U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20049420

Date: OCT. 26, 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 the second preference (EB-2) immigrant classification, 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 while the Petitioner was eligible for the EB-2 classification as a member of the professions holding an advanced degree, he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. In dismissing the subsequent appeal, we withdrew the Director's determination that the Petitioner was eligible for the EB-2 classification but agreed with his conclusion that the Petitioner is ineligible for a national interest waiver.[1]

The matter is again before us on a combined motion to reopen and motion to reconsider. On motion, the Petitioner asserts that we erred in dismissing his appeal. He submits a brief and additional evidence. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Upon review, we will dismiss the combined motions.

I. LAW

A. Motions

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 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.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Resubmitting previously provided evidence or reasserting previously stated facts do not meet the requirements of a motion to reopen. The new facts must also be relevant to the grounds of

[1] For the sake of brevity, we incorporate our previous decision in this matter, ID# 15869478 (AAO JUL. 20, 2021).

the unfavorable decision. A motion that does not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The review of any motion is narrowly limited to the basis for the prior adverse decision. 8 C.F.R. § 103.5(a)(1). Accordingly, we will examine any new facts and assertions to the extent that they pertain to our prior dismissal of the Petitioner's appeal.

Moreover, motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *See INS v. Abudu*, 485 U.S. at 110.

B. National Interest Waiver

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) [Individuals] who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an [individual's] services in the sciences, arts, professions, or business be sought by an employer in the United States.

In addition, the regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience

> in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the [individual] must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In order to show an individual is a professional holding an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the [individual] has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) further provides six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Matter of Chawathe,* 25 I&N Dec. at 376. *See also* 5 *USCIS Policy Manual* F.5, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[2] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the individual's proposed endeavor has both substantial merit and national importance; (2) that the individual 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.

II. ANALYSIS

A. Motion to Reconsider

The Petitioner has not demonstrated that our previous decision is based on an incorrect application of law or policy, nor has the Petitioner's motion shown that our prior decision is incorrect based on the evidence before us when we issued the decision. 8 C.F.R. § 103.5(a)(3).

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or

[2] 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*).

an individual of exceptional ability. The Director concluded that the Petitioner qualifies for EB-2 classification as a member of the professions holding an advanced degree. We withdrew his determination, in part, because the evidence of record did not establish, more likely than not, that the Petitioner possesses the foreign degree equivalent of a U.S. bachelor's degree. *Matter of Chawathe*, 25 I&N Dec. at 376.

We explained in our previous decision that although the Petitioner had provided a copy of his foreign diploma, his course transcripts, and an unsigned, one-page academic equivalency evalution ("evaluation"), the evidence was insufficient to show that he possesses a foreign degree equivalent to a U.S. bachelor's degree. We questioned the credibility of the evaluation - because it was not signed, did not identify the individual who performed the evaluation or the documents evaluated, and because it did not offer any analysis of the Petitioner's academic record to support the evaluator's conclusions. We also observed that the Petitioner's course transcripts included an incorrect year of birth for the Petitioner which had not been acknowledged or explained by the Petitioner or the evaluation company.

On motion, the Petitioner alleges that in our previous decision we "determined that [his foreign] bachelor's degree is the legal equivalent of a U.S. bachelor's degree." We disagree. As discussed above, we concluded in our previous decision that the record did not show that the Petitioner holds the foreign equivalent of a U.S. bachelor's degree in order to establish, in part, that he is eligible for the EB-2 classification under 8 C.F.R. § 204.5(k)(2) and 8 C.F.R. § 204.5(k)(3)(i)(B).

The Petitioner also erroneously asserts on motion that we questioned "the integrity of [his evaluation] because in the transcripts there is a typo about [his] year of birth," indicating that "the legal explanation" for this inconsistency is that "it's just a typo." On motion, the Petitioner does not address the reasons in our previous decision regarding the credibility of the evaluation which we outlined above. While the evaluation offers a conclusory statement – that the Petitioner's foreign degree is equivalent to a U.S. bachelor's degree from a regionally accredited institution in the United States - without more, the evaluation provides little support to inform our analysis regarding whether the Petitioner holds the requisite degree. Any evaluation performed by a credentials evaluator or school official is solely advisory in nature; the final determination continues to rest with the officer. *See Matter of Sea, Inc.* 19 I&N Dec. 817 (Comm 1988), and *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

On motion, the Petitioner has not shown that our previous determination - that the record is insufficient to show that he holds the requisite foreign degree equivalent of a U.S. bachelor's degree - is based on an incorrect application of law or policy; nor has the Petitioner shown on motion that our prior decision is incorrect based on the evidence before us when we issued the decision. 8 C.F.R. § 103.5(a)(3). Therefore, it does not meet the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(4).

