U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21290200

Date: JUL. 05, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a healthcare and life sciences management specialist, seeks second preference immigrant classification as an individual of exceptional ability in the sciences, arts or business, 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 Texas Service Center denied the petition, concluding that although the Petitioner qualified for classification as a member of the professions holding an advanced degree, he 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. We also dismissed the subsequently filed motion to reopen, as well as the motion to reconsider that followed. The matter is now before us on a combined motion to reopen and reconsider. With his third motion, the Petitioner submits a brief and additional evidence.

In these proceedings, it is the Petitioner's 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 motion to reopen and reconsider.

I. LAW

We set forth a framework for adjudicating national interest waiver petitions in the precedent decision Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016). 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). Dhanasar states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may grant a national interest waiver as matter of discretion. See also Poursina v. USCIS, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature). As a matter of discretion, the national interest waiver may be granted 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. See Dhanasar, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

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 (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or USCIS policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial 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 or reconsider to instances where the applicant has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, an applicant must not only meet the formal filing requirements (such as submission of a properly completed Form I 290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. See 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). The issue before us is whether the Petitioner has submitted new facts to warrant reopening or has established that our decision to dismiss the prior motion to reconsider was based on an incorrect application of law or USCIS policy. We therefore incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Applicant's claims on motion.

A. Motion to Reopen

Initially, we note that motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323, (1992) (citing INS v. Abudu, 485 U.S. 94, 108 (1988)); see also Selimi v. Ashcroft, 360 F.3d 736, 739 (7th Cir. 2004). There is a strong public interest in bringing proceedings to a close as promptly as is consistent with giving both parties a fair opportunity to develop and present their respective cases. INS v. Abudu, 485 at 107.

Based on its discretion, USCIS "has some latitude in deciding when to reopen a case" and "should have the right to be restrictive." Id. at 108. Granting motions too freely could permit endless delay when foreign nationals continuously produce new facts to establish eligibility, which could result in needlessly wasting time attending to filing requests. See generally INS v. Abudu, 485 U.S. at 108. The new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." Matter of Coelho, 20 I&N Dec. 464, 473 (BIA 1992); see also Maatougui v. Holder, 738 F.3d 1230, 1239–40 (10th Cir. 2013). Therefore, a party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, 485 at 110. With the current motion, the Petitioner has not met that burden.

The Petitioner asserts that he has made consistent progress on his proposed endeavor and submits additional evidence regarding a gene therapy project he recently worked on for a life science company

called [redacted] While we acknowledge this evidence, it constitutes one example of the types of projects the Petitioner plans to undertake as a part of his proposed endeavor. As this project is in progress or has already occurred, it is not evidence of his proposed endeavor moving forward, but rather serves an example of progress made in the past towards his proposed endeavor. Accordingly, this evidence pertains to whether the Petitioner is well positioned to advance his proposed endeavor under prong two of Dhanasar, rather than the matter at issue on motion, which is the national importance of the proposed endeavor. Even if we considered this evidence under the first prong, it would not establish that the proposed endeavor has national importance. Rather, the evidence indicates that the technology developed by [redacted] is trademarked and the subject of hundreds of patents, which suggests it is not available to the public, science at large, or to individual doctors and hospitals that have not purchased it as [redacted] clients. Furthermore, the role that the Petitioner served for [redacted] does not appear to be a service that the Petitioner provides to the public or to science at large, but rather it appears that he provides his services only to the specific entities that hire or contract him for his services. Accordingly, even if we considered this evidence under prong one of Dhanasar, it would not establish the national importance of the proposed endeavor.

The Petitioner preemptively acknowledges he must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of filing and continuing through adjudication under 8 C.F.R. § 103.2(b)(1), that in accordance with Matter of Izummi, 22 I&N Dec. 169, 175 (Comm'r 1988), a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, as well as that Matter of Izummi, citing Matter of Bardouille, 18 I&N Dec. 114 (BIA 1981), states that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." Id. at 176. Nevertheless, he claims that this regulation and case law do not apply to him because he has already established his eligibility as a member of the professions holding an advanced degree. However, the Petitioner may be confusing his eligibility for the requested EB-2 classification, a threshold eligibility requirement, with his eligibility for a national interest waiver under Dhanasar. Our prior decisions have explained that section 203(b) of the Act is a sequential framework and that after a petitioner establishes eligibility for EB-2 classification, USCIS may grant a national interest waiver if the petitioner demonstrates eligibility under each of the Dhanasar prongs. Although the Director found the Petitioner qualifies as a member of the professions holding an advance degree, this is separate and apart from the analysis conducted under Dhanasar. As such, the above-cited regulation and cases prohibit us from considering evidence that came into being after the filing of the petition. Therefore, as the Petitioner's work on a gene therapy project with [redacted] came into existence after the filing of the petition, evidence of such project cannot be considered as establishing eligibility under any of the Dhanasar prongs.

