U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22046022

Date: AUG. 24, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner seeks classification as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Texas Service Center denied the petition. Although the record establishes that the Petitioner qualifies for classification as a member of the professions holding an advanced degree, in relevant part the Director concluded that the record does not establish that the proposed endeavor has national importance. We dismissed a subsequent appeal. The matter is now before us on combined motions to reopen and reconsider.[1]

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 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). A motion to reconsider must establish that our 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these

[1] After the appeal decision, the Petitioner submitted two additional Forms I-290B, Notice of Appeal or Motion, indicating that the subsequent filings each were appeals. However, the submissions clarified that the Petitioner intended the subsequent filings to be combined motions to reopen and motions to reconsider. After filing the additional Forms I-290B, the Petitioner further clarified that the most recent submission is a duplicate and he requested that we "consolidate the filings and adjudge accordingly." Therefore, we address the merits of the submissions herein and we will dismiss the most recent submission as moot.

requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

II. ANALYSIS

As noted above, the Petitioner submits combined motions to reopen and motion to reconsider. We will address the respective motions separately below.

A. Motion to Reopen

Initially, the Petitioner described the proposed endeavor as a plan "to continue his work on conducting external configuration analysis for aircraft engines." On the Form I-140, Immigrant Petition for Alien Workers, the Petitioner further described the proposed endeavor as working on "external configuration analysis for aircraft engines, life analysis for aircraft engine cold section and structural analysis for air craft mounting system and lubrication system [sic]."

In response to the Director's notice of intent to deny (NOID), the Petitioner materially changed his description of the proposed endeavor. The Petitioner stated, instead, "I found a new employment position at the [redacted] . . .[,] a subsidiary of [redacted] which also incorporates [redacted] where I was working [] at the time of my application." The Petitioner further asserted in response to the NOID, "I am working now in the field of nuclear reactors." However, the Petitioner added, "I intend to continue to advance my knowledge on the FEA/CAE technology for aircraft engine external configuration and to expand this analysis for applications in the seismic and dynamic analysis of nuclear reactors/structures at [redacted]"

A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

As we explained in our prior decision, and as the Director explained in the decision, because the Petitioner's initial description of the proposed endeavor at the time of filing omitted any reference to "working . . . in the field of nuclear reactors," and because the field in which the Petitioner would work is material to the nature of the proposed endeavor and whether it may have national importance, the Petitioner's assertion in response to the Director's NOID that he "found a new employment position at the [redacted]" and that his endeavor would entail "working . . . in the field of nuclear reactors," rather than being limited to "conducting external configuration analysis for aircraft engines," the Petitioner materially changed his description of the proposed endeavor. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176; *Matter of Dhanasar*, 26 I&N Dec. 884, 888-91 (AAO 2016). Because the Petitioner's references to the field of nuclear reactors materially changed the description of the proposed endeavor, they cannot establish eligibility and we need not discuss them further. *See id.*

We further noted in our prior decision that, in addition to the Petitioner stating in response to the Director's NOID that he would divide his time among both "technology for aircraft engine external configuration and . . . applications in the seismic and dynamic analysis of nuclear reactors/structures," the record does not establish how much time he would devote to the proposed endeavor as described at the time of filing, "conducting external configuration analysis for aircraft engines." We explained that, because the record does not establish how much time—if any—the Petitioner would devote to the proposed endeavor as described at the time of filing, in addition to other deficiencies in the record, the record does not establish that some portion of the Petitioner's time spent on such analysis would have national importance, as required by the first *Dhanasar* prong. *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

More specifically, 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 [noncitizen] 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.

On motion to reopen, the Petitioner asserts that "[t]he Director incorrectly applied the standard set forth in *Dhanasar* in adjudicating [the Petitioner's] eligibility for a national interest waiver" by failing "to properly evaluate the national importance of his work and erroneously determin[ing] that [his] endeavor had changed." The Petitioner further asserts on motion, "It is plainly apparent that [the Petitioner's] proposed endeavor has not changed, rather his application of the proposed endeavor can be applied to multidisciplinary areas." The Petitioner submits the following new evidence on motion to reopen: a letter from the Petitioner's manager, and various documents pertaining to nuclear reactors and nuclear energy.

