U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25115006

Date: FEB. 15, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a finance manager, 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 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 her appeal and two subsequent combined motions to reopen and reconsider. In our most recent decision, we determined that the Petitioner did not present a new fact supported by documentary evidence, and the motion did not identify a specific law or policy we incorrectly applied to the evidence of record at the time of our prior decision. The matter is before us again on a third combined motion to reopen and motion to reconsider.

In this proceeding, the Petitioner bears the 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 motions.

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 decision was 1) based on an incorrect application of law or policy, and 2) incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). The scope of any motion is limited to review of "the prior decision." *See* 8 C.F.R. § 103.5(a)(1)(i). As noted, we dismissed the prior combined motions because the motion to reopen did not present a new fact, supported by documentary evidence, and the motion to reconsider did not identify a law or policy that we incorrectly applied to the evidence in the record. Thus, our analysis for these combined motions is limited to the following: (1) whether the Petitioner presents a new fact, supported by evidence, that shows proper cause to reopen our decision on the second combined motions; or (2) whether the Petitioner establishes that the dismissal of the second combined motions was based on an incorrect application of law or policy.

The Petitioner does not demonstrate a new fact supported by documentary evidence for the third motion to reopen, as required by 8 C.F.R. § 103.5(a)(2).[1] Additionally, the Petitioner does not identify a law or policy that we may have incorrectly applied in our decision dismissing the second combined motions under 8 C.F.R. § 103.5(a)(3).

With this motion, the Petitioner requests "a broad overhaul of the current national interest framework" and contends that the *Dhanasar* framework unduly disadvantages "corporate innovators." *Matter of Dhanasar* is the controlling precedent decision that we must follow in evaluating national interest waiver petitions. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). The Petitioner does not claim that we have incorrectly applied the law, rather she requests that we use a different standard. However, the Petitioner does not explain how that standard qualifies as binding authority. This does not meet the requirements for a motion to reconsider. 8 C.F.R. § 103.5(a)(3).

The Petitioner also asserts that she was deprived of her constitutional due process rights in the Director's determination that she did not qualify for a national interest waiver. But the Petitioner does not identify due process rights that are implicated in the adjudication of her national interest waiver petition. *See Lyng v. Payne*, 476 U.S. 926, 942 (1986) (stating that "[w]e have never held that applicants for benefits…have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."); *see also Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (explaining that the Fifth Amendment protects against the deprivation without due process of property rights granted to noncitizens; however, petitioners do not have an inherent property right in an immigrant visa). As such, the Petitioner does not identify a law or policy that we may have incorrectly applied. 8 C.F.R. § 103.5(a)(3).

The Petitioner also claims that the Director's decision was inadequate because it did not sufficiently respond to each of her arguments and, further, if he determines that she is ineligible, "his decision should address all of her arguments and evidence, and explain the relative decisional weight given to each balancing factor." The Petitioner does not cite to a law or policy in support of this claim. Moreover, the Petitioner's claim relates to the Director's initial decision, and not to the dismissal of the second combined motions. As stated above, the Petitioner must first establish that we should reconsider the dismissal of the second combined motions based on an incorrectly applied law or policy, which she has not done. 8 C.F.R. § 103.5(a)(1)(i), (a)(3).

The Petitioner also asserts that the Director erred by applying a stricter standard of proof than the preponderance of the evidence standard. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Again, the Petitioner's claim relates to the initial decision issued by the Director, rather than identifying a law or policy that we incorrectly applied in dismissing her second combined motions. Moreover, the Petitioner does not support this assertion with specificity as to the record, and her unsupported assertion alone does not establish that our dismissal was incorrect based on the evidence in the record. 8 C.F.R. § 103.5(a)(3).

[1] We note that the Petitioner provides with these motions a copy of two paystubs from 2022 and a supplemental statement that discusses her employment as of 2021. The Petitioner filed her petition in 2018. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1). Further, although the Petitioner asserts that this evidence establishes the national importance of her proposed endeavor, the record does not demonstrate that this evidence supports a new fact that establishes her eligibility for a national interest waiver and thus proper cause to reopen the prior decision. *See* 8 C.F.R. § 103.5(a)(1)(i).

Finally, the Petitioner states that she disagrees with the Director's finding that she did not meet at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii) and asserts that she submitted "comparable evidence" of her exceptional ability in accordance with 8 C.F.R. § 204.5(k)(3)(iii). Whether the Petitioner qualifies as an individual of exceptional ability has not been at issue in any of the appellate or motion proceedings below. The Director found that the Petitioner qualified for the EB-2 visa classification as an advanced degree professional. As such, whether the Petitioner is an individual of exceptional ability is moot, and her claim does not meet the requirements for a motion to reopen or reconsider. 8 C.F.R. § 103.5(a)(2)-(3).

The Petitioner also restates many of the same claims and references the same evidence that we have addressed in prior appellate and motion proceedings. Because we have already discussed those claims and evidence, we need not address them again here. Moreover, previously submitted evidence and arguments do not meet the motion requirements at 8 C.F.R. § 103.5(a)(2)-(3).

The third combined motions do not establish proper cause to reopen the proceeding or reconsider our decision dismissing the Petitioner's second combined motions. Because the instant motions do not meet the applicable requirements, we must dismiss them. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.