U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26053854

Date: APR. 10, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a financial manager, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and 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 Texas Service Center denied the petition, concluding that the Petitioner did not establish eligibility for the requested classification as either a member of the professions holding an advanced degree or an individual of exceptional ability. The Director also concluded that the Petitioner did not establish that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We affirmed the Director's decision and dismissed the Petitioner's subsequent appeal. The matter is now before us on combined motions to reopen and reconsider. 8 C.F.R. § 103.5.

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). Upon review, we will dismiss the combined motions.

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 petition. 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.

By regulation, the scope of a motion is limited to the "prior decision." 8 C.F.R. § 103.5(a)(1)(i). Therefore, the filing before us is not a motion to reopen and reconsider the denial of the petition. Instead, it is a motion to reopen and reconsider our most recent decision, the dismissal of the Petitioner's appeal. Accordingly, we examine any new facts and arguments to the extent that they pertain to our prior dismissal of the Petitioner's appeal.

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[1] or an individual of exceptional ability[2] in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Matter of Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[3] grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

II. ANALYSIS

In our appellate decision, we determined that the Petitioner did not establish that he was a member of the professions with an advanced degree. We concurred with the Director that the Petitioner provided evidence that he holds the foreign equivalent of a U.S. bachelor's degree in administration earned in 2005 in Brazil. We also concurred with the Director that the Petitioner did not establish that he possessed more than five years of progressive post-baccalaureate experience in the specialty. *See* 8 C.F.R. § 204.5(k)(3)(i)(B). We further determined that the Petitioner did not establish that he was an individual of exceptional ability because he did not meet at least three of the six evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii), and because the record did not establish that the Petitioner's experience is beyond that which is ordinarily encountered in the profession. As the documentation in the record did

[1] An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States 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] 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.[2] 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 a degree of expertise significantly above that ordinarily encountered in the field.

[3] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

not establish the Petitioner's eligibility for the requested EB-2 classification we concluded that further analysis of his eligibility for a national interest waiver would serve no meaningful purpose.[4]

We first note that the Director issued a request for evidence (RFE) analyzing the Petitioner's initial evidence in support of his request for classification as both a member of the professions with an advanced degree and an individual with exceptional ability. The RFE discussed the initial record in detail and gave the Petitioner an opportunity to submit additional evidence in attempt to establish his eligibility for the requested classification. In response to the RFE, the Petitioner reiterated his claim to qualify as a member of the professions with an advanced degree and submitted new evidence to document his claimed five years of experience. However, he did not provide any additional information or further his claim to qualify as an individual with exceptional ability. Nevertheless, the Director fully analyzed the Petitioner's claim to qualify as both a member of the professions with an advanced degree and as an individual with exceptional ability in his decision, including whether the evidence met each of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii).

On appeal, the Petitioner again reiterated his claim to qualify as a member of the professions with an advanced degree and did not address the Director's determination that he did not establish eligibility as an individual with exceptional ability. Where a petitioner does not address issues in an adverse decision we consider them abandoned. *See Matter of R-A-M-*. 25 I&N Dec. 657. 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). However, because we provided an analysis of the Petitioner's eligibility as an individual with exceptional ability in our decision on appeal and the Petitioner raises this on motion, we will address it here.

On motion, the Petitioner submits a brief with new evidence, as well as copies of evidence already in the record. The Petitioner's new evidence includes:

- A December 2022 course-by-course academic evaluation of his academic credentials.
- His own undated statement describing his experience with his previous employer.
- An English translation (without original foreign language) of a December 2022 printout from a Brazilian website discussing salary information for an "administrator."
- Information describing the Federal and Regional Councils of Administration in Brazil as organizations with oversight of the administrative profession.

In his brief on motion the Petitioner states that "USCIS should have but failed to recognize [his] five years of progressive experience … [and his] exceptional ability." The Petitioner does not assert that

[4] The Director determined that the Petitioner's proposed endeavor as a financial manager has substantial merit. However, he concluded that the Petitioner did not establish that the proposed endeavor is of national importance to meet the remainder of the first prong of the *Dhanasar* framework. He further concluded that the Petitioner did not establish that he is well-positioned to advance the proposed endeavor or that, on balance, waiving the job offer requirement would benefit the United States, under the second and third prongs of *Matter of Dhanasar*. In our appeal decision, we declined to reach but hereby reserved remaining arguments concerning eligibility for a national interest waiver. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding 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).

our previous appeal decision was based on an incorrect application of law and/or policy. As noted above, we do not consider new facts or evidence in a motion to reconsider. Therefore, the Petitioner has not met the requirements of a motion to reconsider.

