U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34810176

Date: NOV. 21, 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, 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 record did not establish the Petitioner's eligibility for EB-2 immigrant classification or the requested national interest waiver. The Director subsequently dismissed a combined motion to reopen and motion to reconsider. The Petitioner now appeals the Director's dismissal of the combined motions pursuant to 8 C.F.R. §§ 103.3 and 103.5(a)(6).

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.

As a preliminary matter, we emphasize that the appeal before us relates to the Director's April 2024 dismissal of the Petitioner's combined motion to reopen and motion to reconsider, not the September 2023 denial of the underlying petition. Therefore, the question before us is whether the Director erred in dismissing the combined motion.

In the September 2023 decision, the Director concluded that the Petitioner was not eligible for the underlying EB-2 immigrant classification as an advanced degree professional[1] because she established only two years, three months, and nine days of post-baccalaureate experience in the specialty.[2] And the

[1] An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

[2] The Director acknowledged the Petitioner's submission of multiple letters of recommendation discussing her experience in the field, but determined that, with the exception of one letter, the Petitioner had not shown that these letters were from former employers. *See* 8 C.F.R. § 204.5(k)(3)(i)(B) (stating that, unless a Petitioner establishes that such evidence is unavailable, "[e]vidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s)")

Director determined she did not qualify as an individual of exceptional ability[3] because she satisfied only two of the six initial regulatory criteria, 8 C.F.R. §§ 204.5(k)(3)(ii)(A) and (C), relating to attainment of a degree, diploma, certificate, or similar award and a license or certification for a profession or occupation[4].

Regarding the national interest waiver[5], the Director determined that the Petitioner made a material change to her proposed endeavor in response to the request for evidence (RFE). The Director, citing to *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), concluded that she was attempting "to make an apparently deficient petition conform to Service requirements" and explained that per *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), " [a] petitioner must establish eligibility at the time of filing" and that "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts."[6]

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence.[7] 8 C.F.R. § 103.5(a)(2). 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). U.S. Citizenship and Immigration Services (USCIS) may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

On motion, the Petitioner submitted primarily the same evidence she previously provided, but did supplement the record with an additional letter of recommendation as well as documents relating to the registration of her company. She also offered the same or similar arguments asserting her eligibility for the underlying classification and national interest waiver, but did not address, for example, the Director's conclusion that she had materially changed her proposed endeavor in response to the RFE. Similarly, the Petitioner did not address the Director's specific conclusions regarding the

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[3] Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having the requisite degree of expertise and will substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

[4] We note that, in concluding the Petitioner satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) relating to a license to practice the profession or certification for the occupation, the Director relied on the certificates of completion of several courses relating to the Petitioner's field. We disagree. While the certificates established that the Petitioner completed relevant courses, the Petitioner did not explain how these certificates of completion are a license to practice the profession or certification for a particular profession or occupation as required by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C). Accordingly, the Petitioner should be prepared to address this is any future filings.

[5] USCIS may grant a national interest waiver if a petitioner demonstrates a proposed endeavor has substantial merit and national importance; the petitioner is well-positioned to advance the proposed endeavor; and on balance, waiving the job offer requirement would benefit the United States. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016).

[6] Nevertheless, the Director acknowledged the remaining evidence in the record and concluded that the Petitioner did not establish the Petitioner's endeavor would result in broader implications to her field beyond the direct benefits to her potential employers or customers, or otherwise result in substantial economic benefits contemplated in *Dhanasar*. The Director also concluded that the record did not establish the Petitioner was well-positioned to advance her endeavor, or that, on balance, that it would be beneficial for the United States to waive the job offer requirement.

[7] *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

insufficient evidence establishing her experience, or otherwise explain how the Director misapplied law or policy in concluding that the Petitioner did not establish eligibility for the underlying classification. Accordingly, the Director dismissed the combined motion concluding that the Petitioner did not provide new facts or establish that the decision was based on an incorrect application of law or policy or incorrect based on the evidence in the record at the time of the decision.

On appeal, the Petitioner again resubmits the same evidence already in the record, along with newly issued experience letters documenting her experience within the field and continues to assert her eligibility for both the underlying EB-2 immigrant classification, as well as her eligibility for a national interest waiver. However, because the Petitioner was put on notice and given a reasonable opportunity to provide these letters before the Director, we will not consider them for the first time on appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *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 reason for filing an appeal is to provide an affected party with the means to remedy what they perceive as an erroneous conclusion of law or statement of fact. *See* 8 C.F.R. § 103.3(a)(1)(v). It is insufficient to broadly assert that the Director made an improper determination. Here, the Petitioner does not address the Director's conclusions in its April 2024 decision, nor does she accurately describe them. For example, the Petitioner states that the Director erred by not recognizing her satisfaction of the academic record criterion relating to her exceptional ability claim, and also erred by only considering three of the six initial evidentiary criteria. However, the record shows that in their initial decision denying the petition the Director acknowledged that the Petitioner satisfied the academic record criterion, and also addressed each of the Petitioner's claims under each qualifying criterion. Additionally, in dismissing the combined motions, the Director explained why the new evidence submitted did not overcome their initial decision concluding that the Petitioner only met two of the six evidentiary criteria. And rather than identifying an erroneous conclusion of law or statement of fact in the decision dismissing the motions, the Petitioner continues to assert her eligibility for the national interest waiver based on her position as CEO for her consulting company. She again does not acknowledge, for example, the Director's determination that she materially changed her proposed endeavor, or otherwise overcome the Director's conclusion that the benefits from her proposed endeavor would be limited to her future customers, and not rise to the level of national importance contemplated in *Dhanasar*.

Because the Petitioner's combined motion to reopen and reconsider did not contain new facts supported by affidavits or other documentary evidence overcoming the Director's decision and establishing her eligibility, and she did not demonstrate that the Director erred as a matter of law or policy, the Director properly dismissed her combined motion to reopen and reconsider. *See* 8 C.F.R. § 103.5(a)(4).

For the reasons provided, the Petitioner has not established that the Director dismissed her 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.