As discussed above, because the proposed endeavor, as described at the time of filing, omitted any reference to "working . . . in the field of nuclear reactors," and because the field in which the Petitioner would work is material to the nature of the proposed endeavor and whether it may have national importance, the Petitioner's subsequent references to the field of nuclear reactors and nuclear energy materially change the proposed endeavor and, therefore, cannot establish eligibility and we need not address them further. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176; *Dhanasar*, 26 I&N Dec. at 888-91. Accordingly, we need not address the various documents pertaining to nuclear reactors and nuclear energy the Petitioner submits on motion.

The letter from the Petitioner's manager asserts that his "background with jet engines is critical to his current work with nuclear reactors" because [redacted] is taking the world's largest jet engine and turning it into a power plant." The letter further informs that [redacted] is the primary design firm for approximately 1/3 of the operating nuclear power plants in the United States" and it discusses how developing nuclear energy may have national importance. However, as discussed above, because the proposed endeavor, as described at the time of filing, omitted any reference to "working . . . in the

field of nuclear reactors," we need not address the letter's references to nuclear power plants and nuclear energy because it cannot establish eligibility. *See id.* We note that the letter asserts that the Petitioner's "previous experience [was] of the utmost importance to the United States, as well as its critical ally in the Pacific region, South Korea" and that it is "directly related to his current endeavor at [redacted]." However, the letter does not elaborate on how the prospective, proposed endeavor of "conducting external configuration analysis for aircraft engines," as described at the time of filing, may have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" or 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 Dhanasar*, 26 I&N Dec. at. at 889-90. References to the Petitioner's "previous experience" and generalized assertions regarding his previous experience's relationship to his current work—notably pertaining to nuclear reactors and nuclear energy and, thus, outside the scope of the endeavor as described at the time of filing—do not articulate how the prospective, proposed endeavor of "conducting external configuration analysis for aircraft engines" may have national importance. In summation, neither the various documents pertaining to nuclear reactors and nuclear energy nor the letter from the Petitioner's manager submitted on motion to reopen establish how we may have erred in our conclusion that the record does not establish that the proposed endeavor, as described at the time of filing the petition, may have national importance.

B. Motion to Reconsider

On motion to reconsider, the Petitioner asserts that "[t]he exacting documentation being demanded is not for evidence that would tend to show that [the Petitioner] 'more likely than not satisfies the qualifying elements,' but rather shows that the Service is holding [the Petitioner] to what is akin to a clear and convincing or even beyond the reasonable standard [sic]," citing *Matter of Chawathe*, 25 I&N Dec. at 376. The only other law or policy the Petitioner references on motion to reconsider, as it may relate to our analysis of the *Dhanasar* criteria, is *Dhanasar* itself. More specifically, the Petitioner asserts that "the Service" in general "impermissibly imposes a higher burden of proof well beyond the preponderance of evidence standard" regarding "website printouts from [redacted] [that] did not include the exact type of engine named in the [redacted] letter; . . . which nuclear reactors or fuels the Petitioner 'would specifically be working on'; and [the omission of] contracts between [redacted] and a U.S. public or private institution'" in the record.

We first note that, to the extent the Petitioner references the Director's comments prior to our decision on the appeal, those issues are outside the scope of review for a motion to reconsider, which is limited to whether the appeal decision was based on an incorrect application of law or policy. 8 C.F.R. § 103.5(a)(1)(ii); *see also* 8 C.F.R. § 103.5(a)(3).

