U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13860506

Date: JAN. 29, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a physical therapist. It requests classification of the Beneficiary as an advanced degree professional under the second preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This immigrant visa category allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition and we dismissed the subsequent appeal. Our decision dismissing the appeal concluded that the Petitioner did not establish that the Beneficiary possessed the required experience for the offered position and the advanced degree professional immigrant visa category. The matter is now back before us as a motion to reopen.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. See section 291 of the Act, 8 U.S.C. § 1361. We will dismiss the motion and the petition will remain denied.

I. MOTION REQUIREMENTS

A petitioner may file a motion on an unfavorable decision under 8 C.F.R. § 103.5. Motions request a review by the same authority that issued the latest decision in the proceeding. 8 C.F.R. § 103.5(a)(1)(ii). This matter is properly before us as it involves a motion to reopen our decision dismissing the Petitioner's appeal.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Resubmitting previously provided evidence or reasserting previously stated facts do not meet the requirements of a motion to reopen. The new facts must also be relevant to the grounds of the unfavorable decision. A motion that does not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). If the motion is granted, USCIS will issue a new decision which may be favorable or unfavorable to the party that filed the motion.

II. THE BENEFICIARY'S EXPERIENCE

A petition for an advanced degree professional must establish that the Beneficiary holds an academic or professional degree above that of baccalaureate, or a baccalaureate degree followed by at least five years of progressive experience. See 8 C.F.R. § 204.5(k)(2). The petition must also establish that the Beneficiary met the requirements of the offered position as set forth on the Schedule A application by the June 28, 2108 priority date. See Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977).

Here, the Schedule A application states that the offered position requires a U.S. bachelor's degree in physical therapy (or a foreign equivalent degree) and five years of experience as a physical therapist, including at least one year of experience in the United States. The Beneficiary's bachelor's degree in physical therapy from the Philippines is the foreign equivalent of a U.S. bachelor's degree. Therefore, in order to meet the requirements of the advanced degree professional category and the requirements of the offered position, the Petitioner must establish that the Beneficiary has five years of progressive experience as a physical therapist after the issuance of his bachelor's degree in 1997 and prior to the June 28, 2018 priority date.

The Schedule A application states that the Beneficiary had approximately 11 years of full-time experience as a physical therapist from multiple positions, but the petition did not document any of this claimed experience as required by 8 C.F.R. § 204.5(g)(1). In response to the Director's notice of intent to deny (NOID) the petition, the Petitioner submitted letters from two of the Beneficiary's claimed former employers. A letter from a healthcare business in the Philippines states that it employed the Beneficiary as a physical therapist from February 2006 to June 2012, and a letter from a U.S. healthcare company states that it employed the Beneficiary from September 2013 to May 2015.

The Director's decision denying the petition concluded that the submitted employment experience letters did not meet the requirements of 8 C.F.R. § 204.5(g)(1) and therefore did not establish the Beneficiary's qualifying experience for the requested immigrant visa classification or the offered position. The decision also noted that the employment letter from the Philippines business was inconsistent with representations of the Beneficiary's experience in another immigration filing. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the Petitioner submitted new experience letters from the same employers that had provided letters for the NOID response. In our decision dismissing the appeal, we did not accept the new employment letters because the Petitioner had notice and a reasonable opportunity to provide them with the petition and in response to the Director's NOID. See Matter of Soriano, 19 I&N Dec. 764, 766 (BIA 1988) (barring consideration of appellate evidence if a petitioner previously received notice of the required materials and had a reasonable opportunity to provide them). Our decision noted that, even if we accepted the new letters, they did not resolve the discrepancies in the Beneficiary's employment history. See Matter of Ho, 19 I&N Dec. at 591.

On motion to reopen, the Petitioner's new counsel claims that the Petitioner's prior counsel was "incompetent, undisciplined and inexperienced" in preparing Schedule A cases. The brief also states that the Petitioner's prior counsel's errors were a contributing factor in the Beneficiary's child's

suicide in 2019. The motion contains a detailed summary of the Beneficiary's work history as well as new letters of employment "that provide more clarity regarding his prior work history and more thorough job descriptions."

A petitioner may file a motion to reopen a proceeding based on a claim of ineffective assistance of counsel.[1] In this case, the Petitioner's claim of ineffective assistance was supported by its motion brief and an affidavit from the Beneficiary. These two documents claim that prior counsel did not instruct the Beneficiary to obtain experience letters at the outset of the process, did not provide guidance on what the letters should say in order to meet regulatory requirements, and did not instruct the Beneficiary to review the entire Schedule A application (despite the fact that the Beneficiary signed a declaration under penalty of perjury that sections J and K of the application were true and correct).[2] These allegations do not satisfy the threshold documentary requirements for a claim of ineffective assistance of counsel because the Petitioner did not provide a detailed description of its agreement with former counsel, evidence that former counsel was informed of these allegations and was given an opportunity to respond, or evidence that a complaint was filed with the applicable state bar association (or an explanation as to why a complaint was not filed).

In addition, the evidence submitted on motion relating to the Beneficiary's experience does not meet the requirements of a motion to reopen as set forth at 8 C.F.R. § 103.5(a)(2). The submitted evidence clarifies and expands on facts that were previously requested by the Director. The Director did not err in denying the petition based on the record before him, and we correctly declined to consider previously requested evidence when we dismissed the appeal. This evidence was available when the petition was originally filed. Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See INS v. Doherty, 502 U.S. 314, 323 (1992) (citing INS v. Abudu, 485 U.S. 94 (1988)). With this motion, the Petitioner has not met that burden. However, the Petitioner may file a new petition on behalf of the Beneficiary and submit the additional evidence it compiled for this motion in order to meet its burden of proof.

IV. CONCLUSION

The motion to reopen is dismissed because it does meet the requirements of 8 C.F.R. § 103.5(a)(2) and Matter of Lozada, 19 I&N Dec. at 637. This decision does not prevent the Petitioner from filing a new petition on behalf of the Beneficiary with USCIS.

ORDER: The motion to reopen is dismissed.

---

[1] See Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988). A claim of ineffective assistance of counsel must contain an affidavit attesting to the relevant facts and providing a detailed description of the agreement with former counsel; evidence that former counsel was informed of the allegation of ineffective assistance and was given an opportunity to respond; and, if former counsel violated his or her ethical or legal responsibilities, evidence that a complaint was filed with the applicable state bar association or an explanation why a complaint was not filed. Id. at 639.

[2] A Beneficiary's signature on an immigration benefit request establishes a strong presumption that he or she knows of and has assented to the contents of the request. Matter of Valdez, 27 I&N Dec. 496 (BIA 2018).