U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26081113

Date: MAR. 22, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a computer science researcher and instructor, seeks employment-based second preference (EB-2) 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 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska 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 the appeal, concluding that the Petitioner has not sufficiently demonstrated that her proposed endeavor is of national importance. Specifically, we concluded that the record did not establish that the Petitioner's instructional work would impact the computer science field more broadly or the senor network and machine learning industries more broadly as opposed to being limited to her students at [redacted] University. The matter is now before us again on combined motions to reopen and 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). 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 review, we will dismiss the combined motions.

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 state the reasons for reconsideration; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the 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 petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner 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).

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[1], grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

II. ANALYSIS

We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion. While we may not address each piece of evidence individually, we have reviewed and considered each one.

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 based on 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 noncitizens 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 Applicant has not met that burden.

[1] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889.

In determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on the "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In addition, we indicated that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance, for example, because it has national or even global implications within a particular field." *Id.* 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.

The Petitioner holds a doctor of philosophy degree in computer science from [redacted] University. According to the non-tenure track faculty contract letter, the Petitioner was an instructor in computer science at [redacted] University from September 2020 to June 2021. The Petitioner indicated that she has two proposed endeavors: (1) expanding on her already substantial research in the field of artificial intelligence and (2) disseminating her knowledge of machine learning to the next generation of American students to enable that generation to keep America competitive in the field of artificial intelligence. The Petitioner further stated that she has investigated in (a) utilizing graphs for more accurate artificial intelligence predictions, (b) developing algorithms to assist older people, especially those suffering from dementia, in living independent lives, and (c) developing algorithms to mine COVID-19 data to uncover pattens, which could be utilized in predicting the spread of the virus more accurately.

The Director determined that the Petitioner's proposed endeavor has substantial merit, but the Petitioner has not established that her proposed endeavor would have a broader impact or national importance. In our prior decision, we found that the Petitioner broadly claimed that she plans to advance the fields of sensor network and machine learning to produce reliable predictions but did not provide a specific proposed endeavor or the type of research she intends to pursue in the fields of sensor network and machine learning. We stated that the Petitioner indicated her previous research and current volunteer work without discussing her prospective endeavor.

As the Petitioner points out on motion, the record contains her statement in which she states that she would like to continue her pursuit of research in technological innovation for high impact projects both for the United States and world-wide, such as COVID-19 spread analysis, and of building capable computer scientists in the United States through teaching at universities. The Petitioner's "expanding on her already substantial research in the field of artificial intelligence" is vague, but we find that her statement that she intends to research the applicability of machine learning and graph data mining to solve complex problems, like COVID-19 virus spread patterns, significantly improves the endeavor. As such, we find that the Petitioner has provided a specific proposed endeavor and the type of research she intends to pursue in the fields of senor network and machine learning.

On motion, the Petitioner submits an article published in The New York Times, which provides estimates of how [redacted] University compares with its peer schools in economic diversity and student outcomes. The record is unclear as to whether [redacted] University and [redacted] University[2] are same school or two different schools and why an article relating to a different school was submitted. The Petitioner notes that the New York Times articles states that about 1.1% of students at [redacted] University came from a poor family but became a rich adult. The Petitioner contends that by teaching computer science courses to undergraduate students at [redacted] University, she is producing capable and rich American computer scientists who will work in the industry and other sectors of the U.S. economy; therefore, her proposed endeavor satisfies the criteria for national interest.

In addition, the Petitioner submits an internet article, which quotes a speech provided by a former Attorney General William Barr in 2020, which alerted the public the economic and technological dangers posed by China, suggesting that its plans for global domination could hinge on artificial intelligence. The Petitioner contends that artificial intelligence is an important field to the country both for miliary purposes and for industrial purposes. The Petitioner also submits an internet article, dated 2020, which states that the Naval COVID Rapid Response Team is exploring the potential of existing commercial or advanced prototype technologies that can be used to underpin a proximity tracking program. The record contains a support letter from [redacted] a professor of electrical engineering and computer science at [redacted] University and the Petitioner's doctoral thesis advisor, which states that the Petitioner has volunteered to collaborate with him on a project in which they are applying graph mining methods to detect patterns in the spread of the COVID-19 virus. Professor [redacted] further states that understanding patterns in this graph is important for U.S. policy decisions and disrupting the virus spread.

