a] license to practice the profession or certification for a particular profession or occupation.'" (emphasis omitted). He argues that "[the Petitioner's] certification as a [j]unior Linux [o]perator is related to his occupation in compliance with the [information technology] regulations and standards" and "validated [the Petitioner] to perform maintenance tasks on the command line, install and configure a computer running Linux open-source operating system and configure basic networking."

The Petitioner relies on new evidence, including his supplemental statement and news articles relating to Linux certifications. In his supplemental statement he explains, "The role of Operations Manager of Computerized Cuts and Fabrication of Metallic Structures is linked with [information technology] in several ways, particularly in modern manufacturing environments that heavily rely on technology and automation." He points out that information technology knowledge is essential to the use and maintenance of the work equipment. The news articles describe the best Linux certifications and the relevance of Linux certifications to employers. While Linux certifications may be valued for certain information technology occupations, the Petitioner has not shown that such certification is for his particular occupation.

The Petitioner also relies on evidence in the record, the opinion of [redacted], associate professor of computer information systems at [redacted] and a letter from [redacted] opinion indicates that the Petitioner is a certified junior Linux operator and provides a brief explanation of Linux. In his explanation of Linux, [redacted] states, "Linux is an operating system that powers the popular Android platform", its use "to run desktops, servers, and embedded systems", and [s]ome services managed through the Linux system include processing, application

previously confirmed the applicability of a two-part adjudicative approach in the context of individuals of exceptional ability. See Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); see generally 6 USCIS Policy Manual F.5(B)(2), https: //www.uscis.gov/policy-manual.

scheduling, basic peripheral devices, and file systems." The letter from [redacted] sets out the Petitioner's job duties, some of which includes programming and management of software for computerized numerical control equipment. The evidence provides information about the Linux system and certifications, and that some of the Petitioner's job duties include the use of information technology; however, the evidence does not show certification as a junior Linux operator is for the Petitioner's occupation as an operations manager of computerized cuts.

The documents submitted with the motion considered with evidence in the record are not sufficient to overcome our prior determination that the Petitioner has not established eligibility for this criterion.

> Evidence that the [noncitizen] has commanded a salary, or other renumeration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

In our appeal decision, we determined that a letter from the Petitioner's former employer stating that the Petitioner "would make $3500 monthly" in his position was not sufficient to show his salary or renumeration for services. We also determined that a report relating to information technology average salaries was not sufficient to show a "basis for comparison to determine that his salary demonstrates exceptional ability," since the report did not appear to include the Petitioner's occupation and the report stated that the salary figures combined many different jobs.

On appeal, the Petitioner relies on his new supplemental statement to argue that our analysis of the comparison report is incorrect. He argues that since the supplemental statement indicates that his work as operations manager of computerized cuts for [redacted] is "linked to" information technology, "particularly in modern manufacturing environments that heavily rely on technology and automation," the report in the record describing information technology salaries should be used as comparison for his salary. However, the Petitioner's new supplemental statement on motion does not overcome the basis for our decision. The Petitioner's supplemental statement does not show his salary or other renumeration for his work. Also, the Petitioner's statement that his work is "linked to" information technology does not show the salary information included in the initially submitted report provides a sufficient basis for his occupation's salary comparison.

Therefore, the Petitioner's supplemental statement does not overcome the reasons for the Petitioner not meeting this criterion.

> Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

In our appeal decision, we determined the record did not demonstrate that the organization, IEEE, qualifies as a professional association. On motion, the Petitioner submitted new evidence, including an article relating to Syracuse University faculty members attaining IEEE fellow recognition, and the constitution and bylaws for IEEE. Section I-104.4 of the IEEE bylaws indicates that the basis for qualification as a "Member" of IEEE is education or work experience, or a combination of both. As stated in our previous decision, "[T]he regulation at 8 C.F.R. § 204.5(k)(2) defines 'profession' as 'any occupation for which a United States baccalaureate degree or its foreign equivalent is minimum requirement for entry into the occupation.'" The by-laws of IEEE indicate that "Member" qualification is based on education or work experience, or a combination of both, instead of a minimum of a U.S. bachelor's degree or its foreign equivalent. Therefore, IEEE does not meet the definition of a

"professional" association under the regulations, as required under the criterion. The new evidence submitted on motion does not show new facts to overcome the basis of the appeal decision.

> Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F).

We determined in our appeal decision that reference letters from the Petitioner's former employers did not show his "significant contributions to the industry or field." The Petitioner disagrees with our analysis of the evidence arguing, "[T]he letters were written by respected professionals and organizations in the field, which lends credibility to [the Petitioner's] claims. Furthermore, the regulation does not specify a quantifiable threshold for what constitutes 'significant' contributions, and therefore, this recognition can come in various forms . . . . [T]he authors have taken steps to demonstrate his achievements and contributions to the industry."

On motion, the Petitioner relies on evidence in the record pointing out specific sections of previously considered recommendation letters to support his claims. These sections and the letters in general mainly reference the Petitioner's work contributions to his employers and their projects, and broadly state he made contributions to the industry and communities. For instance, the letter from [redacted] of [redacted] states, "[The Petitioner's] significant contributions have transformed our Computerized Numerical Control Department." And another letter from [redacted] of [redacted] states, "[The Petitioner] significantly contributed to our company and to the development and welfare of the Panamanian public after participating in large-scale construction projects, guaranteeing the quality of our materials, metal structures, and services." Another letter emphasized by the Petitioner also provides general statements of the Petitioner's contributions, "Our company is very grateful for the collaboration of [the Petitioner] because his knowledge and expertise in the development of this project gave us positive reviews from clients and at the same time contributed to the growth of the company and the economy and population of [redacted] and [redacted]."

On motion, the Petitioner did not submit new facts supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). His reasserting previously stated facts and resubmitting the previously provided reference letters does not constitute "new facts." Therefore, the Petitioner has not shown a basis to reopen the appeal decision for this criterion.

The Petitioner has not established that he meets three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F). Thus, he has not demonstrated his qualifications for the EB-2 category as an individual of exceptional ability. See 8 C.F.R. § 204.5(h)(3)(ii).

Because the Petitioner did not establish eligibility for the underlying EB-2 immigrant classification, he is not eligible for the national interest waiver. However, since the Petitioner's eligibility for the national interest waiver was the sole basis for the Director's initial decision and was addressed on appeal, we will discuss the Petitioner's claims on motion. As explained below, we conclude that we correctly determined that the Petitioner did not establish eligibility for the national interest waiver, and he has not overcome that determination on motion.

On motion, the Petitioner maintains we misinterpreted his claims of national importance. He provides his new supplemental statement arguing that it helps explain his work and why his work as an operations manager of computerized cuts with [redacted] has national significance, drives economic growth, supports businesses, and fosters job creation. We have reviewed and considered the Petitioner's supplemental statement in support of his motion to reopen but conclude that it does not meet the filing standards of such a motion. 8 C.F.R. § 103.5(a)(2).

In his supplemental statement, the Petitioner describes his job duties as they relate to information technology and his qualifications to perform his work, including digital-electronic calculations; software programming and management of modern manufacturing equipment; data collection, storage, analysis, and security; and maintaining technology equipment. He further maintains in his supplemental statement that his technological knowledge optimizing the production for his employer would contribute "to the overall economic growth of the nation." For instance, he attributes his work using information technology for his proposed endeavor while working on "massive" and "prestigious" projects as "contributing to the advancement of technology in the construction sector" which "is crucial for maintaining competitiveness on a global scale and ensuring that the [United States] remains at the forefront of technology and innovation." (emphasis omitted). He further proclaims his commitment to supporting science, technology, engineering, and mathematics (STEM) would contribute to the growth of the STEM workforce in the United States and would be "crucial for sustaining technological progress and driving economic growth." (emphasis omitted).

However, the Petitioner's emphasis on his technological knowledge to show his qualifications for his proposed endeavor relates to *Dhanasar's* second prong, which "shifts the focus from the proposed endeavor to the foreign national." Matter of Dhanasar, 26 I&N Dec. at 890. The issue here is whether the specific endeavor that the Petitioner proposes to undertake has national importance under *Dhanasar's* first prong. To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement, we look to evidence documenting the "potential prospective impact" of his work. See id. at 889.

