U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28559554

Date: DEC. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a civil works project manager, 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. 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 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 is eligible for or otherwise merits a discretionary waiver of the job offer requirement "in the national interest". The Petitioner subsequently filed a motion to reopen, which the Director dismissed based on it not meeting the requirements for filing a motion to reopen. The Petitioner now appeals the Director's dismissal of the motion.

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 dismiss the appeal.

As a preliminary matter, we emphasize that the Petitioner has not appealed the denial of the Form I-140 itself, but rather the Director's subsequent dismissal of the motion to reopen. Thus, the merits of the initial denial decision, and of the underlying petition, are not before us. The only issue before us on appeal is whether the Petitioner has established that the Director erred by dismissing the motion to reopen.

The record reflects that on March 9, 2020, the Petitioner filed a Form I-140 petition and on July 27, 2021, the Director issued a request for evidence, to which the Petitioner submitted a reply. The Director subsequently denied the petition on its merits on March 9, 2022, mailing the denial notice to

the addresses on record, which were the same addresses used for the request for evidence notice.[1] On June 3, 2022, the Petitioner filed a Form I-290B, Notice of Appeal or Motion, as a motion to reopen the petition's denial explaining he did not receive the Director's denial decision as at the time he filed the motion. He stated, "Had the appropriate delivery [sic] been done, the underlying I-140 petition would have been appealed properly." With the motion, the Petitioner submitted: a copy of a USCIS email to the Petitioner's Counsel dated April 7, 2022, advising that on March 9, 2022, a denial notice was mailed to the address on record and that a courtesy copy of the notice would be mailed to the Petitioner; a screenshot of USCIS case history for the underlying Form I-140 petition indicating that on March 9, 2022, USCIS mailed a duplicate notice about the decision; and an email receipt dated May 26, 2022, from USCIS case status. The Director dismissed the motion noting the evidence submitted with the motion did not establish that the requirements for filing a motion to reopen were met.

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). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed."

On appeal, the Petitioner re-submits the documents he submitted with the motion to reopen, together with Counsel's affidavit dated March 14, 2022, attesting to Counsel's non-receipt of the Form I-140 denial decision, and the Petitioner's affidavit dated March 28, 2023, attesting to non-receipt of the Form I-140 denial decision and disagreement with the motion's decision.

USCIS records show that the Form I-140 denial decision was properly mailed to the Petitioner. On March 9, 2022, the Director mailed the Form I-140 denial decision to the addresses on record. USCIS records indicate that on June 7, 2022, USCIS changed the Petitioner's address based on the Petitioner's request for a change of address. On June 8, 2022, a duplicate of the denial decision was mailed to the Petitioner using the updated mailing address. USCIS records do not reflect a request to change the Petitioner's address prior to June 7, 2022. As such, the Director's denial decision was mailed in accordance with 8 CFR § 103.8 (a)(1) and (d) for routine service, and that service was complete upon mailing. 8 CFR § 103.8 (b).

Here, we find that the Director's decision denying the Form I-140 was based on the merits and was properly mailed to the Petitioner. The affidavits submitted on appeal attesting to the non-receipt of the Form I-140 denial decision, and the accompanying documents highlighting the decision's case history, neither establish the denial decision was improperly mailed to the Petitioner nor do they provide new facts overcoming the grounds of the denied petition. We therefore find that the Director properly determined that the Petitioner had not complied with the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2).

[1] USCIS records show that the Form I-140 denial decision was mailed to the Petitioner and to his attorney of record listed on the Petitioner's G-28, Notice of Entry of Appearance as Attorney or Accredited Representative.

The Petitioner has not demonstrated that the Director erred in dismissing the motion to reopen. We will therefore dismiss the appeal for the above stated reasons.

ORDER: The appeal is dismissed.