U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37265461

Date: APR. 03, 2025

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner seeks employment-based second preference (EB-2) immigrant classification, as well as a national interest waiver of the job offer requirement attached to this 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 record did not establish the Petitioner's eligibility for the requested EB-2 immigrant classification or a national interest waiver. We dismissed a subsequent appeal as well as three successive combined motions to reopen and reconsider. The matter is now before us again on a fourth combined motion 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 combined motion.

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 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). 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii).

In our first appellate decision we concluded that the Petitioner waived the issue of his eligibility for EB-2 immigrant classification on appeal, and we dismissed the appeal on that basis.[1] In his initial combined motion to reopen and reconsider, the Petitioner submitted additional evidence, including multiple work experience letters, which he claimed established his eligibility for the underlying EB-2

[1] Because the Petitioner did not establish eligibility for EB-2 immigrant classification, we reserved our consideration of his appellate arguments pertaining to his national interest waiver request. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-,* 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

immigrant classification. While we noted generally that the new evidence did not support his claim that he was an alien of exceptional ability, we dismissed his first combined motion because it did not challenge our determination that he waived the issue of his eligibility for EB-2 classification. The Petitioner based his two subsequent combined motions to reopen and reconsider on claims of ineffective assistance of his former counsel.

In our most recent decision dismissing the Petitioner's third combined motion to reopen and reconsider—the decision that is the subject of this motion—we concluded that, contrary to his assertions, we did address his claims of ineffective assistance of counsel made in his prior motion. We also noted that neither motion included evidence satisfying the requirements for ineffective assistance of prior counsel claims under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).[2] We thus concluded that he had not submitted new facts supported by affidavits or other documentary evidence overcoming our latest decision, nor did he establish that our prior decision was incorrect based on the evidence in the record at the time of the decision. Accordingly, we dismissed the Petitioner's combined motion to reopen and reconsider because it did not meet the regulatory requirements. 8 C.F.R. § 103.5(a)(4)

On motion, the Petitioner now submits a brief and a copy of our prior decision. While the Petitioner does not contest our determination that he did not satisfy any of the *Lozada* requirements, he asserts that we are not precluded from considering his ineffective assistance of counsel claim if "other credible evidence can support his claims and establish his eligibility." Notably, however, the Petitioner does not point to "other credible evidence" in the record supporting his claims. Instead, in their brief, his counsel provides a summary of his alleged engagement with the Petitioner's former attorney and the uncertainty surrounding the attorney who represented him in regards to the underlying Form I-140, Immigrant Petition for Alien Workers. We acknowledge counsel's statements in the brief; however, counsel's unsubstantiated assertions do not constitute evidence. See, e.g., *Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

Moreover, his counsel's statements are not consistent with the record. First, they assert that because the Petitioner's previous attorney did not "file a G-28, Notice of Entry of Appearance as Attorney . . . this lack of formal attorney representation further complicated [the Petitioner's] ability to address the issues of ineffective counsel." Yet, while we acknowledge his claims regarding the filing of the underlying Form I-140, he based his claims of ineffective assistance of counsel in his prior motion, in part, on his former counsel's failure to challenge the Director's determination that he was not eligible for EB-2 immigrant classification in his appeal. That appeal was accompanied by a Form G-28 executed by both the Petitioner and his former counsel. Accordingly, even if we were to consider counsel's assertions as evidence, these claims are directly contradicted by the record. Similarly, we acknowledge counsel's assertions that filing a bar complaint against the Petitioner's former attorney "would have been both financially burdensome and intimidating," but the Petitioner has not explained in detail how this process would be financially burdensome or intimidating.

[2] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) established a framework for asserting and assessing claims of ineffective assistance of counsel, which requires the submission of: (1) a written affidavit of the petitioner attesting to the relevant facts; (2) evidence that the petition informed their former counsel of the allegation of ineffective assistance and was given an opportunity to respond; and (3) evidence that the petitioner filed a complaint with the appropriate disciplinary authorities or an explanation as to why a complaint was not filed.

On motion the Petitioner also relies on several circuit court decisions finding that a petitioner's "substantial compliance" with the *Lozada* requirements was sufficient to support their ineffective assistance of counsel claims; however, the Petitioner has not established that he has substantially complied with any of the *Lozada* requirements. Nor has he shown that his case presents analogous facts to the cases cited, as the petitioners in those cases substantially complied with at least one of the *Lozada* requirements. Here, for example, the Petitioner has not submitted an affidavit or "other credible evidence" supporting his ineffective assistance of counsel claim. Accordingly, he has not established that our most recent decision dismissing his combined motion to reopen and reconsider was erroneous.

Based on the above, we conclude that the Petitioner's motion does not contain new facts supported by documentary evidence that overcomes the grounds underlying our previous decision, nor has he shown that our previous decision was based on an incorrect application of law or policy. Consequently, the Petitioner has not established a basis for us to reopen and reconsider that decision.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.