U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22065039

Date: NOV. 21, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a social work coordinator, seeks second preference immigrant classification as 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 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 qualified for classification as a member of the professions holding an advanced degree, but that he had not established a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We agreed with the Director and dismissed the Petitioner's appeal, as well as his subsequent motion. The matter is now before us again on combined motion to reopen and reconsider. Upon review, we will dismiss the motion.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the combined motion to reopen and reconsider.

I. LAW

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 (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial 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 applicant has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, an applicant 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).

II. ANALYSIS

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). The issue before us is whether the Petitioner has submitted new facts to warrant reopening or has established that our decision to dismiss the prior combined motion was based on an incorrect application of law or USCIS policy. We therefore incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Applicant's claims on motion.

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 on the basis of 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 foreign nationals 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 Petitioner has not met that burden.

We dismissed the Petitioner's appeal on May 12, 2021. The Petitioner filed a combined motion on our appellate decision on August 11, 2021. As our prior decision explained, the Petitioner untimely filed his motion and provided no explanation or documentation to demonstrate that the filing delay was reasonable or beyond his control. On present motion, the Petitioner states that Counsel's law firm had ongoing health challenges and that his prior motion's filing delay was reasonable. In support, the Petitioner provides three COVID-19 test results for Counsel, dated June 13, 2021, July 6, 2021, and August 6, 2021, respectively. Although the Petitioner states that the filing delay was reasonable, he provides little detail concerning the law firm's ongoing health challenges. While we recognize that Counsel may have tested positive for COVID-19, this does not necessarily establish ongoing health challenges that would prevent a timely filing. For instance, the Petitioner has not argued that Counsel's law firm shut down its operations during this time period. Nor does the evidence demonstrate that illness incapacitated Counsel for the entire period from June 13, 2013 to August 6, 2021. Even if the evidence had demonstrated this, it would still not establish how the delay was reasonable, given that nearly a month elapsed between the issuance of our prior decision and Counsel's first positive test results. Furthermore, such evidence would not demonstrate how the Petitioner himself lacked control to timely file or mitigate circumstances.

Although the Petitioner continues to argue that he is eligible for a national interest waiver, he does not provide any new evidence on motion to support his eligibility. Accordingly, the Petitioner has not shown proper cause for reopening the proceedings.

B. Motion to Reconsider

The filing before us does not entitle the Petitioner to a reconsideration of the denial of the petition. Rather, a motion to reconsider pertains to our most recent decision. In other words, we examine any new arguments to the extent that they pertain to our dismissal of the Petitioner's prior motion. Therefore, we cannot consider new objections to the earlier dismissal of his appeal, and the Petitioner cannot use the present filing to make new allegations of error at prior stages of the proceeding.

The Petitioner does not cite to or assert that we based our prior decision on an incorrect application of law or USCIS policy. Rather, he simply requests that we reexamine the record and reach a different conclusion. Because he 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, he has not established that he meets the requirements of a motion to reconsider. Therefore, the motion must be dismissed.

III. CONCLUSION

For the reasons discussed, the evidence provided in support of the motion to reopen does not overcome the grounds underlying our prior decision, and the Petitioner's motion to reconsider has not shown that our prior decision was based on an incorrect application of law or USCIS policy. Therefore, the combined motion to reopen and reconsider will be dismissed for the above stated reasons.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.