U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28918501

Date: OCT. 23, 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 an individual of exceptional ability in business, as well as 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(B)(i).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that he qualifies for EB-2 classification as an individual of exceptional ability and is not eligible for a discretionary waiver of the job offer requirement. We summarily dismissed the Petitioner's subsequent appeal. The matter is now before us 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). Upon review, we will dismiss the motions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

As noted, we summarily dismissed the Petitioner's appeal. The regulations provide that an officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

At the time the Petitioner filed his appeal in December 2022, he did not submit a statement identifying any erroneous conclusion of law or statement of fact as a basis for the appeal, as instructed on the Form I-290B, Notice of Appeal or Motion. He also submitted no brief or evidence with Form I-290B but stated that he would submit those materials to our office within 30 days. When we reviewed the record of proceeding in April 2023, it did not include any supplement to the appeal. As a result, we summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v).

On motion, the Petitioner asserts that he timely submitted a brief and evidence in support of his appeal. In support of this claim, he provides a copy of a USPS Click-N-Ship Label Record printed on January 11, 2023, which indicates a "ship date expected" on the same date, and an expected delivery date of January 14, 2023. The Petitioner maintains that this new evidence overcomes our summary dismissal decision and demonstrates proper cause for the reopening of the appeal.

The new evidence is insufficient to establish that the Petitioner properly filed a brief and/or additional evidence in support of his appeal. The newly submitted mailing label is addressed to the USCIS Phoenix Lockbox. Although this is the appropriate address for the filing of a Form I-290B, Notice of Appeal or Motion, the form instructions to the Form I-290B instruct appellants who elect to submit a supplemental brief within 30 days of filing an appeal to mail the brief or additional evidence directly to the AAO. It is the Petitioner's burden to submit the complete appeal as indicated in the applicable form instructions.

The newly submitted evidence does not indicate that the Petitioner followed these instructions and mailed his brief and additional evidence to the correct USCIS office and mailing address. Further, the USPS label record only shows that a mailing label was created on January 11, 2023; it is not accompanied by evidence that the package was in fact mailed via USPS and delivered to a USCIS facility. Finally, the Petitioner has not provided a copy of the brief and evidence that he claims he timely submitted in support of his appeal and therefore has not demonstrated that his claimed submission included a statement specifically identifying an erroneous conclusion of law or statement of fact as a basis for the appeal. Accordingly, the Petitioner has not provided new facts or new evidence in support of the motion to reopen that would overcome our decision to summarily dismiss his appeal.

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). The Petitioner does not claim our summary dismissal decision was based on an incorrect application of law or policy, nor has he demonstrated that the summary dismissal of his appeal was incorrect based on the evidence of record at the time of the initial decision. Given the record before us on appeal, which did not include a brief or a statement identifying the basis for the appeal, our summary dismissal decision was consistent with the regulation at 8 C.F.R. § 103.3(a)(1)(v).

Although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has shown proper cause for us to reopen his appeal. 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 combined motions 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.