On motion, the Petitioner submits another letter from Professor [redacted] who states that the Petitioner wanted to engage senior students at [redacted] University in research activities and to have experience in supervising students for research projects. Professor [redacted] further states that he and the Petitioner discussed how to utilize static graph-based approaches that the Petitioner used for her previous studies and the project moved in an interesting direction and provides a brief description of two research projects currently developed by the Petitioner's students. The Petitioner also submits a support letter from [redacted] a data scientist at [redacted] Laboratory. Doctor [redacted] states that the Petitioner is an outstanding researcher using graph-based data for artificial intelligence, that the Petitioner is mentoring students for their senior research projects, and that the Petitioner's teaching and research efforts with senior students contribute to the national interest of the United States. The Petitioner also submits a letter from [redacted] the chair of the computer science department at [redacted] University. Doctor [redacted] states that the Petitioner has been a stand-out educator for the last two years, teaching a variety of courses, and that the university encourages and promotes the Petitioner and her students' research, including her graph mining and machine learning projects.

Furthermore, although not raised by the Petitioner in the instant case, we recognize the importance of progress in science, technology, engineering, or mathematics (STEM) fields and the essential role of

[2] The Petitioner holds a doctor of philosophy degree in computer science from [redacted] University, and she was an instructor in computer science at [redacted] University from September 2020 to June 2021.

persons with advanced STEM degrees in fostering this progress, especially in focused critical and emerging technologies, or other STEM areas important to U.S. competitiveness or national security.[3] Volume 6, Part F, Chapter 5 of the USCIS policy manual provides specific evidentiary considerations for persons with advanced degrees in STEM fields and states that many proposed endeavors that aim to advance STEM technologies and research, whether in academic or industry settings, not only have substantial merit in relation to U.S. science and technology interests, but also have sufficiently broad potential implications to demonstrate national importance.[4] In light of the STEM policy manual guidance and the evidence in the record, we conclude that the Petitioner's potential research projects in the fields of senor network and machine learning have broad implications to demonstrate national importance. As such, we find that the Petitioner meets the first prong of the *Dhanasar* framework.

The second prong of the *Dhansar* framework shifts the focus from the proposed endeavor to the individual. To determine whether they are well positioned to advance the proposed endeavor, we consider factors including, but not limited to: their education, skills, knowledge, and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. *Id.* at 890.

The Director determined that the Petitioner has not established that she is well positioned to advance the proposed endeavor. We adopt and affirm the Director's decision as it pertains to the second prong of the *Dhansar* framework. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

As the Petitioner has not met the requisite second prong of the *Dhanasar* framework for the reasons stated in the Director's decision, we find that she has not established that she is eligible for or otherwise merits a national interest waiver as a matter of discretion. Therefore, we conclude that the Petitioner has not shown proper cause for reopening the proceeding.

B. Motion to Reconsider

The Petitioner contends that we disregarded the preponderance of the evidence standard, disregarded expert opinion letters, and required evidence that is not required by the statute, regulations, or any controlling case law.

Regarding the expert opinion letters, the Petitioner states that expert testimony is considered testimony under rule 702 of the Federal Rules of Evidence and that established precent and USCIS policy also require that testimonial evidence must be considered and given appropriate weight along with the rest of the submitted evidence. The Petitioner argues that we erred by not following these rules. The Petitioner claims that new evidence was submitted on appeal, but we did not consider that evidence

[3] *See generally* 6 USCIS Policy Manual f(5)(D)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.
[4] *Id.*

without giving any reason. In our prior decision, we acknowledged that the Petitioner submitted additional letters but did not consider the letters because they were not presented before the Director. Our prior decision cited *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), and *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988) for the proposition that we will not consider evidence submitted for the first time on appeal when the affected party did not properly respond to a director's notices relating to that evidence. The record reflects that the Director issued a request for evidence (RFE). In the RFE, the Petitioner was requested to provide, among other things, a detailed description of the proposed endeavor and evidence that supports her statements and establishes the endeavor's national importance. It appears that in response to the RFE, the Petitioner did not submit the additional letters to the Director for consideration.