In our prior appeal decision, we agreed with the Director that the Petitioner presented evidence that he earned the foreign equivalent of a U.S. bachelor's degree in administration. However, we stated that the evidence in the record does not establish that the Petitioner's employment experience was as a financial manager, the claimed specialty and the field of the Petitioner's proposed endeavor. We also stated that the employment letters in the record indicate that the Petitioner held the same position with one employer for ten years and do not establish that the experience was progressive in nature. Additionally, we noted that the name of the Petitioner's previous employer was inconsistent in that the employment letters in the record state the employer as "[redacted]," while the Petitioner lists the employer on his resume as "[redacted]." The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92.

In discussing the Petitioner's eligibility as an individual with exceptional ability, in our appeal decision we examined whether the evidence met each of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii). We noted that the Petitioner's official academic record does not support a finding of eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(A) because the record does not demonstrate that a bachelor's degree in administration is related to the area of claimed exceptional ability in financial management. With respect to other criteria under which the Petitioner claims eligibility, we noted:

- The Petitioner has not sufficiently established that he has ten years of full-time experience in the area of financial management as required under 8 C.F.R. § 204.5(k)(3)(ii)(B).
- The evidence the Petitioner provided to establish his salary from 2012 to 2015 does not correlate to the untranslated 2017/2018 salary data for the profession of administrator in the record and does not establish eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(D).
- The Petitioner's 2015 professional identity card and 2018 registration certificate from the Regional Council of Administration did not establish eligiblity under 8 C.F.R. § 204.5(k)(3)(ii)(C) or (E), in that the evidence was not valid at the time of filing. Additionally, the record did not demonstrate the relevance and significance of the evidence where the Petitioner claims to have been employed in the profession from 2005 to 2015, 10 years before having been issued an identity card and 13 years before registering with the Regional Council.

In his brief on motion, the Petitioner references evidence already in the record. The deficiencies in the already submitted evidence have been identified and discussed in our prior decision.[5] The Petitioner's brief on motion does not overcome those deficiencies and does not establish that he

[5] On motion the Petitioner again submits the same letter from his previous employer which states his job title as "administrator" and does not describe his job duties in detail beyond "performing administrative work." He also resubmits a letter from [redacted] attesting that the Petitioner "developed and implemented the financial control system" during a project in 2013 to build a soccer stadium in [redacted], Brazil, but does not describe the Petitioner's progressive experience beyond one project in one year. The Petitioner does not submit evidence to resolve the inconsistency in the name of his previous employer that we noted in our appeal decision or address this on motion.

possesses five years of progressive post-baccalaureate experience or that he is an individual with exceptional ability. Nor does the new evidence submitted on motion overcome these deficiencies.

The academic evaluation does not address the lack of evidence to establish that the Petitioner's post-baccalaureate experience was progressive in nature or in the specialty of financial management. The Petitioner's statement describing his job duties is self-serving and does not reflect independent, objective evidence of his claimed progressive experience. A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Here, the Petitioner does not submit independent, objective evidence to demonstrate the progressive nature of his employment or that it was in the specialty of financial management. Therefore, the new evidence does not establish that the Petitioner is a member of the professions with an advanced degree.

Similarly, the new evidence does not address the deficiencies in the Petitioner's evidence claiming eligibility as an individual with exceptional ability. The academic evaluation does not demonstrate that the Petitioner's course of study in administration is comparable to an education in financial management, as required by 8 C.F.R. § 204.5(k)(3)(ii)(A). Although the evaluation identifies courses in math, statistics, and accounting, the transcript lists only one course titled financial management. Further, the analysis and advisory evaluation states that the Petitioner's foreign education is equivalent to a four-year bachelor of business administration from an accredited U.S. institution, but does not list any specialty or concentration to indicate that the Petitioner's course of study was focused on financial management.

In his brief, the Petitioner states that he submits his 2015 professional identity card and 2018 registration certificate from the Regional Council of Administration in attempt to establish eligiblity under 8 C.F.R. § 204.5(k)(3)(ii)(C) as a license to practice the profession or certification for a particular profession. He also states that he does not submit evidence of membership in a professional association under 8 C.F.R. § 204.5(k)(3)(ii)(E). Although the Petitioner submits new evidence on motion describing the Federal and Regional Councils of Administration in Brazil as organizations with oversight of the administrative profession, he does not explain how he was able to practice in the profession of administrator from 2005 to 2015 without a professional identity card or registration, which was issued to the Petitioner in 2015. Additionally, the 2022 salary data does not correlate to the evidence in the record of the Petitioner's salary in 2012 to 2015 and does not establish eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(D).

Upon review of the motion to reopen, we conclude that the Petitioner has not stated new facts supported by documentary evidence that warrant reopening our prior decision. 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). Here, that burden has not been met.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.