U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33967551

Date: NOV. 20, 2024

Appeal of Texas 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 on behalf of the Beneficiary 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 the Petitioner did not establish that the Beneficiary qualifies for the underlying EB-2 classification or 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 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.

In the September 2023 denial notice, the Director concluded the Beneficiary satisfied three of the initial criteria for consideration, official academic record, ten years of full-time experience, and membership in professional associations,[1] but that the totality of the evidence did not demonstrate he obtained a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). The Director also concluded the Beneficiary did not meet the national importance requirement of the first prong of the *Dhanasar* framework. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). Specifically, the Director stated the Petitioner had not

[1]We note that, regarding to the membership in professional associations criterion, the regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." Accordingly, a professional association is one which requires its members to hold at least a U.S. bachelor's degree or the foreign equivalent. Here, the Petitioner did not establish that the International Society of Automation and the Association of Technology, Management, and Applied Engineering organizations require such a degree. In fact, the Beneficiary does not possess a U.S. bachelor's degree or its foreign equivalent. The Petitioner therefore has not demonstrated the Beneficiary's membership in a *professional* association and should be prepared to address this in any future filing.

shown that the Beneficiary's proposed endeavor "stands to sufficiently extend beyond the individuals the beneficiary would serve to impact the industry or field more broadly." The Director discussed media articles, government reports, expert opinion letters, and the shortage of industrial automation professionals.

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 satisfies these requirements and demonstrates eligibility for the requested benefit may be granted.

Here, the Petitioner has not appealed the September 2023 denial of the Form I-140, Immigrant Petition for Alien Workers, but rather the Director's subsequent dismissal of his motion to reconsider from March 2024. 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the question before us on appeal is limited to whether the Director erred in dismissing the motion.

On appeal, the Petitioner requests that we consider the Beneficiary as one of the owners of the petitioning company, rather than an industrial automation specialist (as indicated in the Form I-140). However, a petitioner may not make material changes to a petition that has already been filed in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1988). If significant material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. A new set of facts regarding the proposed endeavor would be material to eligibility for a national interest waiver under *Dhanasar*'s first and second prongs. *See Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

The Petitioner further explains that they are not including any new evidence or documents and that "[a]ll referenced documents are part of the Original Petition, the RFE response, or the Motion to Reconsider." The Petitioner then proceeds to discuss the September 2023 decision and the Beneficiary's eligibility for the requested benefit, rather than identifying an erroneous conclusion of law or statement of fact in the subsequently dismissed motion. 8 C.F.R. § 103.3(a)(1)(v).

Finally, the Petitioner states they requested the Director "treat the [m]otion as an appeal in the event of a dismissal" but that the "request was not addressed." While we acknowledge the Petitioner's statement, the Petitioner does not cite to any regulation that would permit the Director to do so. Further, and as included in the Director's decision dismissing the motion, according to 8 C.F.R. § 103.3(a)(2):

> (iii) ***Favorable action instead of forwarding appeal to AAU.*** The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under § 103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal.

(iv) ***Forwarding appeal to AAU.*** If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the related record of proceeding to the AAU in Washington, DC.

While the above permits the Director to treat an appeal as a motion to reopen or reconsider in certain circumstances, the Petitioner's previous filing was a motion to reconsider and not an appeal. Therefore, the Director did not err by not treating the unfavorable motion as an appeal.

For the reasons provided, the Petitioner has not established that the Director dismissed their motion in error or otherwise overcomes the basis for the prior decision. As such, we will not re-adjudicate the petition anew and, therefore, the underlying petition remains denied.

ORDER: The appeal is dismissed.