U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20490060

Date: AUG. 3, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 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 Petitioner did not qualify for the underlying classification as an individual of exceptional ability and had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Petitioner appealed the matter to us, and we dismissed the appeal. We also dismissed the subsequently filed motion to reopen and motion to reconsider. The matter is now before us on a motion to reconsider. With the motion, the Petitioner submits a brief.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion.

I. LAW

By regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). The filing before us is not a motion to reconsider the denial of the petition. Instead, it is a motion to reconsider our most recent decision. In other words, we examine any new arguments to the extent that they pertain to our prior dismissal of the Petitioner's motion to reopen and motion to reconsider. Therefore, we cannot consider new objections to the earlier denial, and the Petitioner cannot use the present filing to make new allegations of error at prior stages of the proceeding.

A motion to reconsider must 1) state the reasons for reconsideration, 2) establish that the decision was based on an incorrect application of law or USCIS policy, and 3) establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). The Board of Immigration Appeals (BIA) generally provides that a motion to reconsider asserts that at the time of the previous decision, an error was made. It questions the decision for alleged errors in appraising the facts and the law. The very nature of a motion to reconsider is that the original decision was defective in some regard. *See Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991).

II. ANALYSIS

In dismissing the prior motion to reopen and motion to reconsider, we concluded that the Petitioner did not establish 1) that he qualifies for the underlying classification either as an advanced degree professional or as an individual of exceptional ability, 2) the national importance of his specific proposed endeavor, as required by the first prong of the *Dhanasar* analysis and, thus, he had not established that he is eligible for or otherwise merits a national interest waiver as a matter of discretion, and 3) "proper cause for reopening the proceedings or reconsidering our decision."

Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016),[1] states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

On motion, the Petitioner generally disagrees with our prior decision, but does not demonstrate that it was 1) based on an incorrect application of law or USCIS policy and 2) incorrect based on the evidence in the record at the time of the decision. As explained in our prior decisions and above, the Petitioner must first establish that he is eligible for the underlying classification, either as an advanced degree professional[4] or as an individual of exceptional ability.

The Petitioner argues that "a diploma does not define someone's ability" and incorrectly asserts that "a minimum of ten years professional work experience may satisfy the advanced degree requirement," but fails to demonstrate that he has an underlying U.S. bachelor's degree or its foreign equivalent, in addition to five years of post-baccalaureate experience to establish that he is an advanced degree professional as required by the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B).[5] As we previously explained, the Petitioner has not submitted "[a]n official academic record showing that [he] has a United States baccalaureate degree or a foreign equivalent degree." Further, without evidence of such a degree, we cannot conclude that any of the Petitioner's experience qualifies as "post-baccalaureate." *Id.*

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[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).
[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).
[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[4] The Petitioner raised this claim for the first time on appeal.
[5] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D) (defining "equivalence to completion of a United States baccalaureate or higher degree" for purposes of H-1B classification.) Where combinations of education or experience may equate to baccalaureate degrees, the Act and regulations state so explicitly. See section 214(i)(2)(C) of the Act, 8 U.S.C. § 1184(i)(2)(C) (allowing H-1B workers to have "experience in the specialty equivalent to the completion of such [bachelor's] degree"); *see also* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) (H-1B workers may have "education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate ... degree"). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

Regarding the Petitioner's claims that he is an individual of exceptional ability, as discussed in previous decisions, the record does not establish that he meets any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Further, in our prior decision, we explained that the Petitioner did not provide "any new documentary evidence" or "address the lack of specific arguments on appeal" regarding the claimed criteria. While the Petitioner continues to claim that he qualifies for the requested classification, he has not demonstrated that our prior decision was in error.

Because the record does not establish that Petitioner meets the underlying visa classification as either an advanced degree professional or an individual of exceptional ability, further discussion of the *Dhanasar* analysis would serve no meaningful purpose.

The Petitioner has not established that our prior decision, the dismissal of his motion to reopen and motion to reconsider, was based on an incorrect application of law or USCIS policy or that it was incorrect based on the evidence in the record at the time of the decision as required by 8 C.F.R. § 103.5(a)(3).

ORDER: The motion to reconsider is dismissed.