



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 28943260

Date: AUG. 28, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an attorney, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or, in the alternative, as an individual of exceptional ability in the sciences, arts or business. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. See section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner merits a discretionary waiver of the job offer requirement “in the national interest”. The Director dismissed the subsequent combined motions to reopen and reconsider and ordered that the original decision denying the Form I-140 remain undisturbed. The matter is now before us on appeal, where we will consider the Petitioner’s appeal as it relates to the Director’s decision to deny the Petitioner’s motions to reopen and reconsider. 8 C.F.R. § 103.3.

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). We review the questions in this matter de novo. *Matter of Christo’s, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the following analysis.

## **I. LAW**

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

## II. ANALYSIS

For the underlying petition, the Director determined that the Petitioner did not qualify for a national interest waiver under the Dhanasar framework. In support of the combined motions to reopen and reconsider, the Petitioner submitted her statement and re-submitted documentation provided with the petition. She claimed her previous counsel made errors and that she did not receive the request for evidence notice. She requested her case be reopened and reconsidered since her petition was denied through no fault of her own. She provided an analysis of documentation she submitted with the petition, asserting the evidence meets the three prongs of the Dhanasar framework and establishes her eligibility for the national interest waiver.

Preliminarily, we note that the appellate brief primarily addresses the Director's denial of her petition. However, that matter is not before us.<sup>1</sup> The only issue before us is whether the Director properly dismissed the Petitioner's motions to reopen and to reconsider. Upon de novo review, we find he did not.

For the motion to reopen, the Director found, "The evidence submitted with the motions to reopen and reconsider does not establish that the requirements for filing a motion to reopen have been met." The decision then analyzed the evidence in the record, concluding that it did not meet any of the three prongs of the Dhanasar framework and that the Petitioner did not establish eligibility for the national interest waiver.

However, the Director's decision did not include a decision on the motion to reconsider.

The Director did note that the Form I-290B for the motions was not accompanied by a statement about whether or not the unfavorable decision has been the subject of any judicial proceeding. See 8 C.F.R. § 103.5(a)(1)(iii)(C). The required statement on judicial proceedings under 8 C.F.R. § 103.5(a)(1)(iii)(C) is a procedural rule that helps USCIS identify those cases involving judicial proceedings so they can be held in abeyance pending the outcome of litigation involving the originally filed petition. See, e.g. Memorandum from Richard E. Norton, Assoc. Comm'r for Examinations, Immigration and Naturalization Service, Adjudication of Petitions and Applications which are in Litigation or Pending Appeal (Feb. 8, 1989). This provision applies equally to the Petitioner's motion to reopen, which the Director adjudicated on its merits. We therefore remand for the Director to issue a decision on the merits of the Petitioner's motion to reconsider.

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<sup>1</sup> The Petitioner filed this appeal indicating she was appealing the underlying Form I-140 petition. Initially, we rejected this appeal as being untimely filed. However, after further review, we re-opened our rejection decision. USCIS records show that after denial of the underlying Form I-140 petition, the Petitioner filed the combined motions to reopen and reconsider, and the Director issued a decision dismissing the motions. Although, the Petitioner's appeal does not address the Director's decision on the motions, we limit our review to the Director's most recent decision dismissing the Petitioner's combined motions to reopen and reconsider.

### III. CONCLUSION

We withdraw the Director's decision and remand the matter for a new decision which addresses whether the Petitioner's motion satisfies the requirements of a motion to reconsider at 8 C.F.R. § 103.5(a)(3). If the case meets the requirements for the motion to reconsider, the Director should determine if the Petitioner has established eligibility for the underlying classification and for a national interest waiver and to enter a new decision. The Director may request any additional evidence considered pertinent to the new determination. As such, we express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The Director's decision is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.