The Petitioner's supplemental statement further describing various aspects of his work related to information technology does not overcome the reasons for the dismissal of the appeal to demonstrate his claims of national importance. Statements made without supporting documentation are of limited probative value and are insufficient to satisfy the Petitioner's burden of proof. See Matter of Soffici, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998). Without further evidence, the Petitioner's supplemental statement generally detailing how his work relates to information technology is not sufficient to demonstrate his claims that his proposed endeavor would contribute "to the economy, the construction industry, technology and innovation, significant projects, the STEM workforce, and the nation's competitiveness and infrastructure." Considered with evidence in the record, the statement does not demonstrate that his proposed endeavor extends beyond his employer and its clients to impact his field or any other industries or the U.S. economy more broadly at a level commensurate with national importance. Beyond general assertions, he has not demonstrated that the work he proposes to undertake as an operations manager of computerized cuts for his employer offers original innovations that contribute to advancements in his industry or otherwise has broader implications for his field. The economic benefits that the Petitioner claims depend on numerous factors and the Petitioner did not offer a sufficiently direct evidentiary tie between his proposed work and the claimed results.

On motion, the Petitioner further asserts that our appeal decision dismissed probative research by stating reports submitted with the petition do not support the importance of the Petitioner's specific proposed endeavor, but instead show the importance of the construction industry. He submits his supplemental statement and highlights articles and reports in the record to argue that his work responsibilities detailed in the supplemental statement show the potential economic and societal benefits of his work. He maintains that his work described in his supplemental statement aligns with U.S. government initiatives described in the articles, such as those related to the national economic recovery from the COVID-19 pandemic. He emphasizes that his professional experience and knowledge would not only help these initiatives but would also help the construction industry overcome its skilled labor shortage.

However, the Petitioner's supplemental statement considered with the articles and reports in the record does not provide new facts demonstrating the Petitioner's claims of national importance. The supplemental statement further describes the Petitioner's technological knowledge with computerized cuts and the construction work projects he has worked with for his employer with general claims his work has economic and technological importance for the construction industry. As pointed out in our appeal decision, the articles and reports in the record do not focus on the Petitioner's specific proposed endeavor, instead focusing on government initiatives and the importance of technology and the construction industry.

Submission of the Petitioner's supplemental statement on motion does not establish new facts sufficient to overcome our prior determination that the Petitioner has not established the national importance of his proposed endeavor to qualify for a national interest waiver. We will therefore dismiss the motion to reopen.

B. Motion to Reconsider

On motion, the Petitioner contests the correctness of our prior decision. He asserts that we misinterpreted his claims of national importance and that in our analysis of national importance, we applied a standard stricter than preponderance of the evidence. He also argues we erred and abused our discretion by not considering the precedent Dhanasar decision.

In our discussion of the national importance of the Petitioner's proposed endeavor, our appeal decision stated, "[T]he Petitioner focuses on the importance of the construction industry to the United States' economy, and notes that his work is 'related to the development of 3D printing technology to space exploration, both of which are important areas of focus for the country.'" While acknowledging the economic benefits and importance of the construction industry, we found the Petitioner did not demonstrate the work for his employer would "potentially have broader implications for the industry or substantial positive economic effects for the region or nation." We further determined, "[T]he evidence does not support the potential prospective impact of his proposed endeavor on that specific field or space exploration." Our decision pointed out, "[T]he focus of the Dhanasar framework's first prong is the petitioner's specific endeavor, not the entire industry or field in which they work."

In his motion brief, the Petitioner disagrees with our assessment of the evidence mainly restating the same claims he made on appeal, and he emphasizes evidence we addressed in our prior appeal

decision. Arguing that evidence in the record shows the national importance of his proposed endeavor, his motion brief requotes evidence quoted in his appeal brief. Both briefs quote the same lengthy sections of his initial personal statement, professional opinions, and reports and articles relating to government initiatives and the construction and information technology fields. For instance, on motion, he argues that his initial personal statement explains "the scope of his current and prospective positions to illustrate the capacity in which he intends to work." Requoting the same lengthy sections of his personal statement that he quoted in his appeal brief, he argues his personal statement shows the national importance of his work. Similarly, he restates extracts from articles and reports to show the prospective potential of his proposed endeavor aligns with national initiatives and would contribute to the information technology and construction fields. While the Petitioner disagrees with our analysis of the evidence, he does not identify any incorrect application of law or policy.