Because the record at the time of our previous decision did not demonstrate that the Petitioner possesses the foreign degree equivalent of a U.S. bachelor's degree, we will reserve the Petitioner's assertions on motion that he possessed at least five years of post-baccalaureate progressive work experience to show his eligibility, in part, for the EB-2 classification. 8 C.F.R. § 204.5(k)(3)(i)(B).[3]

[3] It is unnecessary and would be an unwise use of the government's time and resources to analyze the remaining independent grounds when another is dispositive of the appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding

Although the Petitioner did not assert his eligibility as an individual of exceptional ability on appeal, we nevertheless examined the evidence in accordance with this classification and concluded in our previous decision that the record does not support a finding that the Petitioner meets at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). On motion, the Petitioner states in his brief that his "eligibility to submit an EB2 National Interest Waiver" is based upon his foreign bachelor's degree and his years of work in his field of endeavor. Since the Petitioner does not challenge our previous determination regarding his eligibility for the EB-2 classification as an individual of exceptional ability, we consider that issue waived on motion.[4]

The remaining issue raised by the Petitioner in his motion is whether the Petitioner has established his eligibility for a national interest waiver. As discussed, in order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for the EB-2 classification as either an advanced degree professional or an individual of exceptional ability. 203(b)(2)(A) of the Act. As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot.

A. Motion to Reopen

We will also dismiss the Petitioner's motion to reopen the proceeding. *See* 8 C.F.R. § 103.5(a)(2). On motion, the Petitioner provides another unsigned academic credential evaluation issued by an education credential evaluation company. The evaluation indicates that the "credential authentication" was based on "documents [that] were verified by the institution," but it does not identify the specific documents that were reviewed as part of the analysis. Therefore, we cannot determine what evidence, if any, was used by the evaluator during the review of the Petitioner's foreign education credentials.

In similar fashion to the previously submitted evaluation, the new evaluation is written on the company's letterhead but does not identify who performed the evaluation. The evaluation also provides a conclusory statement that the Petitioner's foreign degree is equivalent to a *Canadian (not a United States)* bachelor's degree and offers no indication regarding how the evaluation company analyzed the attributes about the Petitioner's specific academic institution, his credit hours, course content, and grades in order to assess his academic record.

In cases involving foreign degrees, USCIS may favorably consider a credentials evaluation performed by an independent credentials evaluator who has provided a credible, logical, and well-documented case for an equivalency determination that is based solely on the individual's foreign degree(s). Opinions rendered that are merely conclusory and do not provide a credible roadmap that clearly lays out the basis for the opinions are not persuasive. *See* 9 USCIS Policy Manual F.5, https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-9. Here, the information offered in the Petitioner's newly submitted evaluation is limited to a conclusory statement about the Petitioner's

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it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); 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).

[4] *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012), (when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived).

academic qualifications as they relate to education obtained in Canada, not the United States, and does not offer any analytical roadmap that lays out the basis for the evaluator's opinions. We conclude that this evidence is of little probative value to the issue at hand. *Matter of Chawathe*, 25 I&N Dec. at 376.

For the reasons discussed, the academic evaluation provided on motion does not constitute a new fact sufficient to establish that at the time of filing the petition, the Petitioner possessed the foreign degree equivalent of a U.S. bachelor's degree as required by 8 C.F.R. § 204.5(k)(2) and 8 C.F.R. § 204.5(k)(3)(i)(B). This evidence does not meet the requirements of a motion to reopen as set forth at 8 C.F.R. § 103.5(a)(2). Therefore, the motion does not meet the requirements of a motion to reopen. 8 C.F.R. § 103.5(a)(4).

Because the record does not demonstrate that the Petitioner possesses the foreign degree equivalent of a U.S. bachelor's degree, an analysis of the evidence offered on motion to establish that the Petitioner possessed at least five years of post-baccalaureate progressive work experience - to show his eligibility, in part, for the EB-2 classification would serve no useful purpose.[5]

As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot. There is no constructive purpose in analyzing the evidence provided on motion to establish his eligibility for the national interest waiver because it cannot change the outcome of the motion.

III. CONCLUSION

The Petitioner has not established that our previous decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record at the time of the decision. Further, the evidence provided in support of the motion to reopen does not overcome the grounds in our previous decision that specifically addressed the Petitioner's ineligibility for the EB-2 classification. The combined motions will be dismissed for the above stated reasons.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.

[5] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976); *see also Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015).