U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 38454392

Date: AUG. 05, 2025

Motion on Administrative Appeals Office Decision

Form I-526, Immigrant Petition by Alien Entrepreneur

The Petitioner seeks classification as an immigrant investor pursuant to the Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference (EB-5) classification makes immigrant visas available to qualified immigrants who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees.[1]

Field Operations Directorate (FOD) denied the petition, concluding that the Petitioner did not establish that the NCE will create at least 10 full-time positions for qualifying employees. We dismissed a subsequent appeal. The Petitioner then filed a motion to reopen, which we dismissed because it was untimely filed. The matter is now before us on a 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 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). Because the scope of a motion is limited to the prior decision, we will only review the latest decision in these proceedings. 8 C.F.R. § 103.5(a)(1)(i), (ii). 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).

On motion to reopen, the Petitioner asserts new facts, specifically that the prior motion to reopen was filed untimely due to severe weather and this delay was beyond his control. In support of these facts,

[1] On March 15, 2022, the EB-5 Reform and Integrity Act of 2022 was signed into law, revising general eligibility requirements, substantially reforming and codifying the Regional Center Program in section 203(b)(5) of the Immigration and Nationality Act, and adding significant new integrity provisions. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). As the Petitioner filed his petition in February 2018, the relevant law then in existence governs this appellate adjudication.

the Petitioner submits copies of weather reports from the dates near the filing deadline and Fedex tracking information. The Petitioner's brief states that "most of the services were closed due to the weather condition" and that Petitioner's counsel "tried going to various mailing services on that date, but they were closed for business." The Petitioner points to guidance from the *USCIS Policy Manual* regarding flexibilities for emergencies or unforeseen circumstances and contends that this guidance is applicable here. *See* 1 *USCIS Policy Manual* H.2, https://www.uscis.gov/policy-manual. The Petitioner contends that the delay was not within his control and requests that we reverse the decision to dismiss the motion as untimely.

As we stated in our decision to dismiss the Petitioner's prior motion to reopen, a motion on an unfavorable decision must be filed within 33 days of the date the decision is mailed. The Petitioner's motion was received 36 days after the decision was mailed. The failure to file a motion to reopen timely may be excused, in our discretion, if it is demonstrated that the delay was reasonable and was beyond the control of the petitioner. 8 C.F.R. § 103.5(a)(1)(i).

We conclude that the evidence of inclement weather does not establish that the failure to file the prior motion timely was reasonable or beyond the Petitioner's control. The weather reports and the tracking information submitted do not establish, as the Petitioner's brief contends, that all of the mailing services in the area were closed, or that the scheduled pick up of the shipment was cancelled. *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"). Additionally, the Petitioner does not explain why he was unable to submit his motion earlier, prior to the end of the filing period, particularly if severe weather was forecasted.

The Petitioner also has not established that the *Policy Manual* guidance is applicable here. The guidance states that USCIS may have discretion to take measures on requests related to delays in filing applications or petitions if a requestor has been affected by an emergency or unforeseen circumstance. *See generally* 1 *USCIS Policy Manual, supra.* The guidance states that emergencies and unforeseen circumstances include natural disasters, national emergencies, conflicts abroad, and unforeseen circumstances such as terrorist attacks. *See id.* None of these circumstances are present here.[2]

The new facts and evidence submitted on motion to reopen do not warrant reopening the proceeding. The untimely filing of a motion to reopen may be excused, in our discretion, only if it is demonstrated that the delay was reasonable and was beyond the control of the petitioner. *See* 8 C.F.R. § 103.5(a)(1)(i). The Petitioner submitted evidence of inclement weather around the date of the filing deadline and tracking information. This evidence does not establish that the delay was reasonable or beyond the Petitioner's control.

Regarding the Petitioner's motion to reconsider, we conclude that the motion does not meet the regulatory requirements of a motion to reconsider and therefore must be dismissed. 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

[2] The *USCIS Policy Manual* defines natural disasters as those identified by the Federal Emergency Management Agency as such for the purposes of public assistance. The Petitioner did not submit evidence that the severe weather in this case qualified as a natural disaster.

the decision. 8 C.F.R. § 103.5(a)(3). The Petitioner does not contend that our decision to dismiss the motion as untimely was incorrect based on the record at the time of the decision. Instead, the Petitioner requests that we consider the new evidence submitted regarding the reasons for the untimely filing. Additionally, the Petitioner has not established that we incorrectly applied any law or policy by dismissing the motion as untimely. Because the motion to reconsider does not meet these requirements, it must be dismissed.

Although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has not submitted evidence that warrants reopening the proceeding. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision and that our decision was incorrect based on the evidence in the record at the time of the decision. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

NOTICE: Aliens who are not lawfully present, or who are otherwise inadmissible or deportable, may be subject to the commencement of removal proceedings under section 240 of the Act through the issuance of a Form I-862, Notice to Appear. Those proceedings may result in their removal from the United States and possible ineligibility for future visas or other immigration benefits.