Additionally, on motion, the Petitioner quotes a few sentences in the *Dhanasar* decision, which provides discussion on the national importance determination, and contends that by not quoting the exact sentences or not reprinting the exact sentences in our prior decision but by briefly summarizing them, we tried to have the reader believe that every rule that old pre-*Dhanasar* EB-2 requirements is still in effect. However, on pages 2 and 3 of our prior decision, we provided three prongs of the *Dhansar* analytical framework and explained in detail how the Petitioner can satisfy the national interest waiver requirements under the *Dhansar* framework.

Moreover, the Petitioner's attorney claims that he had a previous case, motions to reopen and reconsider, which he won and that the issues between that case and the instant case are very similar with regard to the errors made by the Director. The Petitioner's attorney also contends that he won cases similar to the instant case in a federal district court, that the keystone case on this subject is in *Rubin* v. *Miller*, 19-cv-4320 (S.D.N.Y. Aug. 13, 2020), and that the court in *Rubin* has labeled all these errors as abuse of discretion. The Petitioner's attorney adds that this case will likely be sent to the Office of Inspector General and the Office of Citizenship and Immigration Services Ombudsman.

In contrast to the broad precedential authority of the case law of a U.S. circuit court, we are not bound to follow the published decision of a U.S. district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. First, the *Rubin* case is a district court case, not a circuit court case. Second, the *Rubin* case was decided in the Southern District of New York, which is not the same district as the instant case. Third, the petitioner in the *Rubin* case sought an immigrant visa classification as an individual of extraordinary ability (EB-1), which is different from an immigrant visa classification as an advanced degree professional or an individual of exceptional ability (EB-2) sought by the Petitioner in the instant case. Fourth, since we do not have the record of proceeding for the *Rubin* case, we are unable to examine the reasoning underlying the district judge's decision. Fifth, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Lastly, we must decide each case on its own facts regarding the sufficiency of the evidence presented. *Matter of Frentescu*, 18 I&N Dec. 244, 246 (BIA 1982); *Matter of Serna*, 16 I&N Dec. 643, 645 (BIA 1978). As we do not have facts in other cases represented by the Petitioner's attorney, we cannot compare the prior cases with the instant case and conclude that we made errors in our prior decision.

As indicated above, to have established merit for reconsideration of our latest decision, a petitioner must both state the reasons why he or she believes the most recent decision was based on an incorrect application of law or policy; and specifically cite laws, regulations, precedent decisions, or binding policies that the petitioner believed we misapplied in that prior decision. Thus, to prevail in her motion to reconsider, the Petitioner cannot merely disagree with our conclusions but rather must demonstrate how we erred as a matter of law or policy in that immediate prior decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit, in essence, the same brief and seek reconsideration by generally alleging error in the prior decision.) Here, although we acknowledge that the Petitioner submits a brief and additional evidence, we determine that she does not provide proper reasons for reconsideration of those conclusions. Likewise, the brief in support of the current motions lacks any cogent argument as to how we misapplied the law or USCIS policy in dismissing the appeal.

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 instant motion does not meet the requirements of a motion to reconsider.

III. CONCLUSION

The Petitioner's motion to reconsider has not shown that our prior decision was based on an incorrect application of law or USCIS policy. Although the evidence provided in support of the motion to reopen may overcome the grounds underlying our prior decision, the record remains insufficient to demonstrate that the Petitioner is eligible or otherwise merits a national interest waiver as a matter of discretion. Therefore, we will dismiss the combined motions for the reasons stated above.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.