U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28999364

Date: OCT. 30, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, an entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this 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 did not established that he qualifies for EB-2 classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, and did not establish 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. The matter is now before us on motion to reconsider.

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.

A motion to reconsider must establish that our prior 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

As noted above, the Director denied the petition based on two independent and alternative grounds, determining that the Petitioner (1) did not establish his eligibility for EB-2 classification and (2) did not demonstrate that a discretionary waiver of the required job offer would be in the national interest under the framework set forth in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). On appeal, the Petitioner contested the Director's determination regarding his eligibility for EB-2 classification as an individual of exceptional ability; he did not, however, dispute the Director's conclusion that he was ineligible for a national interest waiver under the *Dhanasar* framework.

Issues or claims that are not raised on appeal are deemed to be waived. We therefore deemed this uncontested ground for denial to be waived and dismissed the appeal, emphasizing that if the affected

party does not address issues raised by the director, and those issues are dispositive of the case, the appeal will be dismissed based on those waived issues. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

Further, because the Petitioner did not contest the Director's determination regarding his eligibility for a national interest waiver, and this issue was dispositive of his appeal, we reserved the Petitioner's appellate arguments regarding his eligibility for EB-2 classification as an individual exceptional ability. *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).

We also noted in our decision that the Petitioner did not meet the requirement at 8 C.F.R. § 204.5(k)(4)(ii), which requires submission of Form ETA 750-B, Statement of Qualifications of Alien, in duplicate, and did not submit, in the alternative, Form ETA 9089, Application for Permanent Employment Certification, with parts J, K, and L completed. The Petitioner was instructed to submit one of these required forms in a request for evidence (RFE), but the record reflected that his response did not include either form.

On motion, the Petitioner submits additional evidence and contests the correctness of our prior decision. Specifically, the Petitioner asserts that our decision "lacks a proper and specific analysis of the effectiveness of each presented evidence." He also maintains that "the lack of specificity limits my opportunity to understand the shortcomings pointed out by the AAO and to present additional information or pertinent clarifications." Finally, the Petitioner submits a copy of a signed Form ETA 9089 and asserts that the original signed form was included in his response to the Director's RFE.

As discussed above, we dismissed the appeal because the Petitioner did not address or contest the Director's adverse determination regarding his eligibility for a national interest waiver under the *Dhanasar* framework. With this issue waived, he could not overcome the denial of the petition, even if he established that the Director erred with respect to his eligibility for EB-2 classification as an individual of exceptional ability. Therefore, we reserved the Petitioner's arguments with respect to his eligibility for EB-2, and cited our legal authority to do so, thus providing the Petitioner with an explanation with our basis for dismissing his appeal. Although he correctly asserts on motion that we did not address the arguments he made on appeal regarding his eligibility for EB-2 classification as an individual of exceptional ability, he has not demonstrated that we misapplied law or policy by reserving those arguments. Nor does he contest our determination that his appeal addressed only one of two independent grounds for denial.

Finally, we acknowledge the Petitioner's submission of Form 9089 on motion, and his claim that he provided this evidence in response to the Director's RFE. However, we have reviewed the record and observe that this required evidence was not in fact included in the RFE response or mentioned in the Petitioner's letter accompanying that response and was not in the record of proceedings at the time we dismissed the appeal.

For the reasons discussed, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy, or that it was incorrect based on the evidence in the record at the time we issued our decision. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reconsider is dismissed.