U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31699824

Date: JULY 1, 2024

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 Petitioner did not establish eligibility for the EB-2 classification and also did not merit a national interest waiver as a matter of discretion. We dismissed the Petitioner's appeal and a subsequent motion to reopen and reconsider. The matter is now before us on a second 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 motions.

As previously discussed, 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, in turn, 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 benefit sought.

Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). Thus, we will only consider new evidence and arguments to the extent that they pertain to our latest decision dismissing the Petitioner's previous motion to reopen and reconsider. We incorporate that decision here by reference and will repeat only certain facts necessary to address the Petitioner's assertions on this second motion.

As stated, the Director determined that the Petitioner did not qualify for EB-2 classification, and the Petitioner did not challenge this determination on appeal.[1] We therefore considered the issue waived and dismissed the appeal concluding that the Petitioner did not establish eligibility for the underlying

[1] We noted that the Petitioner incorrectly stated in his appellate brief that the Director found him eligible for the EB-2 classification as a member of the professions holding an advanced degree.

immigrant classification. Because he was ineligible for the benefit sought on that basis alone, we did not address whether he met the national interest waiver criteria. The Petitioner then filed a motion to reopen and reconsider with additional evidence to demonstrate his eligibility for EB-2 classification as an individual of exceptional ability. We dismissed the motion, concluding that the Petitioner did not present new facts sufficient to reopen the proceedings, because the new evidence was related to the previously waived issue and evaluating it on motion for the first time would not have changed the outcome.[2] We further concluded that the Petitioner also did not show that our appellate decision was in error as a matter of law or policy or that it was otherwise incorrect based on the evidence in the record at the time, such that it would warrant reconsideration.

With the instant motion, the Petitioner submits a brief and asserts that even though he qualified for EB-2 classification as an individual of exceptional ability, his former counsel failed to address the deficiencies raised by the Director regarding the related eligibility criteria. He states that as a result the petition was denied based, in part, on his ineligibility for EB-2 classification, which his former counsel mistakenly neglected to raise on appeal. The Petitioner states that we improperly dismissed his previous motion without considering the new facts and evidence, which he claims not only established his eligibility for the sought immigrant classification, but also revealed ineffective assistance of counsel. He avers, referencing *Castillo-Perez v. INS*, 212 F.3d 518, 528 (9th Cir. 2000), that there is a reasonable likelihood that the result would have been different but for the former counsel's errors and the appropriate remedy therefore is to reopen our prior decision to consider the previously provided evidence and remand the matter to the Director for further review.

We acknowledge the Petitioner's statements, but they do not establish a sufficient basis for us to reopen and reconsider our prior dismissal of his motion.

The Petitioner again claims eligibility for EB-2 classification as an individual of exceptional ability and references evidence he provided with the previous motion in support of this claim. However, the issue of the Petitioner's eligibility for EB-2 classification was not before us on motion, as he waived it on appeal. As the Petitioner does not indicate if and how the previously provided evidence may be relevant to the grounds for dismissal of his prior motion, and he does not submit any additional documents with the instant motion, he has not established new facts that might warrant reopening of these proceedings.

The Petitioner also has not identified any legal or policy errors in our prior decision that might cause us to reexamine our adverse determination. Firstly, the Petitioner did not specifically raise the ineffective assistance of counsel claim in his previous motion. Rather, in the motion brief, he stated generally that it was his "understanding that the merits proposed by former counsel were based on Advanced Degree and not Exceptional Ability, which [caused him] significant harm . . . through no fault of his own,"[3] and requested us to consider new evidence of his claimed eligibility as an individual

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[2] *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome). We also noted that because some of the documents the Petitioner submitted were not accompanied by certified English language translations as required under 8 C.F.R. § 103.2(b)(3), we were not able to determine if they supported his claims.

[3] We note that by signing a benefit request or any document submitted to U.S. Citizenship and Immigration Services, the requestor affirms that they have knowledge of the facts and claims therein and attest that those facts and claims are true. 8 C.F.R. § 103.2(a)(2); *see also generally* 1 *USCIS Policy Manual* B.2(B).

of exceptional ability. Although the Petitioner states that we erred by dismissing his motion without evaluating this evidence, he does not point to any legal authority or policy guidance indicating that we are required to consider claims and evidence concerning an issue that was waived on appeal in adjudicating a subsequent motion.

A motion is not an opportunity to restate previously considered and rejected arguments. *See e.g.*, *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (stating that a motion to reconsider is not a mechanism by which a party may submit in essence, the same brief and seek reconsideration by generally alleging error in the prior decision).

Based on the above, we conclude that the Petitioner's motion does not show that our previous decision was based on an incorrect application of law or policy, and it does not include new information or evidence that overcomes the grounds underlying our previous decision. 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.