U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-O-A-A-

DATE: JAN. 22, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an architect, 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as 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 Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not 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.[1] The matter is now before us on motion to reconsider. For the reasons discussed below, we will deny the motion.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

With respect to her proposed endeavor, the Petitioner indicated that she plans to design, produce, and market a multi-functional bag, called [redacted] for retail customers, non-profits, non-

[1] *See Matter of K-O-A-A-*, ID# 1392402 (AAO June 21, 2018).

governmental organizations, and humanitarian purposes (homeless and refugee populations). She asserted that she intends to introduce a "product that offers its users a multi-functional bag that can be available to all sectors of the market." In addition, the Petitioner stated that she will partner "with organizations like the [redacted] to supply them with bags and form a "worker's cooperative" enlisting "the homeless who want to work . . . for this endeavor." In our prior decision, we determined that because the documentation in the record did not establish that the prospective impact of the Petitioner's endeavor was consistent with a finding of national importance as required by the first prong of the *Dhanasar* precedent decision, she had not demonstrated eligibility for a national interest waiver.

On motion, the Petitioner argues that our decision "failed to address the ex post facto application of *Matter of Dhanasar*" to her case. She notes that her petition was filed in October 2016 before the *Dhanasar* precedent decision was issued. In December 2016, we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884. In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*). *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when a petitioner meets the three-prong analytical framework identified at the outset of this decision. We note that *Dhanasar* does not represent a change in the underlying law, but rather an adoption of a clearer and more flexible framework for exercising the discretion granted to USCIS by already-existing law and regulations.[2]

The Petitioner contends that "because her petition was filed under *NYSDOT*, the proper precedent decision to apply to her case should have been *NYSDOT* and not *Dhanasar*." She further states: "If the correct law had been applied in light of the evidence submitted, the Petitioner believes she would have prevailed and her appeal would have been sustained." The Petitioner does not provide support for her assertion that her evidence would have established eligibility under the *NYSDOT* framework. Regardless, with regard to following the national interest waiver framework set forth in *Dhanasar*, USCIS, by law, does not have the discretion to disregard binding precedent. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions "may be modified or overruled by later precedent decisions" and that "they are binding on all Service employees in the administration of the Act."

In addition, we note that the Director issued an April 2017 Request for Evidence advising the Petitioner of the eligibility requirements under *Dhanasar* and asking for documentation to satisfy its three-part framework. *See* 8 C.F.R. § 103.2(b)(8) (requests for evidence). In response, the Petitioner provided further evidence and asserted that she was eligible for a national interest waiver under the *Dhanasar* framework. Further, after the Director denied the petition, the Petitioner's appellate submission presented further information and arguments relating to her eligibility under *Dhanasar*.

[2] We explained in *Dhanasar* that the new framework will "provide greater clarity, apply more flexibly to circumstances of both petitioning employers and self-petitioning individuals, and better advance the purpose of the broad discretionary waiver provision to benefit the United States." *Id.* at 888-89.

Accordingly, the Petitioner has not shown that she was deprived of due process or that we erred in adjudicating her appeal under the *Dhanasar* framework.

In addition, the Petitioner asserts that we erred in not considering her [redacted] chair designed for senior citizens to facilitate their movement in the house and to make it easier for them to help themselves in the kitchen." Regarding her proposed endeavor, the Petitioner previously presented a [redacted] and [redacted] She did not identify development of the [redacted] chair as her proposed endeavor or present sufficient plans for its development. For example, her concept paper states that her company's "vision is to create a multi-functional bag that will become known globally for revolutionizing how many people think of the tote bag of today." Accordingly, the Petitioner has not demonstrated error in our identification or analysis of her proposed endeavor based on the record before us.[3]

Furthermore, regarding her eligibility under the first prong of the *Dhanasar* framework, the Petitioner contends that we erred in concluding that the record did not indicate the "potential prospective impact" of her proposed work relating to [redacted] She maintains that [redacted] was conceived as a tool to enable the homeless to get back on their feet" and that that this product "will be used globally for revolutionizing emergency preparedness tools for victims" and "will mitigate disaster casualties and response times." The Petitioner further indicates that [redacted] offers broader implications for health and emergency preparedness, border control and immigration, defense, and domestic security. In addition, the Petitioner identifies [redacted] as the company she "will be incorporating to manufacture and distribute this home-in-a-bag." With regard to job creation, the Petitioner asserts: "The initial project team of 5 would be supported by twenty workers operating in various capacities. It is envisaged that the direct work force would grow to 200 in a projected four locations . . . ."

The Petitioner asserts that the record demonstrates her eligibility under the first prong and she provides a statement "elaborat[ing] on the evidence in the record that supports the potential prospective impact of her work." However, she has not identified errors in our previous decision or cited to pertinent precedent decisions to establish that these determinations were based on an incorrect application of law or policy.

In *Dhanasar*, we noted that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890. We found in our previous decision that, although the Petitioner had asserted that the product itself will offer benefits to vulnerable populations, she had not shown that her proposed endeavor stands to impact those populations at a level

[3] The record reflected that the Petitioner designed this leaning chair as part of her 2013 architectural coursework at the [redacted] We further note that, even if the Petitioner had identified development of the [redacted] chair as her specific proposed endeavor, which she did not, the record does not include sufficient information and evidence to demonstrate the national importance of this work.

consistent with having national importance. Although Petitioner states on motion that [redacted] offers "an innovative way to provide relief to a category of victims flexibly and efficiently," she has not shown error in our previous determination that she had not sufficiently described or documented plans for this product to be widely distributed or made available to them. As noted in our prior decision, the record does not include sufficient information or evidence regarding the number of individuals her product stands to impact, nor has the Petitioner adequately shown the prospective broader implications of her endeavor for the populations she proposes to help.

In addition, with respect to her assertions of job creation, the Petitioner's motion to reconsider does not explain how her work force metrics demonstrate that her endeavor will offer substantial economic benefits to the region in the United States where her product will be assembled or to the nation. Our previous decision explained that while the financial forecasts for [redacted] indicate that the Petitioner's project has growth potential, they do not show that benefits to the regional or national economy would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*.[4] Moreover, although the Petitioner claims that [redacted] would ensure the recruiting of a significant population of homeless individuals in the [redacted] area as necessary manpower," this statement does not overcome our finding that the record lacks sufficient evidence that this area is economically depressed, that she would employ a significant number of homeless individuals in this area, or that her proposed undertaking would offer the region or its population a substantial economic benefit through either its employment levels or product sales.

Finally, the Petitioner argues that we "failed to evaluate the proper factors in determining whether [she] warrants forgoing the labor certification process." Her appeal brief cites to the specific factors that *Dhanasar* identified as examples of relevant considerations under the third prong.[5] In our appellate decision, we explained that because the Petitioner had not met the requisite first prong of the framework, she had not demonstrated her eligibility for a national interest waiver and further analysis of her eligibility under the second and third prongs outlined in *Dhanasar*, therefore, would have served no meaningful purpose.

III. CONCLUSION

The Petitioner has not met the requirements for a motion to reconsider as she has not demonstrated that we erred in our previous analysis based on the record before us on appeal. Further, the motion to reconsider does establish that our previous findings were based on an incorrect application of the law, regulation, or USCIS policy. As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we find that she has not established she is eligible for or otherwise merits a national interest waiver as a matter of discretion.

[4] We further note that the Petitioner does not adequately explain how her financial forecasts were calculated.
[5] *See Id.* at 890-91.

ORDER: The motion to reconsider is denied.

Cite as *Matter of K-O-A-A-*, ID# 1925478 (AAO Jan. 22, 2019)