U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31481632

Date: JUL. 25, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as either a member of the professions holding an advanced degree or 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 Nebraska Service Center denied the petition, concluding that the record did not establish the Petitioner's eligibility for the requested national interest waiver. The Director dismissed a subsequently filed motion to reopen and motion to reconsider. The Petitioner now appeals the Director's dismissal of the combined motions pursuant to 8 C.F.R. §§ 103.3 and 103.5(a)(6).

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). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To qualify for the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act.

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate 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,[1] grant a national interest waiver if the petitioner demonstrates that:

[1] *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

- 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.

Id.

II. ANALYSIS

As a preliminary matter, we emphasize that the appeal before us relates to the Director's November 14, 2023, dismissal of the Petitioner's combined motions to reopen and reconsider.[2] Therefore, the question before us on appeal is whether the Director erred in dismissing the motions. In that decision, the Director considered both the evidence submitted prior to the denial, as well as the evidence submitted on motion, and determined that the motions did not meet the applicable requirements.

The record reflects the Petitioner intended to own and operate a multimodal transportation company. According to the Petitioner's first business plan, he intended to base his company in New York to provide comprehensive logistics solutions by "leveraging various transportation modes such as air, road, rail, sea, and potentially pipelines to offer a comprehensive and seamless logistics solution," which would allow his company to "optimize[] routes, minimize transit times, and enhance overall supply chain efficiency." The Petitioner also planned to offer freight management, logistics and supply chain services, customs and documentation support, last-mile delivery, as well as additional value-added services.

In the most recent decision, the Director determined that the Petitioner's new business plan submitted on motion, and in particular his decision to now establish his company in Pennsylvania rather than New York, amounted to a material change to the petition. As such, the Director, citing to *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), concluded that he was attempting "to make an apparently deficient petition conform to Service requirements" and explained that per *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), " [a] petitioner must establish eligibility at the time of filing" and that "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts." Nevertheless, in dismissing the combined motions, the Director analyzed the new business plan and determined that it too did not establish the national importance of the Petitioner's endeavor. The Director also concluded that the new evidence and claims submitted on motion did not establish the Petitioner was well-positioned to advance his proposed endeavor or that, on balance, waiving the job offer requirement would benefit the United States.

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence.[3] 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that the 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

[2] 8 CFR §103.5(a)(6).

[3] *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

On appeal, the Petitioner asserts that the Director's reliance on *Matter of Katigbak* is "misunderstood and misapplied," and contends that it does not apply to the national interest waiver category. But, on motion, a petitioner must still establish eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(12). We generally do not "consider facts that come into being only subsequent to the filing of a petition." *Matter of Izummi*, 22 I&N Dec. at 176 (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981)). Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). Moreover, this principle is also codified in the regulation at 8 C.F.R. § 103.2(b)(1), which states in pertinent part that a "petitioner must establish that he or she is *eligible for the requested benefit at the time of filing the benefit request* and must continue to be eligible through adjudication." [emphasis added].

Upon review, we agree that the change in the area of intended operations reflects a material change to the Petitioner's eligibility under the first prong of *Dhanasar*, as the location is relevant to the substantial positive economic effects (particularly to an economically depressed area) analysis. As such, the Director was correct in concluding that the Petitioner could not rely on these new facts to establish eligibility under *Dhanasar*. Nevertheless, we again note that the Director did review the revised business plan and concluded that it did not establish the national importance of the Petitioner's endeavor.

On appeal, the Petitioner attempts to refute this conclusion by claiming that a business plan is a dynamic document that is subject to change based on various factors. He asserts that his decision to change his intended area of operations "was made after a comprehensive market study . . *and in response to the [Director's] feedback on the economically depressed area.*" [emphasis added]. Notably, however, the Petitioner has not provided any additional information or evidence corroborating this market study, and the industry and market analysis contained within his new business plan concludes that most logistics and shipping industry activities occur in the southeast, west, and southwest regions of the United States, which contradicts his assertion. In fact, the only information in his business plan pertaining to the selection of [redacted] Pennsylvania as the new area of intended operations relates to his claims of national importance. As such, the record appears to indicate this change was made primarily for the purposes of strengthening the Petitioner's national importance claim, and not in response to outside factors.

The Petitioner also asserts that the decision shows "a complete disregard for the substantial content of the [b]usiness [p]lan." Yet, as discussed, the Director's decision did address the claimed staffing projections and the revenue projections, which were directly applicable to the proposed endeavor. And the Petitioner has not identified what information in the business plan established the national importance of his endeavor or substantiates his claims. It is not enough to generally assert errors in a decision. The Petitioner must also establish that they were prejudiced by any claimed errors. Errors can be overlooked when they had no bearing on the substance of an agency's decision. *See e.g., Aguilar v. Garland*, 60 F.4th 401, 407 (8th Cir. 2023) (citing *Prohibition Juice Co. v. United States Food & Drug Admin.*, 45 F.4th 8, 24 (D.C. Cir. 2022)).

Regarding *Dhanasar*'s second prong, he contends that in dismissing the combined motions, the Director disregarded letters establishing both his relevant experience in the industry, as well as interest from prospective customers and investors which showed he was well-positioned to advance his endeavor. However, upon review, we agree that the evidence and claims submitted did not overcome

the Director's denial. On appeal, the Petitioner does not address the Director's conclusion that the recommendation letters do not establish how his past successes working in various business development positions directly relate to his entrepreneurial endeavor of owning and operating his own logistics company. Moreover, the letter of intent to invest submitted on motion was executed more than three weeks after the petition was denied[4] and is a non-binding agreement contingent on the investor's ability to secure financing. Additionally, the agreement indicates the investor will receive 100% ownership interest in the Petitioner's business, but the Petitioner did not explain how he would continue to direct the operations of his business after transferring ownership to his investor. As such, the Director did not err in concluding that the evidence and claims on made on motion did not overcome the Petitioner's initial denial.

The Director also determined the Petitioner did not establish that, on balance, it would be beneficial to the United States to waive the requirements of a job as the endeavor did not lead to job creation sufficient to waive the interest inherent in the labor certification process, and the endeavor primarily benefited the Petitioner and his customers rather than the United States. On appeal, other than providing general claims of eligibility, the Petitioner has not overcome the Director's conclusions regarding the limited benefits of his business nor has he shown how the Director erred in dismissing his motions. And we agree with the Director that the claims and evidence submitted on motion did not establish the Petitioner's eligibility under the third prong of the *Dhanasar* framework. While it may be impractical for the Petitioner to obtain a labor certification, that is only one consideration under *Dhanasar*'s third prong, and on balance the Petitioner has not shown it would be beneficial to the United States to waive the requirements of a job offer.

III. CONCLUSION

For the reasons above, the Petitioner has not shown that the Director erred in dismissing either the motion to reopen or to reconsider.

ORDER: The appeal is dismissed.

[4] As previously stated, a petitioner must establish eligibility for a requested benefit at the time of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Izummi*, 22 I&N Dec. at 176.