U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25573069

Date: MAR. 24, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a pilot, seeks second preference immigrant classification as either an advanced degree professional or an individual of exceptional ability in the sciences, arts or business. He also seeks 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Acting Director of the Texas Service Center denied the petition, concluding that: 1) the Petitioner had not established eligibility for the underlying EB-2 immigrant visa classification as a member of the professions holding an advanced degree or an individual with exceptional ability; and 2) the Petitioner did not establish that a waiver of the classification's job offer requirement would be in the national interest. The Petitioner subsequently filed an appeal, which we dismissed, concluding that the Petitioner had not overcome the Acting Director's adverse conclusion regarding his eligibility for the underlying EB-2 immigrant visa classification.[1] The matter is now before us on a motion to reopen.[2]

[1] We determined that because the Petitioner did not establish eligibility for EB-2 visa classification, we reserved, without making a conclusion on, the issue of whether the Petitioner meets the remainder of the first prong on national importance, or the second and third prongs under the *Dhanasar* framework. *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). We note, however, that although we did not include a discussion of the *Dhanasar* framework in our decision on appeal, even if the Petitioner could establish EB2 eligibility, which he has not, the record does not show that the Petitioner would overcome the Acting Director's decision on national importance so as to merit approval of his request for a national interest waiver.

[2] We decline the Petitioner's request for oral argument. 8 C.F.R. § 103.3(b).

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 motion to reopen.

I. REQUIREMENTS OF A MOTION TO REOPEN

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

In addition, the new facts in a motion to reopen must possess such significance that "the new evidence offered would likely change the result in the case." *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). In other words, a motion to reopen should only be granted under limited circumstances where the petitioner demonstrates that the new evidence would result in a different outcome. *See id.*

II. ANALYSIS

The issue to be determined is whether the Petitioner has offered evidence that warrants reopening of our prior decision, where we concluded that the Petitioner did not demonstrate eligibility for the EB-2 immigrant classification because he did not establish that he is an individual with exceptional ability. Although we explained why the Petitioner also does not qualify for the EB-2 classification as a member of the professions holding an advanced degree, we ultimately concluded that the Petitioner waived that issue on appeal because he did not address it, either through arguments in his appeal brief or through the submission of evidence on appeal. *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). Accordingly, because the Petitioner effectively waived the issue of whether he qualifies as an advanced degree professional, any evidence submitted on motion with regards to the waived issue will not be considered as a basis for reopening of our prior decision.

Next, we addressed the Petitioner's claim that he is an individual with exceptional ability.

To determine eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations at 8 C.F.R. § 204.5(k)(3)(ii) further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
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> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other renumeration [*sic*] for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act. Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows the petitioner possesses exceptional ability. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376.

In the present matter, of the six criteria listed above, we agreed with the Acting Director's determination that the Petitioner met the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), and (E). We noted, however, that the Petitioner did not address the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) on appeal. Therefore, although the current motion to reopen contains evidence pertaining to the Petitioner's prior experience in the occupation for which he seeks a national interest waiver, the Petitioner did not previously address this criterion on appeal and thereby waived any future claim pertaining to that criterion on motion. *See Matter of R-A-M-,* 25 I&N Dec. at 658 n.2.

Likewise, we noted that on appeal the Petitioner did not offer additional evidence or put forth an argument regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D); we further pointed out that in response to a previously issued notice of intent to deny (NOID) the Petitioner stated that he was "not submitting evidence to prove this criterion." As such, we will not consider on motion any evidence that the Petitioner now offers regarding a criterion he previously waived. *See Matter of R-A-M-,* 25 I&N Dec. at 658 n.2.

Regarding the last criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), although we acknowledged that the Petitioner has extensive experience as a pilot, we determined that the Petitioner did not explain the nature of his specific contributions to the field of aviation and he offered no supporting evidence on

this point. As such, we concluded that the Petitioner did not demonstrate that he received "recognition for achievements and significant contributions to the industry or field." In addressing this criterion on motion, the Petitioner resubmits copies of the following: 1) translation of Federal Law 12,725 from October 2012; 2) translation of an "Acknowledgement" of the Petitioner's "active participation in the Commission for the Control of Aviation Hazard in Brazil"; 3) a partially translated environmental license;[3] 4) a translated "Diploma" establishing the Petitioner's "valuable services to [redacted] and 5) a 1998 letter from [redacted] who identified himself as [redacted] of the National Transportation Safety Board (NTSB) at the time the letter was written. Because these documents were part of the record at the time of the appeal and had been previously considered, they do not constitute evidence of new facts to be considered in support of a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2).

Other supporting evidence on motion includes another letter from [redacted] in his capacity as former [redacted] of the NTSB and a letter from the former [redacted] at the Brazilian Aeronautical Accidents Investigation and Prevention. We note, however, that the Petitioner previously provided letters from the same two signatories in response to the NOID. Although the letters submitted on motion are not the same letters that were previously submitted, their content is remarkably similar to that in the originally submitted letters from the same two signatories, and on motion the Petitioner does not point to any difference in content. Because the newly submitted letters do not offer new facts and because the content in the letters had been duly considered as part of our appellate review, the letters do not establish cause for reopening our prior decision.

Lastly, the Petitioner seeks to address our final merits determination where we highlighted our finding that the Petitioner did not explain the nature of his specific contributions to the field of aviation or provide evidence with regard thereto. We further pointed out that the Acting Director's denial included the final merits determination in which she provided a comprehensive analysis of the evidence in the record. We noted, however, that the Petitioner neither discussed that analysis nor provided evidence on appeal, but rather merely reiterated his professional accomplishments during his 40 years of experience in the aviation field. We concluded that despite the Petitioner's extensive experience as a pilot, he did not explain how satisfying his academic and licensing requirements demonstrate exceptional ability. Likewise, the Petitioner similarly fails to adequately address the final merits determination on motion, focusing instead on our summary of the Acting Director's decision where she commented on the lack of relevance and significance of the evidence pertaining to the Petitioner's membership in a professional association. However, the Petitioner does not offer new facts or evidence to specifically address deficiencies identified; instead, he resubmits previously submitted declarations and other documents pertaining to his professional credentials and experience.

III. CONCLUSION

In sum, the Petitioner has not offered facts supported by evidence to show proper cause for reopening our prior decision. Therefore, the Petitioner has not met the requirements of a motion to reopen.

[3] This document appears to be a license comprised of various fields containing information associated with the filer, such as names and license duration period. However, only portions of the document have been translated into English. We note that a partial translation is not in compliance with regulatory criteria, which require that a full English language translation accompany any foreign document submitted as evidence. *See* 8 C.F.R. § 103.2(b)(3).

ORDER: The motion is dismissed.