The Petitioner also disagrees with our analysis of the professional opinions. Our appeal decision explained that instead of focusing on the Petitioner's proposed endeavor, the opinions write "broadly about the use of information technology in the construction industry, and mention technologies that are not directly related to the proposed endeavor." Asserting the opinions help establish the Petitioner's proposed endeavor's credibility and national importance, particularly for those who may not have the "technical knowledge or experience in the field," he restates extracts of the opinions, which he also included in his appeal brief. The extracts generally describe the importance of information technology to the construction industry and its positive economic effects. The Petitioner reiterates his appeal arguments by restating, ". . . [The Petitioner's] expertise in using information technology in the construction industry in the United States can lead to significant improvements in efficiency, accuracy, and safety, making it an increasing relevant and valuable tool in the field." (emphasis omitted). He asserts that the opinions' broad discussions of the use of information technology in the construction industry "can often have significant implications for the proposed endeavor." Again, while the Petitioner disagrees with our findings, he does not identify any incorrect application of law or policy.

On motion, the Petitioner contends that we did not consider the Dhanasar precedent decision in our evaluation of the evidence. He emphasizes that like Dr. Dhanasar, he "submitted two . . . probative opinions from experts holding senior positions in academia and industry [sic] that describe the importance of his proposed endeavor and, more broadly, the benefits of his work for the United States. In addition, [he] submitted probative research to support [the Petitioner's] claims." Also, citing Dhanasar and emphasizing Dr. Dhanasar's proposed endeavor was to continue his work as a researcher, the Petitioner argues that his intention to continue his work as an operations manager of computerized cuts for his employer "has far reach in our country by impacting the construction industry more broadly at a level commensurate with national importance."

The standard of proof in this proceeding is a preponderance of the evidence, meaning that a petitioner must show that what is claimed is "more likely than not" or "probably" true. Matter of Chawathe, 25 I&N Dec. at 375-76. To determine whether a petitioner has met the burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. Id.; Matter of E-M-, 20 I&N Dec. 77, 79-80 (Comm'r 1989). Here, we properly analyzed the Petitioner's documentation and weighed the evidence to evaluate the Petitioner's eligibility by a preponderance of the evidence.

In addition, the Petitioner has not explained how his work as an operations manager of computerized cuts for his employer compares to Dr. Dhanasar's work as an academic researcher who received grants from government agencies for his work. The Petitioner's claims that his continuing his work as an operations manager of computerized cuts for his employer will benefit the construction industry and the United States have not been established through independent and objective evidence. The Petitioner's statements are not sufficient to demonstrate his endeavor has the potential to provide benefits to the construction industry. The Petitioner must support his assertions with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. at 376.

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. The Petitioner's contentions in the current motion merely reargue facts and issues we have already considered in our previous decision. See e.g., Matter of O-S-G-, 24 I&N Dec. 56, 58 (BIA 2006) ("a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior Board decision").

The purpose of a motion to reconsider is to show error in the most recent prior decision. The Petitioner's motion to reconsider does not meet this standard. We addressed the Petitioner's prior arguments in our earlier decision, and the Petitioner's repetition of the same arguments does not show proper cause for reconsideration. The motion to reconsider will be dismissed. 8 C.F.R. § 103.5(a)(4).

II. CONCLUSION

The Petitioner has not established that our dismissal of the appeal was based on an incorrect application of law or policy warranting reconsideration of our decision; or that a new fact, supported by evidence, shows proper cause to reopen our appeal decision. We affirm our previous determination that the Petitioner has not established eligibility for the underlying EB-2 classification, 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 he also asserts on motion that he meets the second and third Dhanasar prongs, we will continue to reserve that issue.[3]

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[3] See INS v. Bagamasbad, 429 U.S. at 25-26.