U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31681374

Date: JUL. 1, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner 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 and 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 motions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

In our decision on appeal, we agreed with the Director that the Petitioner had not demonstrated eligibility for a national interest waiver of the job offer requirement for EB-2 immigrant classification because she had not established the national importance of her proposed endeavor. Section 203(b)(2)(B)(i) of the Act; *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016). Additionally, we withdrew the Director's determination that the Petitioner qualifies for the underlying EB-2 immigrant classification as an advanced degree professional, as required by section 203(b)(2)(B)(i) of the Act, because the evidence was insufficient to show that she had gained five years of progressive post-baccalaureate experience.

On motion, the Petitioner submits a brief arguing that we erred in considering her eligibility for the underlying EB-2 classification because she did not raise it as an issue on appeal. She cites *Matter of*

O-R-E-, 28 I&N Dec. 330 (BIA 2021), to support her claim that because an issue will be deemed waived if an affected party does not raise it on appeal, her "satisfaction of the NIW criteria" is "not an issue presented in the appeal and is thus shielded from AAO de novo review." Accordingly, she declines to address on motion this basis for our dismissal of her appeal and states she does "NOT raise issues nor provide counter argument" relating to this issue. Instead, the Petitioner only discusses our determination that the Director correctly found she had not established the national importance of her proposed endeavor, alleging error in that portion of our decision.

On motion, the Petitioner has not stated new facts supported by affidavits or other documentary evidence, and therefore has not met the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2). And although the Petitioner argues that a portion of our prior decision was incorrect, which is one of the requirements for a motion to reconsider under 8 C.F.R. § 103.5(a)(3), she has not established her eligibility. As discussed, in addition to not providing sufficient evidence to establish the national importance of her proposed endeavor, the Petitioner is also ineligible for the underlying EB-2 classification as an advanced degree professional. On motion, she has declined to provide evidence or argument relating to this portion of our appeal decision and has not clearly alleged that our determination on that ground was legal error. Instead, she asserts that we were barred from considering the issue on appeal because she did not raise it. However, she does not provide sufficient legal authority to support her claim that we are limited on appeal to considering only the issues an affected party raises.

In general, we do not address issues or claims that are not raised on appeal, and those issues are therefore deemed waived. In the case the Petitioner cites, *Matter of O-R-E-*, the Board of Immigration Appeals noted that where a respondent did not develop an argument regarding an issue, that issue was deemed waived. 28 I&N Dec. 330, 336 n. 5 (citing *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012), explaining that because the respondent did not appeal the Immigration Judge's decision on a particular issue, the issue was waived). Nevertheless, we may exercise our discretion to address an issue sua sponte despite the affected party's failure to raise it on appeal. *See, e.g., Lizama v. Holder*, 629 F.3d 440, 448-49 (4th Cir. 2011). Furthermore, the Petitioner has not provided legal support for her claim that we cannot consider certain issues in our de novo appellate review, or that deeming issues waived when the affected party does not raise them also operates as a limitation on what we may consider in our appellate adjudication. On appeal, we review the Director's decision de novo, which means we look at the record anew and may address issues that were not raised or resolved in the prior decision. *See generally AAO Practice Manual*, Ch. 3.4, https://www.uscis.gov/aao-practice-manual. Also, we may identify additional grounds of ineligibility. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 (AAO 2015). On motion, the Petitioner has not addressed one of the grounds for our prior dismissal of her appeal. She remains ineligible for EB-2 classification as an advanced degree professional, an issue which she has not specifically disputed or addressed aside from stating that we should not consider it. Because she declines to dispute or present any argument relating to this issue, we now deem it waived per *Matter of O-R-E-* and *Matter of R-A-M-*.

Since the identified basis for denial is dispositive, we decline to reach and hereby reserve the Petitioner's arguments regarding the national importance of her proposed endeavor. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N

Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

The Petitioner has not submitted additional evidence in support of the motion to reopen. 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 motions 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.