As discussed above, the Petitioner materially changed his description of the proposed endeavor from "conducting external configuration analysis for aircraft engines" to "working . . . in the field of nuclear reactors." Therefore, the type of engines and nuclear reactors or fuels addressed in—or omitted from—the record relate to understanding what the proposed endeavor would be both at the time of filing and as articulated thereafter. The type of engines and nuclear reactors or fuels addressed in—or omitted from—the record also relate to whether the proposed endeavor may have both substantial merit and national importance, as required by the first *Dhanasar* prong. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176; *Dhanasar*,

26 I&N Dec. at 888-91. Relatedly, whether the record contains sufficient evidence that the Petitioner's stated employer, [redacted] has contracted for work with a public or private institution also addresses the scope of the Petitioner's proposed endeavor and whether the endeavor may have national importance. *See id.* Thus, contrary to the Petitioner's assertion on motion, the Petitioner did not establish by a preponderance of the evidence that his initial proposed endeavor - external configuration analysis for aircraft engines - has national importance.

We note separately that the Petitioner asserts on motion to reconsider that we erred by stating in the appeal decision, "[t]he Director's finding of misrepresentation may be considered in any future proceeding where admissibility is an issue," citing *Matter of O-*, 8 I&N Dec. 295 (BIA 1959). The Petitioner further asserts on motion that an individual "may be found inadmissible at a later date when he or she subsequently applies for admission to the United States or applies for adjustment of status to permanent resident status," rather than found inadmissible in the adjudication of an immigrant petition itself, citing one of our non-precedent decisions dated 2010. The Petitioner also requests that "the [p]etition be reopened and reconsidered and the finding of fraud and inadmissibility made against [the Petitioner] be rescinded."

We first note that the Petitioner's reliance on the referenced non-precedent decision is misplaced. In addition to containing the passage quoted by the Petitioner above, the non-precedent decision specifically states that the "finding of fraud *shall be considered in any future proceeding where admissibility is an issue*" (emphasis added). Because the non-precedent decision referenced by the Petitioner on combined motion and the statement in our decision to which the Petitioner objects are essentially verbatim language, we are unpersuaded that the non-precedent decision indicates that we may have erred in the appeal decision.

Moreover, neither we nor the Director entered a finding of inadmissibility against the Petitioner. Accordingly, neither we nor the Director erred by entering such a finding, and there is no such finding to be rescinded if the matter were to be reopened or reconsidered.

We acknowledge that the Petitioner asserts on motion, "The Service's decision failed to identify with specificity the evidence submitted that served as the basis for a finding that the Petitioner and Beneficiary committed fraud or willful misrepresentation," citing section 212(a)(6)(C)(i) of the Act, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51-54 (1984), *Qwest Corp. v. Boyle*, 589 F.38 985, 998 (8th Cir. 2009), *Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994), and other, unpublished cases. However, the Petitioner also submits on motion, in relevant part, "an up-to-date resume" and "an employment verification letter." We incorporate by reference our analysis of the misrepresentations in the record discussed in the appeal decision and we note that the Petitioner's submission of the résumé and letter on motion undermine his assertion that the decision failed to identify with specificity the evidence that served as the basis for finding misrepresentation. On the contrary, our appeal decision contained a large table that specifically listed numerous items of evidence that served as the basis for finding misrepresentation regarding the titles and dates of the Petitioner's positions held, apparently simultaneously, since 2010. As we specifically listed in our appeal decision, that evidence includes the following: NIW résumé, NIW organizational chart in NOID response, NIW Form ETA 750 Part B, L-1A initial support letter, NIW [redacted] letter in NOID response, L-1A initial support letter, NIW [redacted] letter in NOID response. That the Petitioner submitted a new résumé and letter indicates that we sufficiently informed him that

information provided in a résumé and multiple letters in the record were among the evidence that served as the basis for finding misrepresentation.

We further note that newly submitted evidence is beyond the scope of a motion to reconsider, which is limited to evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). Additionally, although a motion to reopen must state new facts and be supported by documentary evidence, 8 C.F.R. § 103.5(a)(2), the information contained in the résumé and letter submitted on motion do not present new facts; rather, they address information already in the record that we discussed in the appeal decision.

In summation, although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has not established eligibility. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4). We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong, and any other issue addressed in our prior decision. *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).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.