U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30992616

Date: MAY 21, 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 a member of the professions holding an advanced degree or, in the alternative, 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 Nebraska Service Center denied the petition. The Director determined that the Petitioner did not establish eligibility for EB-2 classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. The Director further determined that the Petitioner did not demonstrate his eligibility for the requested national interest waiver. The Director dismissed the Petitioner's subsequently filed combined motions to reopen and reconsider. The matter is now before us on appeal.

In these proceedings, 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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).

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 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. Dhanasar states that 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.

Id. at 889.

II. ANALYSIS

Preliminarily, we note that while the Petitioner's appellate brief mainly addresses the Director's initial denial decision, we emphasize that the Petitioner did not appeal the petition's denial, but rather the Director's subsequent finding that his combined motions to reopen and reconsider did not meet applicable requirements. Therefore, the merits of the underlying petition's denial decision are not before us. Rather, the only issue before us is whether the Director properly found that the Petitioner's combined motions did not meet applicable requirements.

The Director dismissed the Petitioner's motion to reopen stating, "[t]he new evidence submitted on August 9, 2023[,] does not provide documents or information that would change the results of the case."

On appeal, the Petitioner points out that although he submitted new employment letters to demonstrate he meets the underlying EB-2 classification as an advanced degree professional, the Director did not give due consideration to the new evidence or provide an explanation with specific reasons for the denial of the motion to reopen. The Petitioner argues that the evidence submitted in support of his motion to reopen provided new facts relevant to the Petitioner's classification as an advanced degree professional.

Upon review, we agree that the Director did not provide any analysis or address the Petitioner's arguments or evidence on motion. The Director's decision dismissing the motion to reopen does not reflect acknowledgement or consideration of the Petitioner's new evidence, nor does it explain why the submitted evidence did not satisfy the requirements of a motion to reopen.

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

In dismissing the motion to reconsider, the Director stated "[y]our motion does not provide new facts, nor does it give reasons for reconsideration supported by any pertinent precedent decisions. Accordingly, your motion is dismissed per 8 CFR 103.5(a)(4)."

On appeal, the Petitioner contends that his motion to reconsider included arguments that the Director's decision was "based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the case record at the time of the decision." (emphasis omitted). When considering his eligibility for the national interest waiver, he argues that the Director incorrectly applied the law set out in the precedent decision of Dhanasar and did not give due consideration to the evidence in the record. He points out that the Director did not meaningfully consider his arguments or provide an explanation with specific reasons for denying his motion to reconsider.

Upon review, the Director did not provide any analysis or address the Petitioner's arguments on motion to reconsider. In addition, the Director's decision incorrectly implies that a motion to reconsider must be supported by new facts. While a motion to reopen must state new facts, a motion to reconsider must establish an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings. 8 C.F.R. § 103.5(a)(3) (emphasis added). The Director's decision dismissing the motion to reconsider did not meaningfully consider the Petitioner's arguments, nor did it explain why his arguments did not satisfy the requirements of a motion to reconsider.

When denying a motion, the Director must fully explain the reasons in order to allow the Petitioner a fair opportunity to contest the decision and provide an opportunity for meaningful appellate review. See Matter of M-P-, 20 I&N Dec. 786 (BIA 1994) (finding that the reasons for denying a motion must be clear to allow the affected party a meaningful opportunity to challenge the determination on appeal). Because the Director has not yet addressed the merits of the Petitioner's motions to reopen and reconsider, the record of proceeding is not ripe for us to consider the Petitioner's arguments in that combined motion. On remand, the Director should address the Petitioner's claims, legal arguments, and any new facts, and explain why they are insufficient to overcome the denial of the petition.

II. CONCLUSION

As the Director's decision did not adequately address the merits of the Petitioner's combined motions to reopen and reconsider, we will remand the matter for entry of a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.