U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35830998

Date: JAN. 28, 2025

Motion on Administrative Appeals Office Decision

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

The Petitioner, a lawyer, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, and a national interest waiver of the job offer requirement attached to this classification. See section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding the Petitioner had not established a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We dismissed the appeal and three subsequently filed motions to reconsider. The matter is now before us on a fourth motion to reconsider. 8 C.F.R. § 103.5(a)(3).

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 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). The scope of a motion is limited to "the prior decision" and "the latest decision in the proceeding." 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.

The issue on motion is whether we erred in dismissing the Petitioner's prior motion to reconsider as untimely because it was filed 58 calendar days after the date we mailed the decision he requested we reconsider. See 8 C.F.R. §§ 103.5(a)(1)(i) (providing a motion on an unfavorable decision must be filed within 30 calendar days of the date of the decision), 103.8(b) (providing 3 days shall be added to the prescribed period when notice is served by mail).

The Petitioner asserts his motion was not timely filed because of "misinformation received after the unexpected and abrupt withdrawal of prior counsel," which resulted in his being unaware of the recent increase of filing fees.[1] He further asserts that our failure to consider his extraordinary circumstances

[1] Notably, in resubmitting the prior motion after it was rejected for the incorrect fee, the Petitioner stated that "[b]efore

and due diligence and rigidly adhering to a procedural rule would be arbitrary, capricious, and an abuse of our discretion.

While 8 C.F.R. § 103.5(a)(1)(i) allows U.S. Citizenship and Immigration Services (USCIS) to excuse a late motion to reopen "where it is demonstrated that the delay was reasonable and was beyond the [the affected party's] control," there is no similar regulation for a late filed motion to reconsider. Rather, any motion to reconsider must be filed within 30 days of the unfavorable decision. 8 C.F.R. § 103.5(a)(1)(i) (emphasis added).[2]

We acknowledge the Petitioner's statements that, but for his motion being rejected for the incorrect fee amount, it would have been timely filed. However, each form, benefit request, or other document requiring a fee payment by regulation must be filed with the correct fee(s). 8 C.F.R. § 103.2(a)(1), (a)(7)(D); see generally 1 USCIS Policy Manual B.3, https://www.uscis.gov/policy-manual (providing, as guidance, requestors must include the required fee amount, which is controlled by regulation, with the submission of a benefit request to USCIS). USCIS' fee schedule is publicly available information and the fee increase went into effect more than two months before the Petitioner filed the prior motion.[3]

Moreover, we do not agree that our prior decision was arbitrary, capricious or an abuse of discretion. Immigration regulations carry the force and effect of law. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954). The regulations do not provide for an exception to the requirement that a motion to reconsider be filed within 30 days and we lack the authority to waive the requirements of the regulation. See United States v. Nixon, 418 U.S. 683, 695-96 (1974) (holding that both governing statutes and their implementing regulations hold "the force of law" and must be adhered to by government officials).

The Petitioner further asserts that courts have consistently held that withdrawal of counsel constitutes an extraordinary circumstance warranting equitable tolling, particularly when it leaves the petitioner without essential legal guidance at a critical moment, citing to a Supreme Court case analyzing criminal proceedings, a First Circuit case dealing with the Federal Tort Claims Act, and a Fifth Circuit case analyzing removal proceedings. However, we have no authority to apply the doctrine of equitable estoppel. See Matter of Hernandez-Puente, 20 I&N Dec. 335, 338-39 (BIA 1991). The Petitioner also cites to a number of federal cases claiming federal courts have consistently recognized that equitable tolling applies in immigration cases. However, while the federal courts may apply the doctrine against USCIS, we may not. Id. The Petitioner has not cited to any legal binding precedent supporting his assertion that USCIS may apply the doctrine of equitable estoppel.

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mailing the check, I diligently checked the internet for the updated fee information multiple times," and while he also stated that he "navigated this process without the assistance of an immigration attorney," he did not make any mention of the "unexpected and abrupt withdrawal of prior counsel."

[2] Further, even if we could consider the circumstances around the Petitioner's late filed motion, and we cannot, the Petitioner does not explain when counsel withdrew representation or how the timing of the withdrawal affected his filing of the instant motion. We note that the Petitioner was unrepresented by counsel both when he filed the untimely motion to reconsider and in his previously filed second motion to reconsider.

[3] USCIS' fee schedule can be located on Form G-1055, Fee Schedule, accessible through USCIS' website at https://www.uscis.gov/forms/filing-fees.

The Petitioner has therefore not established 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. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reconsider is dismissed.