U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25233946

Date: MAR. 22, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a sales and marketing officer, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability, 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 neither qualified for classification as an individual of exceptional ability nor established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Petitioner appealed the matter to us, and we dismissed the appeal, concluding that the Petitioner had not established that he was an advanced degree professional[1] or an individual of exceptional ability, nor had he established that he was eligible for a national interest waiver of the job offer.[2] We also dismissed on the same grounds a subsequently filed motion to reopen and motion to reconsider.[3] We dismissed a later motion to reconsider[4] because the Petitioner did not demonstrate that our prior decision was in error; since the record did not establish that the Petitioner met the underlying visa classification as either an advanced degree professional or an individual of exceptional ability, we did not include further discussion of the *Dhanasar* analysis, as it would have served no meaningful purpose. The matter is now before us on a motion to reopen and a motion to reconsider. On motion, the Petitioner submits a brief.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion to reopen and the motion to reconsider.

[1] The Petitioner raised this claim for the first time on appeal.
[2] *See* [redacted] (AAO January 27, 2021).
[3] *See* [redacted] (AAO August 19, 2021).
[4] *See* [redacted] (AAO August 3, 2022).

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 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).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen to instances where the petitioner has shown "proper cause" for that action. The scope of a motion is limited to "the prior decision." *Id.* We cannot grant a motion that does not meet applicable requirements. See 8 C.F.R. § 103.5(a)(4).

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. Section 203(b)(2) of the Act. The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *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 [noncitizen] 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.
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> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of 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).

Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016), states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion,[5] grant a national interest waiver if the petitioner demonstrates: (1) that the noncitizen's proposed endeavor has both substantial merit and national importance; (2) that the noncitizen 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.[6]

[5] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS decision to grant or deny a national interest waiver to be discretionary in nature).
[6] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

As an initial matter, we note that the review of any motion is narrowly limited to the basis for the prior adverse decision. In dismissing the prior motion to reconsider, we concluded that the Petitioner did not establish the following: (1) that he qualifies for the underlying classification either as an advanced degree professional or as an individual of exceptional ability; and (2) proper cause for reconsidering our decision. We stated that further discussion of the *Dhanasar* analysis would serve no meaningful purpose because the Petitioner did not establish eligibility for the underlying visa classification.

A. Motion to Reopen

On motion to reopen, the Petitioner does not state new facts supported by documentary evidence to establish that he qualifies for the underlying classification either as an advanced degree professional or as an individual of exceptional ability. 8 C.F.R. § 103.5(a)(2). Therefore, we will dismiss the motion to reopen.

B. Motion to Reconsider

On motion to reconsider, the Petitioner disagrees with our prior decision but does not demonstrate that the decision was based on an incorrect application of law or policy and that it was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). As explained in our prior decision, the Petitioner must first establish that he is eligible for the underlying classification as either a professional holding an advanced degree or as an individual or exceptional ability.

As he stated in the brief accompanying his prior motion to reconsider, the Petitioner again incorrectly asserts that "a minimum of ten years professional work experience may satisfy the advanced degree requirement." The Petitioner appears to conflate language concerning requirements found in regulations applicable to other employment-based visa classifications [7] with requirements for the EB-2 classification at 8 C.F.R. § 204.5(k). While the Petitioner asserts that either work experience alone or a combination of experience and educational credentials may be considered as equivalent to a bachelor's degree, that is not the case for the EB-2 classification; the regulations require, in part, receipt of a U.S. bachelor's degree or a degree that is the foreign equivalent, followed by at least five years of progressive experience in the specialty. The record does not include documentation to establish that the Petitioner possesses a U.S. bachelor's degree or its foreign equivalent.[8] Further, without evidence of such a degree, we cannot conclude that any of the Petitioner's experience qualifies as post-baccalaureate experience. The Petitioner has not established that he is eligible for the requested classification as an advanced degree professional.

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[7] Compare 8 C.F.R. § 214.2(h)(4)(iii)(D) (defining "equivalence to completion of a United States baccalaureate or higher degree" for purposes of H-1B classification). Where combinations of education or experience may equate to baccalaureate degrees, the Act and regulations state so explicitly. *See* section 214(i)(2)(C) of the Act, 8 U.S.C. § 1184(i)(2)(C) (allowing H-1B workers to have "experience in the specialty equivalent to the completion of [a bachelor's] degree"); *see also* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) (H-1B workers may have "education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate…degree"). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

[8] The Petitioner does not assert, and the record does not reflect, that he has a master's or higher degree.

Regarding the Petitioner's claims that he is an individual of exceptional ability, as discussed in previous decisions, the record does not establish that he meets any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Further, in our prior decisions, we explained that the Petitioner did not provide new documentary evidence, offer specific arguments regarding the claimed criteria, or identify any erroneous conclusion of law or statement of fact. While the Petitioner continues to claim that he qualifies for the requested classification, he has not demonstrated that our prior decision was in error. The Petitioner has not established that he is eligible for the requested classification as an individual of exceptional ability.

Because the record does not establish that the Petitioner meets the underlying visa classification as either an advanced degree professional or an individual of exceptional ability, further discussion of the *Dhanasar* analysis would serve no meaningful purpose.

The Petitioner has not established that our prior decision, the dismissal of his motion to reconsider, was based on an incorrect application of law or policy and that it was incorrect based on the evidence in the record at the time of the decision, as required by 8 C.F.R. § 103.5(a)(3). Therefore, we will dismiss the motion to reconsider.

III. CONCLUSION

For the reasons discussed, the evidence provided in support of the motion to reopen and the motion to reconsider does not overcome the grounds underlying our prior decision and does not meet the requirements of a motion to reopen or a motion to reconsider. Therefore, the motions must be dismissed.[9]

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[9] The regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires the motion to be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceedings and, if so, the court, nature, date, and status or result of the proceeding." In addition to the deficiencies noted above, the Petitioner did not include the required statement; therefore, his motion does not meet the applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).