U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28744332

Date: NOV. 07, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, an animal science specialist, seeks second preference immigrant classification as a member of the professions holding an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant 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 qualifies for the EB-2 classification as a member of the professions holding an advanced degree, but did not establish that that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We summarily dismissed the appeal as the Petitioner did not identify any specific legal or factual error in the Director's decision on his Form I-290B, Notice of Appeal or Motion, and did not submit his brief and/or additional evidence to us within 30 days of filing the appeal as he indicated on his Form I-290B. The matter is now before us on a combined motion 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). Upon review, we will dismiss the motion.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). 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.

On motion to reopen, the Petitioner claims that the brief was "timely filed but rather sent to the wrong USCIS address instead of the AAO" and that this "clerical error" is a proper cause for reopening the proceedings. With the motion, the Petitioner submits his appeal brief and additional evidence he previously intended to submit to us, along with a copy of FedEx tracking label for a proof of delivery. However, the tracking label shows that the Petitioner incorrectly sent the brief and evidence to the

filing location of Form I-290B instead of sending them directly to our office. The Form I-290B instructions specifically require that any appeal brief and/or evidence submitted after filing a Form I-290B "must be sent directly to the AAO." *See* USCIS Form I-290B, Instructions for Notice of Appeal or Motion, at 6 (rev. 12/02/19).

The Petitioner's new evidence and explanations on motion therefore do not show that he properly filed his appeal brief and evidence with us prior to our adjudication of his appeal. Consequently, our summary dismissal of the appeal according to 8 C.F.R. § 103.3(a)(1)(v) was proper, and the Petitioner has not demonstrated that reopening is warranted.

On motion to reconsider, the Petitioner does not dispute or assert any error in our prior determination that he did not submit the brief and/or additional evidence within 30 days and that we did not have his promised brief and documents when we adjudicated the appeal. Instead, the Petitioner relies on the motion regulations to assert the delay or failure in properly filing the appeal brief should be excused. However, the motion regulations referenced by the Petitioner do not relate to his circumstances. While 8 C.F.R. § 103.5(a)(1)(i) allows an exception to a late filing of a motion to reopen where the delay was reasonable and beyond one's control, the issue here involves the Petitioner's appeal and whether an appeal brief and evidence were properly filed pursuant to 8 C.F.R. § 103.3(a)(2)(i) (stating that the affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions within 30 days after service of the decision).

Furthermore, although the regulations, for good cause shown, permit us to grant more time to submit an appeal brief upon a written request for additional briefing time, the record does not show that the Petitioner had ever sought such request with us, that we granted it, and he then submitted his appeal brief directly to us, as required. *See* 8 C.F.R. § 103.3(a)(2)(vii), (viii) (if additional time for the filing of a brief on appeal is given, the affected party shall submit the brief directly to the AAO). Consequently, the Petitioner has not demonstrated that our previous decision was based on an incorrect application of law or policy and that our decision was incorrect based on the evidence before us at the time. The Petitioner, therefore, has not met the requirements of a motion to reconsider.

Although the Petitioner has submitted additional evidence in support of the motion to reopen, he did not demonstrate on motion that he followed form instructions and mailed his brief and additional evidence to the correct mailing address. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy 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 reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.