Although the Petitioner provides documents that purport to establish eligibility under the first prong of Dhanasar, the Petitioner previously had ample opportunity to submit evidence pertaining to the national importance of the proposed endeavor, such as in his response to the Director's request for evidence (RFE) and on appeal. Documentation of the national importance of the proposed endeavor was already requested in the prior proceeding and is therefore not new. The evidence he now submits on his third motion cannot be considered new, as it involves matters already considered and adjudicated. Additionally, as explained above, even if we considered it new evidence, it would still not establish the Petitioner's eligibility under the first prong of Dhanasar. Accordingly, the Petitioner has not shown proper cause for reopening the proceedings.

B. Motion to Reconsider

On motion, the Petitioner contends that our prior decision did not reflect a consideration of all the evidence. However, the standard of review on motion differs from the de novo standard of review we employ on appeal. The filing before us does not entitle the Petitioner to a reconsideration of the denial of the petition or even the Petitioner's prior appeal. Rather, a motion to reconsider pertains to our most recent decision. In other words, we examine any new arguments to the extent that they pertain to our dismissal of the Petitioner's prior motion. Therefore, we cannot consider new objections to the earlier denial of the petition or the Petitioner's appeal of it, and the Petitioner cannot use the present filing to make new allegations of error at prior stages of the proceeding.

The Petitioner argues that his proposed endeavor is nationally important and that we erred in our decision by not considering evidence demonstrating how society would benefit from his proposed endeavor. He contends that we did not consider his contributions: (1) to the development of a medical device used to diagnose and treat [redacted] (2) to the commercialization of a drug designed to treat people with a resistant form of [redacted] (3) to enabling a gene therapy company to enter the U.S. market; and (4) to the increased economic activity resulting from the company's market entry, including the acquisition of the company. However, in review of our prior decision, we stated that the Petitioner "has not sufficiently established that the societal impact of his proposed endeavor rises to the level of national importance consistent with the analysis provided in our precedent decision." This sentence demonstrates that our prior decision undertook a specific consideration of evidence pertaining to the proposed endeavor's benefits to society and found the evidence to be insufficient. To provide further context, the evidence does not show that the Petitioner's services in such areas were made available to society at large. For example, he does not assert that he provides services beyond the specific companies that hire or contract him. Further, the specific design and construction of the medical device and drugs do not appear available to science or the public at large. The evidence provided does not suggest, for instance, that doctors and hospitals may access the technology underlying the device and drug without becoming clients of the company that sells them. Rather, it appears that the benefit accrues to the organizations that pay for the Petitioner's services and to those entities that purchase the products from its creators. Although the benefits of such products may eventually trickle down to patients through the work of doctors or hospitals that purchase a device or drug, such theoretical effects would not be the result of the proposed endeavor, but rather would be the result of the widespread purchase of the products.

The Petitioner next argues for a broad overhaul of the current national interest waiver framework. He requests that we apply a different national importance standard than that of Dhanasar and suggests instead that we use the standard used by the National Science Foundation (NSF). However, precedent case law and policy do not currently permit a departure from the standards set forth in Dhanasar. Had the Petitioner submitted evidence that he receives grant money from the NSF to provide his services, we would certainly have considered it as relevant to the national importance of the proposed endeavor. However, even if the Petitioner submitted evidence of NSF granted funding toward the general "commercialization of translational research," the unknown nature of the Petitioner's various future projects would prevent us from ascertaining whether the Petitioner's services would rise to the level of national importance.

To the extent the Petitioner's proposed endeavor is the services he provides to other companies within the general realm of commercialization and innovation of translational research, he has not shown he would offer his services on a scale so significant that it would rise to the level of national importance. As previously stated, the Petitioner does not suggest he will offer his services beyond those who hire or contract him to provide such services. On the other hand, if the proposed endeavor is comprised of the unknown future projects for which he may be hired, the speculative nature of the projects would preclude us from determining the national importance of them and therefore would not establish eligibility under Dhanasar. While the Petitioner may request that we accept his proposed endeavor and determine that it has national importance, we already explained in our prior decision that the Petitioner's evidence "relates to the overall importance of the commercialization and innovation stage from research rather than identifying and establishing the national importance of his specific proposed endeavor" (emphasis added).

The Petitioner also suggests that our interpretation of the Dhanasar framework unduly disadvantages corporate innovators. Even if true, this would not be a basis for approving the Petitioner's petition. Simply because it may be more difficult to meet the eligibility requirements as a corporate innovator does not mean that the standards set forth in Dhanasar can be lowered for such petitioners. It is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012).

For the foregoing reasons, the Petitioner has not shown that our prior decision contained errors of law or policy, or that the decision was incorrect based on the record at the time of that decision. Therefore, the motion does not meet the requirements of a motion to reconsider, and it must be dismissed.

III. CONCLUSION

For the reasons discussed, the evidence provided in support of the motion to reopen does not overcome the grounds underlying our prior decision, and the Petitioner's motion to reconsider has not shown that our prior decision was based on an incorrect application of law or USCIS policy. Therefore, the combined motion to reopen and reconsider will be dismissed for the above stated reasons.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.