U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26423250

Date: APR. 21, 2023

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner seeks to temporarily employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both: (a) the theoretical and practical application of a body of highly specialized knowledge: and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the Petitioner did not establish that the proffered position qualifies as a specialty occupation. We dismissed the Petitioner's appeal affirming the Director's decision. The Petitioner has since filed four consecutive motions (consisting of two individual motions to reconsider and two combined motions to reopen and reconsider), and we have dismissed each one. The matter is now before us a fifth time in the form of a combined motion to reopen and reconsider.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review of the record of proceeding we will grant the motion to reconsider our previous decision. After reconsideration, we will again dismiss the Petitioner's motions.

I. LAW

A motion to reopen is based on new facts that are supported by documentary evidence, and a motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3).

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean those that are relevant to the issues raised on motion and that have not been previously submitted in the proceeding, which includes within the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not

constitute "new facts." A motion to reopen that does not satisfy the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider on the other hand must: (1) state the reasons for reconsideration, (2) be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy, and (3) 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). A motion to reconsider that does not satisfy these requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

The review of a motion is limited to the basis for the prior adverse decision. The regulations at 8 C.F.R. § 103.5(a)(1)(i) generally require that the decision a motion seeks to reopen or reconsider must have taken place within the prior 30 days. So we follow the regulations as written and limit our review to the prior decision made within 30 days of filing the motion. We evaluate any new facts, arguments, or allegations of error in the application of law or service policy in connection with our decision upon which the current motion was filed. We may only grant a motion that satisfies these requirements and demonstrates eligibility for the benefit sought.

II. ANALYSIS

A. Motion to Reopen

The Petitioner has not provided us with new facts warranting reopening the proceedings here. We interpret "new facts" to mean those that are relevant to the issues raised on motion and that have not been previously submitted in the proceeding. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute submission of "new facts." The Petitioner's brief essentially encourages us to look beyond our prior decision and expand our examination to encompass our dismissals of the appeal and subsequent motions to find the new facts it says support a motion to reopen so that the original denial of the petition can be reversed. We do not have the authority to do so. The regulations at 8 C.F.R. § 103.5(a)(1)(i) generally require that the decision a motion seeks to reopen or reconsider must have taken place within the prior 30 days and we follow the regulations as written. The denial of the petition, the dismissal of the appeal and three out of the previous four motion dismissals occurred well outside of the 30-day window provided for in the regulation at 8 C.F.R. § 103.5(a)(1)(i).

All parties to a matter deserve an opportunity to be heard. But once proceedings provide that fair opportunity, a strong interest exists to bring the matter to a close. *INS v. Abudu*, 485 U.S. 94, 107 (1988). So a party seeking to reopen the proceedings bears a "heavy burden" of proof. *Id.* at 110.

The Petitioner does not provide any new facts that relate to our July 2022 decision dismissing the Petitioner's third motion. In this fifth in the Petitioner's series of motions, it submits a letter brief encouraging us to reopen the proceedings by reviewing its "genuine reasons along with additional facts and information" submitted in its prior proceedings. But "additional facts" that are repeated and were provided previously are not "new facts" by definition and we decline to consider them. Our authority is delegated by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in the Secretary through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective Mar. 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The

fact here is that the Petitioner was required to file any motion to reconsider or reopen our February 20, 2020 dismissal of the Petitioner's appeal within 33 days. The Petitioner did not file their motion until October 26, 2020. This was 249 days later. So the Petitioner's motion was correctly dismissed as untimely. We addressed the Petitioner's request for us to extend U.S. Citizenship and Immigration Services' (USCIS) COVID-19 flexibility announced on March 27, 2020 in our previous decisions in this matter. The COVID-19 flexibilities USCIS announced on March 27, 2020 only applied to requests for evidence (RFE) and notices of intent to deny (NOID) issued between March 1, 2020 and May 1, 2020. The Petitioner did not receive an RFE or NOID on February 20, 2020; they received a dismissal of their appeal and were required to file a Form I-290B. The COVID-19 flexibilities USCIS announced on March 27, 2020 made no provision for flexibility in regulatory response timeframes for filing Form I-290B.[1] Although some COVID-19 flexibilities did commence during the period the Petitioner could have filed their motion, those flexibilities did not apply to the Petitioner. And the Petitioner has not provided any statutory or regulatory authority or USCIS policy that would enable us to provide them with the relief they seek. So there is no factual or legal basis for us to consider reopening the matter before us.

B. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). The Board of Immigration Appeals generally requires that a motion to reconsider assert an error was made at the time of the previous decision. The very nature of a motion to reconsider is the claim that the original decision was defective in some regard. *See Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006).

A motion to reconsider must: (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and (3) establish that the decision was incorrect based on the evidence in the record at the time of the decision.

The Petitioner's motion to reconsider is not supported by any precedent decision to establish that our previous decision was based on an incorrect application of law or policy. It also does not establish that our decision was incorrect based on the evidence in the record at the time of decision. Consequently, it does not meet the requirements for a motion to reconsider and does not overcome the reasons for our previous decision of July 2022.

Disagreeing with our conclusions without showing that we erred as a matter of law is not a ground to reconsider our decision. *See O-S-G-*, 24 I&N Dec. at 58. The Petitioner has not demonstrated how we erred in our previous decision on the Petitioner's prior motion in July 2022. So the Petitioner has not shown proper cause for reconsidering our decision on its previous motion.

[1] COVID-19 flexibility on regulatory timeframes to submit a Form I-290B was not available until May 1, 2020 and even then only provided a 60-day flexibility. The Petitioner filed their combined motion to reopen and reconsider the dismissal of their appeal 249 days after our decision.

III. CONCLUSION

The Petitioner should note that the filing of a motion to reopen or reconsider does not provide any interim benefits such as staying the execution of any decision or extending a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv). The Petitioner has not demonstrated that we should either reopen the proceedings or reconsider our decision.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.