U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33303850

Date: SEP. 03, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a chemist and materials scientist, seeks employment-based second preference (EB-2) immigrant classification as either a member of the professions holding an advanced degree or 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the proposed endeavor was of national importance, the Petitioner is well positioned to advance the endeavor, or that it would be beneficial to waive the requirements of a job offer. The Petitioner then filed a combined motion to reopen and reconsider, which the Director subsequently dismissed. The matter is now before us on appeal pursuant to 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

A motion to reopen is based on new facts that are supported by documentary evidence. 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).

Upon review, we conclude the Director's decision contained sufficient errors to warrant a remand. For example, the Director found that "the motion satisfied the regulatory requirements for a filing a motion to reopen." Yet the motion was ultimately dismissed. If a motion to reopen is granted, the proceeding shall be reopened. 8 C.F.R. § 103.5(a)(4). As such, it is unclear from this language if the Director intended to grant or deny the motion to reopen. On remand, the Director should clarify the issue.

Additionally, the decision appears to have conflated the requirements of a motion to reopen and a motion to reconsider as the analysis of the motion to reconsider assessed the new evidence submitted with the motion to reopen. A motion to reopen is based on new facts supported by evidence, while motion to reconsider must establish the Director's decision was incorrect based on the evidence *in the record at the time of the decision*. 8 CFR 103.5(a) (emphasis added). Therefore, evidence submitted with the motion to reopen, should not have been reviewed in connection to the motion to reconsider. We are remanding the case to the Director for further review and to provide an accurate and sufficient explanation of the grounds of denial so that the Petitioner can more fully understand the Director's concerns.

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