U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34812349

Date: NOV. 12, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an HVAC professional, seeks employment-based second preference (EB-2) immigrant classification as 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 Texas Service Center denied the petition, concluding that the Petitioner had not established that he qualified for classification as an individual of exceptional ability. The Director also determined that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Director dismissed a subsequently filed motion to reopen and reconsider. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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

- 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.

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).

II. ANALYSIS

The Petitioner claims to be an HVAC and electrical expert and intends to continue his work in this field in the United States. In denying the petition, the Director determined that the Petitioner did not establish that he qualified for classification as an individual of exceptional ability or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Petitioner filed a combined motion to reopen and reconsider which the Director dismissed, determining that the Petitioner's submissions did not meet the motion requirements. The matter is now before us on appeal.

Where, as here, an appeal is filed in response to a director's unfavorable action on a motion, the scope of the appeal is limited to the Director's decision on that motion. The regulatory provision at 8 C.F.R. § 103.3(a)(2)(i) states: "The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions *within 30 days after service of the decision.*" (Emphasis added). Thus, if the Petitioner wished to appeal the Director's decision to deny the petition, he should have elected to file that appeal within 30 days of the Director's denial decision. Here, though, the Petitioner elected to file a combined motion instead, thus limiting the scope of the appeal to the merits of the Director's decision to dismiss the combined motion.

The only issue correctly before us on appeal is whether the immediate prior decision – that is, the Director's decision dated April 19, 2024 dismissing the Petitioner's motion to reopen and reconsider – was correctly decided. Our review and analysis in this matter, therefore, will focus on that determination. Upon review, we concur with the Director's decision dismissing the combined motion.

A. Motion to Reopen

In dismissing the Petitioner's motion to reopen, the Director determined that the Petitioner did not submit new facts that were supported by affidavits and/or documentary evidence demonstrating eligibility at the time of filing of the underlying petition. On motion, the Petitioner submitted the following evidence:

---

in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

1. Support Letter
2. Business Plan
3. Opinion letter from [redacted]
4. Document titled "Social Security Statement"
5. Document from the Ministry of Industry
6. Document titled "Capa de Processo"
7. Document titled [redacted]
8. Salario article
9. Letters of recommendation
10. Course completion certificates
11. Copy of Petitioner's High School Technical Diploma
12. Printout of assistance page from [redacted]
13. Accreditation letters
14. Certificate of quality of services for Service provision and Air Conditioning
15. [redacted] Certificate
16. Letter of intent from [redacted]
17. Article titled "Study: Immigrants in the U.S. are more likely to start firms, create jobs."

After review of the statements submitted on motion and the accompanying documentation, we concur with the Director's determination. Specifically, we note that almost all of the evidence submitted on motion was previously submitted in support of the petition or in response to the Director's request for evidence. A review of the evidence submitted on motion before the Director reveals no fact that could be considered *new* under 8 C.F.R. 103.5(a)(2).

Additionally, as noted by the Director, the Petitioner's submissions on motion did not address or resolve inconsistencies in the evidence previously submitted, such as discrepancies regarding his claimed foreign employment history. Rather than stating new facts supported by documentary evidence, the Petitioner resubmitted evidence and maintained that this previously submitted evidence was sufficient to overcome the Director's adverse findings.

Moreover, the Director properly determined that the Petitioner's resubmission of and reliance on his business plan for his company, [redacted] was not probative because the Petitioner was required to demonstrate eligibility at the time of filing.[2] On appeal, we note the Petitioner's repeated assertions that his proposed HVAC company and its accompanying business plan demonstrate the substantial merit and national importance of his proposed endeavor, but for the same reasons noted by the Director, we find this documentation insufficient. U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit sought at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A petitioner may not make material changes to a petition that has already been filed to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1988); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). On motion, the Petitioner did not contest the Director's adverse determination on this

[2] In response to the Director's request for evidence, the Petitioner stated for the first time that he intended to work as the CEO and chief technical officer of his own company, in contrast to his initial assertion that he intended to provide HVAC installation and corrective maintenance services.

issue, nor did he submit documentary evidence demonstrating his eligibility at the time of filing of the underlying petition.

Further, we agree with the Director's determination that the resubmission of letters on motion, including the opinion letter of [redacted] and the letter of intent from [redacted] did not reveal facts that could be considered *new* under 8 C.F.R. 103.5(a)(2). The Director noted that these letters had been previously considered and therefore did not warrant a change in the adjudication decision of the petition.

For the reasons outlined above, we find no error in the Director's decision dismissing the motion to reopen.

B. Motion to Reconsider

The Director dismissed the motion to reconsider on the basis that it did not provide reasons for reconsideration that were supported by citations to appropriate statutes, regulations, or precedent decisions, and it did not show that the decision was incorrect based on the evidence of record at the time of the decision.

On appeal, the Petitioner challenges the Director's determination that he does not qualify for classification as an individual of exceptional ability. To demonstrate eligibility for EB-2 classification as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). If a petitioner meets the minimum requirements by providing at least three types of initial evidence, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. The officer must determine whether the petitioner, by a preponderance of the evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

In the underlying decision denying the petition, the Director analyzed the evidence submitted by the Petitioner under all six of the evidentiary criteria and determined that the Petitioner met the requisite minimum of three criteria. After conducting a final merits determination, the Director determined that although the Petitioner met at least three out of six criteria under 8 C.F.R. § 204.5(k)(3)(ii), the record lacked evidence that the Petitioner's professional achievements demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In dismissing the Petitioner's motion, the Director recounted the findings set forth in the final merits determination and concluded that the Petitioner did not provide reasons for reconsideration that were supported by citations to appropriate statutes, regulations, or precedent decisions, and did not show that the determination regarding his eligibility for the underlying classification was incorrect based on the evidence of record at the time of the decision. On appeal, the Petitioner argues that "the judging officer failed to analyze ALL THE FORMAL ELIGIBILITY REQUIREMENTS FOR EB2 EXCEPTIONAL ABILITY, since the judge only analyzed 3 evaluative criteria . . ."

The Petitioner's assertion on appeal that the Director "only analyzed 3 evaluative criteria," while noted, is misplaced. Initially, the Director analyzed the Petitioner's evidence under all six criteria and

conducted a final merits determination, and restated the reasons for their adverse findings in the decision dismissing the motion. On motion, the Petitioner did not specifically and sufficiently articulate why the Director's decision determining that he was ineligible for classification as an individual of exceptional ability was based on an incorrect application of law or USCIS policy, nor did the Petitioner cite to any relevant statute, regulation or relevant precedent decision that would support a contention that the Director's decision was based upon a misapplication of statute, regulation, or policy to the evidence of record before the Director at the time of the decision to deny the petition.

Regarding his eligibility for a national interest waiver, the Petitioner makes no specific assertion of error on appeal with regard to the Director's April 19, 2024 decision. The Petitioner did not provide reasons for reconsideration that were supported by citations to appropriate statutes, regulations, or precedent decisions, and it did not show that the decision was incorrect based on the evidence of record at the time of the decision. Rather, his appellate brief simply reasserts facts already considered by the Director and maintains that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

For the reasons outlined above, we conclude that the Director's decision dismissing the Petitioner's motion to reconsider was correctly decided.

III. CONCLUSION

The Director properly determined that the Petitioner's combined motion did not meet the requirements under 8 C.F.R. § 103.5(a)(2) and (3).

ORDER: The appeal is dismissed.