U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20570853

Date: MAY 31, 2022

Motion on Administrative Appeals Office Decision

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

The Petitioner, a general and operations professional, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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 qualified for classification as a member of the professions holding an advanced degree but 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. We dismissed a subsequent appeal, concluding that the Petitioner had not established that the proposed endeavor has national importance, reserving other eligibility criteria issues. The matter is before us again on a combined motion to reopen and a motion to reconsider.

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

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, "new facts" are facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original application. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

A motion to reconsider must establish that our 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). We do not consider new facts or evidence in a motion to reconsider.

II. ANALYSIS

As noted above, although we found that the proposed endeavor has substantial merit, we found that the record did not establish that the proposed endeavor has national importance, as required by the first prong of *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1]

Despite filing a combined motion to reopen and motion to reconsider, the Petitioner does not state a new fact, nor does he support such a fact with documentary evidence, material to the issue of whether the proposed endeavor has national importance. *See id.*; *see also* 8 C.F.R. § 103.5(a)(2). Instead, he asserts on motion, "through the evidence of record, the [Petitioner] has demonstrated under the preponderance of evidence standard, that [he is eligible for a national interest waiver]." Furthermore, the extent of the motion filing is the following: 1) the filing fee; 2) a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative; 3) Form I-290B, Notice of Appeal or Motion; 4) a copy of the Director's request for evidence; 5) a copy of the Director's decision; 6) a copy of our decision dismissing the appeal; and 7) the brief in support of the combined motion. None of these documents are documentary evidence supporting a new fact.

Because the motion to reopen does not state a new fact, supported by documentary evidence, we will dismiss the motion to reopen. *See* 8 C.F.R. § 103.5(a)(2), (a)(4).

Turning to the motion to reconsider, the Petitioner identifies several laws or policies that he asserts we misapplied. The Petitioner asserts that we misapplied the preponderance of evidence standard. The Petitioner also asserts that we misapplied 8 C.F.R. § 103.2(b)(8). The Petitioner further asserts that we misapplied *Dhanasar*, 26 I&N Dec. 884.

Except where a different standard is specified by law, a petitioner must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Under the preponderance of the evidence standard, the evidence must demonstrate that the petitioner's claim is "probably true." *Id.* at 376. We will examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

If a petitioner submits relevant, probative, and credible evidence that leads us to believe that the claim is "more likely than not" or "probably" true, it has satisfied the standard of proof. Stated another way, a petitioner must establish that there is greater than a fifty percent chance that a claim is true.

In determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. *Dhanasar* provided examples of endeavors that may have national importance, as required by the first prong, having "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

[1] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on the three prongs.

The Petitioner asserts, "through the evidence of record, the [Petitioner] has demonstrated under the preponderance of the evidence standard . . . [he has] highly qualified experience and expertise [and] has made significant contributions to the field," he "has demonstrated his record of success in related efforts . . . and, as such, he is well positioned to advance his proposed endeavor," and that "on balance, it would be beneficial for the United States to waive the requirements of a job offer and thus of a labor certification." The Petitioner's record of success in the past is material to the second *Dhanasar* prong, whether he is well positioned to advance the proposed endeavor, not the first *Dhanasar* prong, whether the proposed endeavor rises to the level of national importance. *See Dhanasar*, 26 I&N Dec. at 888-91. Similarly, the contributions the Petitioner "has made" to the field in the past is material to the second, not the first, *Dhansar* prong. *See id.* In turn, whether waiving the requirements of a job offer would be beneficial to the United States is material to the third *Dhanasar* prong. *See id.* Other than providing generalized statements that relate to the second and third *Dhanasar* prongs, the Petitioner does not identify specific evidence of record, either individually or in the aggregate, that establishes under the preponderance of evidence standard that the proposed endeavor will have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *See id.* at 889-90; *see also Matter of Chawathe*, 25 I&N Dec. at 375-76. Accordingly, the Petitioner does not establish that we misapplied the preponderance of evidence standard by dismissing the appeal.

Next, the Petitioner asserts, "if there is insufficient evidence to meet the [preponderance of evidence] standard, examiners should resolve their doubts by requesting clarifying evidence to afford the Petitioner the opportunity to explain and document its eligibility," citing 8 C.F.R. § 103.2(b)(8). The Petitioner's reliance on 8 C.F.R. § 103.2(b)(8) is misplaced. The regulation states:

> *If all required initial evidence has been submitted but the evidence submitted does not establish eligibility,* [*U.S. Citizenship and Immigration Services* (*USCIS*)] *may: deny the benefit request for ineligibility*; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the benefit request and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

8 C.F.R. § 103.2(b)(8)(iii) (emphasis added). Although USCIS may request more information or evidence from a petitioner, it is not required to do so. *Id.* On the contrary, USCIS may also deny the benefit request for ineligibility. *Id.* In the alternative, if all required evidence is not submitted with the benefit request or it does not establish eligibility, USCIS in its discretion may deny the benefit request. 8 C.F.R. § 103.2(b)(8)(ii). It is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *see also* 8 C.F.R. § 103.2(b)(1) (requiring petitioners to establish eligibility for the requested benefit at the time of filing the benefit request and to maintain eligibility through adjudication). Where, as here, the evidence of record indicated that a basic element of eligibility had not been met, it was appropriate for USCIS to deny the petition without a request for evidence. Accordingly, the Petitioner does not establish that we misapplied 8 C.F.R. § 103.2(b)(8) by dismissing the appeal.

Next, the Petitioner asserts that we misapplied *Dhanasar*, specifically that we "contradict[ed] the opinion issued in *Dhanasar* that the AAO emphasized on the geographic location that limits the Petitioner to show evidence of creating jobs and revenues in an economically depressed area." The Petitioner asserts that *Dhanasar* "does not require a petitioner to show substantial economic impact on an economically depressed area." The Petitioner mischaracterizes our decision, in which we stated:

> In addition, although the Petitioner asserts that [his company] will employ U.S. workers, he has not offered sufficient evidence that the area where they will operate is economically depressed, that he would employ a significant population of workers in that area, or that his endeavor would offer the region or its population a substantial economic benefit through employment levels or business activity.

Our decision did not require the Petitioner to show substantial economic impact on an economically depressed area. Instead, it observed that in addition to other reasons discussed therein, the Petitioner did not establish that the proposed endeavor has significant potential to employ U.S. workers or has other substantial positive economic effects. *See Dhanasar*, 26 I&N Dec. at 889-90. Accordingly, the Petitioner has not established that we misapplied *Dhanasar* by dismissing the appeal.

In summation, the Petitioner has not established on motion that we misapplied a law or policy and that our decision was incorrect based on the evidence in the record of proceedings at the time of the decision; therefore, we will dismiss the motion to reconsider. *See* 8 C.F.R. § 103.5(a)(3), (4).

Because the Petitioner has not satisfied the first *Dhanasar* prong on motion, we need not address whether he has satisfied the second and third *Dhanasar* prongs, and we hereby reserve these issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not submitted new facts and evidence sufficient to establish that he is eligible for, or otherwise merits, a national interest waiver as a matter of discretion. *See* 8 C.F.R. § 103.5(a)(2). In addition, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy and that it was incorrect based on the evidence then before us. *See* 8 C.F.R. § 103.5(a)(3).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.