U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20486869

Date: MAR. 25, 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 bioethicist, 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 Texas 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 a subsequent appeal, concluding that, although the proposed endeavor has both substantial merit and national importance, the record does not establish that the Petitioner is well-positioned to advance the endeavor and that, on balance, a waiver of the job offer requirement would be beneficial to the United States. The matter is before us again on a combined motion to reopen and a motion to reconsider.

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.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, "new facts" are facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original application. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

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 of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider.

II. ANALYSIS

As noted above, we found that the record satisfies both aspects of the first *Dhanasar* prong, that the proposed endeavor has both substantial merit and national importance.[1] However, we found that the record did not satisfy the second *Dhanasar* prong—that the Petitioner is well-positioned to advance the proposed endeavor—because his training and experience was incomplete or had yet to occur at the time he filed the petition. We incorporate our prior decision dismissing the Petitioner's appeal here by reference. On combined motion, the Petitioner reasserts that he is well-positioned to advance the proposed endeavor. We address the combined motion separately below.

A. Motion to Reopen

New evidence in support of the motion to reopen includes the following: (1) a letter from the director of the Institute of Clinical Bioethics at [redacted]'s University; (2) a letter from the director of [redacted] University's [redacted]; (3) a letter from the University [redacted] Center for [redacted] (4) an invitation for the Petitioner to join a team of researchers at the University [redacted] Canada; and (5) articles published in 2019 and 2021 that cite the Petitioner's work.

As we discussed in our prior decision, a petitioner must establish eligibility at the time of filing a visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

None of the evidence submitted on motion to reopen may establish eligibility because all of that evidence presents sets of facts that did not exist when the Petitioner filed the petition in 2018. The letter from [redacted]'s University addresses the Petitioner's post-doctoral fellowship between 2019-2021, after the petition filing date. Similarly, the letter from [redacted] University addresses work that the record establishes the Petitioner performed in 2021, after the petition filing date. Likewise, the letter from the University [redacted] addresses work the Petitioner performed in 2020 and it offers an appointment for 2021-22, all of which is after the petition filing date. In turn, the invitation to join a team of researchers at the University [redacted] Canada, is dated November 2021, substantially after the petition filing date. The articles submitted in support of the motion to reopen were published in 2019 and 2021, after the petition filing date. Although this evidence may be considered in support of a newly filed petition, because it all presents a set of facts—work, training, experience, citations to the Petitioner's work—that did not exist at the time of filing the petition, it therefore may not establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49.

Because none of the new facts submitted in support of the motion to reopen establish eligibility at the time of filing the petition, the motion to reopen does not establish that, at the time of filing the petition, the Petitioner was well-positioned to advance the proposed endeavor. *See* 8 C.F.R. § 103.5(a)(2).[2]

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[1] *See Matter of Dhanasar*, 26 I&N Dec. 884, 888-91 (AAO 2016), for elaboration on these three prongs.

[2] Moreover, to the extent that the evidence submitted on motion merely reiterates information already in the record regarding the Petitioner's training and experience that occurred after the petition filing date, it does not present a new fact as required by 8 C.F.R. § 103.5(a)(2).

B. Motion to Reconsider

Turning to the motion to reconsider, the Petitioner quotes two passages from *Dhanasar*: "To determine whether [a petitioner] is well-positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge, and record of success in related or similar efforts; [and] a model or plan for future activities," and:

> We recognize that forecasting feasibility or future success may present challenges to petitioners and USCIS officers and that many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed.

Dhanasar, 26 I&N Dec. at 890. The Petitioner asserts that he had "reached the zenith of [his] educational pursuit" at the time of filing and that he has a "well-delineated plan towards advancing [his] career," even though his "plan may not have transpired as planned" in his petition. The Petitioner also asserts that he satisfies the requirements of *Dhanasar* under a preponderance of the evidence.

As it pertains to the second *Dhanasar* prong, a petitioner must establish that they are well positioned to advance the endeavor at the time of filing. Accordingly, any improved positioning that arises after the filing of the petition is not persuasive in establishing eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49. Although a petitioner need not establish whether an endeavor is more likely than not to ultimately succeed, a petitioner must nevertheless establish that, at the time of filing the petition, the petitioner is well-positioned to advance the proposed endeavor, regardless of the endeavor's ultimate outcome. For the reasons discussed in our prior decision, the Petitioner has not established that he is well-positioned to advance the proposed endeavor in this case.

The Petitioner has not established on motion that we misapplied a law or policy and that our decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).[3] Therefore, we will dismiss the motion to reconsider.

Because the Petitioner has not satisfied the second *Dhanasar* prong on motion, we need not address whether he has satisfied the third *Dhanasar* prong. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *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).

[3] On motion, the Petitioner draws our attention to the education he had completed at the time of filing the petition. However, we acknowledged that in our prior decision, stating, "The Petitioner possesses education consistent with the proposed endeavor, but his training was still incomplete when he filed the petition." We further discussed the training and experience the Petitioner had yet to complete as of the petition filing date.

III. CONCLUSION

As the Petitioner has not met the requisite second prong of the *Dhanasar* analytical framework, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.