U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31218727

Date: JUNE 28, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an attorney and investment consultant, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or 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).

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 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). We interpret "new facts" to mean those that are relevant to the issues raised on motion and that have not been previously submitted in the proceeding, which includes within the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." See id.

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." INS v. Abudu, 485 U.S. at 110.

II. ANALYSIS

The Petitioner proposes to establish an investment consulting business in Florida. As noted above, the Director denied the approval of this petition. The Director determined that the Petitioner qualifies for the underlying EB-2 classification as a member of the professions holding an advanced degree. We acknowledged the Director's determination and limited our review of the appeal to the Petitioner's eligibility for the national interest waiver.

For the national interest waiver, 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 arguments on the second and third prongs. 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). 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.

A. Motion to Reopen

On motion to reopen, the Petitioner submits a brief with evidence previously submitted with his petition and appeal brief. He does not, however, introduce any new evidence, or a new fact supported by documentary evidence to establish the national importance of his proposed endeavor. We will therefore dismiss the motion to reopen.

B. Motion to Reconsider

On motion, the Petitioner contests the correctness of our prior decision arguing we made "an erroneous conclusion of the law" and "misconception" of Dhanasar. The Petitioner maintains we erred in our understanding of his proposed endeavor, ignored evidence, and imposed "novel substantive requirements" beyond those set out in 8 C.F.R. § 204.5.

The Petitioner mainly takes issue with our assessment of opinions from professors arguing that we "failed to validate and weigh" those opinions in accordance with the law and that such opinions show his proposed endeavor is of national importance under the first prong of the Dhanasar analytical framework. In our discussion of the national importance, our appeal decision stated,

> Regarding the advisory opinion letters, in addressing the first prong of the Dhanasar framework, both professors state that the Petitioner's proposed endeavor 'impacts a matter that a government entity has described as having national importance or is the subject of national initiatives.' Specifically, they assert that according to information dated 2020 and posted on The White House.gov, 'discussions have deepened for a bilateral trade package, with a view towards intensifying the economic partnership' between the United States and Brazil. However, the fact that a petitioner is qualified for and may accept a position in an industry or sector that is the subject of national initiatives is not sufficient, in and of itself, to establish the national importance of a specific endeavor. The Petitioner must still demonstrate the potential prospective impact of his specific endeavor in that area of national importance, and he has not met that burden.

The Petitioner argues, "the fact that [the Petitioner] is qualified to establish his proposed endeavor in an industry or sector that is the subject of national initiatives is aligned to the requirements to establish the national importance of the specific endeavor." (emphasis omitted). However, we disagree with the Petitioner's assessment of the Dhanasar framework. The focus of Dhanasar*'s* first prong is the potential prospective impact of a petitioner's specific endeavor, not the entire industry or field in which they work. The professors' discussions of national foreign trade initiatives between the United States and Brazil are not sufficient to demonstrate that the Petitioner's work with foreign Brazilian investors for his investment consulting business rises to the level of national importance. As pointed out in our prior decision, "working in or establishing a business in an industry that is the subject of national initiatives is not sufficient, in and of itself, to establish the national importance of a specific endeavor." (emphasis added). Instead, a petitioner must demonstrate the potential prospective impact of his proposed endeavor, which for instance, may include showing the endeavor's impact on a matter that is the subject of national initiatives. Matter of Dhanasar, 26 I&N Dec. at 889 (stating that the first prong's focus is on "the specific endeavor that the foreign national proposes to undertake"). While the opinions point out that the Petitioner would be working in an industry which is the subject of national initiatives, they do not sufficiently demonstrate the potential prospective impact of his endeavor on the matter that is the subject of national initiatives.

Additionally, the Petitioner objects to our statement that the evidence did not show his business would "employ a significant population of workers in an economically depressed area, or that his endeavor would offer a particular U.S. region or its population a substantial economic benefit through employment levels or business activity." He argues that our decision did not adhere to the plain language of the law by changing the language of the examples set out in Dhanasar thereby creating an "ultra vires obligation." Under Dhanasar, he states that an endeavor may show national importance if it has "significant potential to employ U.S. workers." Id. at 890. The Petitioner argues that instead of adhering to *Dhanasar's* plain language which has no reference to the quantity of U.S. workers, we shifted the word "significant" to "operate as if a large number of workers must be employed to establish national importance." On motion, the Petitioner points to financial and personnel forecasts stated in his business plan to show his proposed endeavor has significant potential to employ U.S. workers.

In addition, he argues that we changed *Dhanasar's* "legal recommendation" that an endeavor may be of national importance if it has "substantial economic effects, particularly in an economically depressed area." Id. He claims that our statements imply "the need to employ a significant population of workers in an economically depressed area." (emphasis omitted). Also, he claims that we "changed the recommendation" from the endeavor having "substantial positive economic effects" to requiring the endeavor offer an economically depressed region or population "substantial economic benefits" through its employment levels or business activity. By using the word "benefits" instead of "effects," he claims we required that the endeavor "must have already produced economic advantages to the population and the region," which he claims supersedes Dhanasar's recommendation that "the proposed endeavor substantially influences an economically depressed area to have positive effects." On motion, the Petitioner again points to his business plan's financial and personnel forecasts arguing they support his statements that his proposed endeavor has the potential to have significant positive economic effects, particularly in an economically depressed area of Florida.

The Petitioner has not persuasively shown that our decision was based on an incorrect application of law or policy. Our statements at issue were made in the context of responding to and analyzing the Petitioner's assertions of his endeavor's prospective employment and financial forecasts and their potential prospective economic impacts. We addressed the evidence, including the financial and personnel projections in the business plan and the opinions. The points we highlighted addressed the Petitioner's claims of alleged job creation, potential tax revenue, and economic benefits to an economically depressed community, and they fall within *Dhanasar's* parameters as they relate to our analysis of the endeavor's potential prospective economic impact.

Furthermore, as explicitly stated in our previous decision, the statements at issue are an "example[,]" not mandatory requirements, of why the evidence did not sufficiently corroborate the opinions' assertions or sufficiently demonstrate the endeavor's significant potential "to employ U.S. workers" or "substantial economic effects" as contemplated by Dhanasar. Id. at 889-890. While a predetermined number of potential employees is not required to show an endeavor's national importance, employing a significant population of U.S. workers in an economically depressed area or offering other substantial economic benefits through employment levels or business activity may be indicative of an endeavor's "substantial positive economic effects." After considering all these factors and the evidence in the record, we correctly concluded the Petitioner had not adequately demonstrated that the potential prospective impact of his endeavor would rise to the level of national importance.

Finally, the Petitioner maintains that we did not mention or consider additional evidence submitted with his appeal which shows his business is working with foreign investors to invest in the construction of affordable housing in an economically depressed city in Florida. He also contends that we did not consider on appeal the new evidence clarifying his investment consulting business is not limited to real estate investments, but instead his business "operates across various industries . . . ." However, contrary to the Petitioner's assertions, our appeal decision did address the Petitioner's new evidence submitted with the appeal, specifically naming the evidence and stating that "we will not consider this evidence for the first time on appeal as it was not presented before the Director." See 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).

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.

The Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued it. Accordingly, we will dismiss the motion to reconsider.

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

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.