U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-L-H-

DATE: JUNE 27, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a teacher, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We dismissed the Petitioner's appeal and denied his subsequent motion to reconsider.[1] The Petitioner then filed a motion to reopen, and we denied that motion as untimely.

The matter is now before us on combined motions to reopen and reconsider. With the motions, the Petitioner submits additional documentation and a brief asserting that the delay in filing his previous motion to reopen was reasonable and beyond his control. For the reasons discussed below, we will deny the motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] *See Matter of K-L-H-*, ID# 478723 (AAO Sep. 22, 2017) and *Matter of K-L-H-*, ID# 1102545 (AAO Mar. 13, 2018).

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the petitioner must file the motion within 30 days of the decision. With respect to a motion to reopen, "failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." *Id.* If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the proper signature and the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

II. ANALYSIS

The record reflects that we denied the Petitioner's motion to reconsider on March 13, 2018. His motion to reopen that decision was filed more than three months after the service date of the unfavorable decision. Accordingly, we denied the motion to reopen as untimely filed.[2]

In the current motion, the Petitioner does not contest our finding that the June 2018 motion was untimely filed. Instead, he asserts that the "delay in filing was reasonable and beyond [his] control because he had to retain new counsel after his former attorney refused to assist him."[3] The Petitioner contends that he contacted present counsel on April 26, 2018, and retained counsel's services on May 7, 2018. He requests that we reopen the matter, reconsider our previous decision, and approve his petition.

With the motion, the Petitioner presents a statement explaining the circumstances under which he retained present counsel. He attributes the delay in filing his previous motion to being "unaware of the time it would take to gather all of the pertinent evidence" and "financial difficulty." In addition, he provides a copy of his April 2018 inquiry for legal services and email communications with present counsel. This information and evidence, however, is not sufficient to demonstrate that the delay in filing the June 2018 motion was reasonable and beyond the control of the Petitioner to warrant excusing the untimely filing as a matter of discretion.

The Petitioner has not met the requirements for a motion to reconsider as he has not shown that we erred in finding that the June 2018 motion was untimely or in concluding that he had not demonstrated that the filing delay was reasonable and beyond his control. Further, the current motion to reconsider does not establish that our previous determination was based on an incorrect application of the law, regulation, or USCIS policy. In addition, the current motion to reopen does include new facts or evidence establishing that the June 2018 motion was timely or that the Petitioner's delay in filing that motion was reasonable and beyond his control.

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[2] We also denied the Petitioner's request to excuse the filing delay because he had not demonstrated that the delay was reasonable and beyond his control. *See* 8 C.F.R. § 103.5(a)(1)(i).

[3] The record includes multiple March-April 2018 email communications between the Petitioner and his former attorney, [redacted], in which [redacted] updated the Petitioner about his case and responded to his questions. For instance, an April 2, 2018 email from [redacted] advised the Petitioner against "filing another motion" because of the unlikelihood of USCIS "reversing the denial." The Petitioner has not asserted an ineffective assistance of counsel claim against [redacted] nor has he provided sufficient information and evidence to support such a claim. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988).

III. CONCLUSION

The Petitioner has not established that our previous decision was incorrect based on the record before us, nor does his new evidence on motion overcome the grounds underlying our previous decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of K-L-H-*, ID# 3773802 (AAO June 27, 2019)