U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30003220

Date: FEB. 8, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a software engineer, seeks second preference immigrant classification as an advanced degree professional and as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this employment-based "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 had not established eligibility for EB-2 classification and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We dismissed a subsequent appeal and a combined motion to reopen and motion to reconsider. We then rejected a motion submitted directly to our office, contrary to publicly available information regarding the proper filing location for motions. We then dismissed an untimely motion to reconsider. The matter is now before us on motion to reopen.

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

A brief summary of the procedural history is as follows: After we dismissed the Petitioner's appeal, we dismissed a subsequent combined motion to reopen and motion to reconsider on March 27, 2023. The Petitioner then submitted a motion, addressed directly to our office's mailing address. We rejected the motion submitted directly to our office because it is not a valid filing location for motions, and we returned the motion and filing fee to the Petitioner. The Petitioner then submitted another motion, specifically identified as a motion to reconsider, addressed to a valid filing location, to be delivered via FedEx on May 4, 2023. The filing location rejected the motion, indicating that it "cannot contain a mix of check, money order, and G-1450 pay receipts." The Petitioner filed another motion on May

16, 2023, contesting the prior motion's rejection. On July 27, 2023, we deemed the motion to reconsider filed on May 4, 2023; however, we dismissed it, explaining that it was untimely submitted more than 33 days after we dismissed the combined motion to reopen and motion to reconsider on March 27, 2023, in violation of the filing requirements at 8 C.F.R. § 103.5(a)(1)(i), 103.8(b) (providing that a petitioner choosing to file a motion must do so within 33 days after the date on which U.S. Citizenship and Immigration Services (USCIS) mailed the underlying unfavorable decision); *see also* 8 C.F.R. § 1.2 (defining "day").

Now, on motion to reopen, the Petitioner resubmits information already in the record, including evidence of the types of motions submitted, the addresses to which they were submitted, the tracking numbers under which the motions were sent, and the dates on which the motions were delivered to the respective locations. The Petitioner then notes that "failure to file before [the 33-day motion-filing period] expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner," citing 8 C.F.R. § 103.5(a)(1)(i). The Petitioner requests that we "reopen and reconsider [his motion] untimely filed on May 4, 2023, for reasonable causes beyond his control."

We first note that the Petitioner specifically filed the instant motion as a motion to reopen, not a combined motion to reconsider; therefore, the motion before us is to reopen the prior motion, not to reopen and to reconsider it, as the Petitioner asserts. We next note that the first motion the Petitioner submitted following the appeal dismissal was submitted as a combined motion to reopen and motion to reconsider, indicating that the Petitioner is familiar with different types of motions and the option to combine them in one submission. We further note that the motion submitted on May 4, 2023, specifically was a motion to reconsider, not a motion to reopen or a combined motion to reopen or motion to reconsider. For example, the brief submitted with the motion specifically states, "[the Petitioner] hereby files this Motion to Reconsider as pertains to the AAO's dismissal of his Motion to Reopen and Reconsider the USCIS' underlying decision to deny his I-140/EB-2 National Interest Waiver," indicating familiarity with different types of motions, the option to combine them in one submission, and the decision not to do so at that time.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides the general filing deadline for both motions to reopen and motions to reconsider. However, the regulation specifically bifurcates motions to reopen and motions to reconsider, providing:

> Any motion *to reopen* a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks *to reopen*, except that 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.

8 C.F.R. § 103.5(a)(1)(i) (emphasis added); *see also* 8 C.F.R. § 103.8(b) (providing three additional days when USCIS serves notice by mail). In contrast, the regulation does not provide that USCIS has the discretion to excuse failure to file a motion to reconsider before the filing period expires.

As we explained in our prior dismissal, the Petitioner submitted a motion to reconsider on May 4, 2023; however, the Petitioner did not properly submit a motion to a proper filing location within 33

days after we mailed the underlying unfavorable decision on March 27, 2023. *See id.*; *see also* 8 C.F.R. § 1.2. Moreover, the Petitioner submitted the motion as a motion to reconsider, not as a motion to reopen; therefore, we do not have the discretion to excuse failure to file it before the filing period expires. *See* 8 C.F.R. § 103.5(a)(1)(i).

Even if the Petitioner had submitted the motion in question as a motion to reopen, whose untimeliness we could excuse as a matter of discretion, the record does not support such a conclusion. Specifically, as noted above, the Petitioner properly and timely filed both an appeal and a combined motion to reopen and motion to reconsider before the filing woes began. Therefore, properly and timely submitting a Form I-290B, Notice of Appeal or Motion, both as an appeal and as a motion, appears to have been within the Petitioner's control during the relevant time period. The Petitioner does not reconcile in the instant motion why submitting a subsequent motion, after having properly and timely submitted both an appeal and a combined motion, escaped his control thereafter.

In summation, the Petitioner has not provided new facts to establish that we erred in dismissing the prior motion. Specifically, the Petitioner has not established that the motion to reconsider that we dismissed as untimely either was timely or that we had the discretion to excuse its untimeliness. *See* 8 C.F.R. § 103.5(a)(1)(i). Because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision. Therefore, the underlying petition remains denied. *See* 8 C.F.R. § 103.5(a)(2), (4).

ORDER: The motion to reopen is dismissed.