U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30315725

Date: MAR. 14, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an entrepreneur in the gym, health, and fitness clubs industry and in the martial arts studios industry, 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, concluding that the Petitioner did not establish that he is eligible for or otherwise merits a national interest waiver as a matter of discretion. We dismissed a subsequent appeal, concluding that the record did not establish that the Petitioner's proposed endeavor is of national importance. 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.

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[1], 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.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. The endeavor's merit may be demonstrated in a range of areas, such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889.

The second prong shifts the focus from the proposed endeavor to the individual. To determine whether they are well positioned to advance the proposed endeavor, we consider factors including, but not limited to: their education, skills, knowledge, and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. *Id.* at 890.

The third prong requires a petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, we may evaluate factors such as: whether, in light of the nature of the individual's qualifications or the proposed endeavor, it would be impractical either for them to secure a job offer or to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from their contributions; and whether the national interest in their contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, establish that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Id.* at 890-91.

[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).

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 record did not establish that the Petitioner's proposed endeavor is of national importance. 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

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 U.S. 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 U.S. at 110. With the current motion, the Petitioner has not met that burden.

The Petitioner proposed to work in the United States as an entrepreneur in the gym, health, and fitness clubs industry and in the martial arts studios industry. Specifically, the Petitioner proposed to open [redacted] a gym and martial arts studio, which will provide cross training, boxing, kickboxing, Muay Thai, and Brazilian jiu-jitsu classes and a course in martial arts teaching techniques. We previously determined that the Petitioner has not provided sufficient documentary evidence that his proposed endeavor as an exercise trainer and a group fitness instructor at his gym and martial arts studio would impact the gym, health, and fitness clubs industry, the martial arts studios industry, or the field of health and fitness more broadly rather than benefiting his own gym and martial arts studio and its students, trainees, or clients. We also determined that the Petitioner has not offered sufficient evidence that his gym and martial arts studio will employ a significant population of workers in an economically depressed area or that the proposed endeavor would offer a particular U.S. region or its population a substantial economic benefit through employment levels or business activity. In addition, we determined that the Petitioner has not otherwise provided sufficient information and evidence to demonstrate the prospective impact of his proposed endeavor rises to the level of national importance.

On motion, the Petitioner does not present new facts supported by affidavits or other documentary evidence to establish that we erred in dismissing the appeal. *See* 8 C.F.R. § 103.5(a)(2). Instead, the

Petitioner provides the same brief he previously submitted to us in support of his appeal and seeks reopening of the proceeding. Therefore, we conclude that the Petitioner has not shown proper cause for reopening the proceeding.

B. Motion to Reconsider

As indicated above, to have established merit for reconsideration of our latest decision, a petitioner must both state the reasons why they believe 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).

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. Instead, the Petitioner provides the same brief he previously submitted to us in support of his appeal and seeks reconsideration of our prior decision.

The Petitioner has not shown that our prior decision contains 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). 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.