U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26992107

Date: JUNE 24, 2024

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 noncitizens who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish (1) that the Petitioner has created a new commercial enterprise, (2) that the Petitioner has invested or is actively in the process of investing the required amount of capital in a new commercial enterprise, and (3) that the new commercial enterprise is principally doing business and creates jobs in a targeted employment area. We dismissed a subsequent appeal and two subsequent combined motions to reopen and reconsider. The matter is now before us again on the third combined motions 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.

I. LAW

A motion to reopen must state new facts and be supported by affidavits or other 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 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). 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.

II. ANALYSIS

A review of any motion is narrowed to the basis for the prior adverse decision. Accordingly, we will examine any new facts and arguments to the extent that they pertain to our most recent decision - the dismissal of motions to reopen and reconsider. As such, our analysis for these motions is limited to the following: (1) whether we erred in dismissing the Petitioner's prior motion to reopen, concluding that the documentation presented on the prior motion did not overcome the conclusion in our appellate decision that the Petitioner had waived the lawful source of funds issue on appeal because he did not timely raise it and (2) whether we erred in dismissing the Petitioner's prior motion to reconsider, concluding that the Petitioner did not demonstrate that our prior motion decision was based on an incorrect application of law or USCIS policy or was incorrect based on the evidence before us when we issued the prior motion decision.

We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion. While we may not address each piece of evidence individually, we have reviewed and considered each one.

A. Motion to Reopen

The Chief found that the record did not contain evidence to demonstrate that the Petitioner had received employment authorization between 1985 through 1999 and that income earned while engaging in unauthorized employment in the United States is considered unlawfully earned income for EB-5 purposes. Therefore, the Chief concluded that it is unclear from the record if the Petitioner's investments in the new commercial enterprise are derived from income earned while engaging in unauthorized employment in the United States.

On appeal, the Petitioner did not challenge, address, or reference this adverse lawful source of funds finding. We, therefore, deemed the issue waived and found the Petitioner had not shown by a preponderance of the evidence that his invested funds derived from lawful means. We dismissed the Petitioner's subsequent appeal and two subsequent combined motions to reopen and reconsider. We dismissed the Petitioner's prior motion to reopen, finding that he had offered as new evidence a 1989 document from the U.S. Department of Justice concerning an immigration application and a copy of an employment authorization card issued in 1999, but these documents did not overcome or address the conclusion in our appellate decision that the Petitioner had waived the lawful source of funds issue on appeal because he did not timely raise it.[1]

The Petitioner contends that he did not intend to abandon the subject claim but merely failed to raise it because he mistakenly thought the issue of lawful funds was decided in his favor. He claims that the Chief erred in denying his petition on the basis that he did not have employment authorization from 1985 to 1999. However, he does not present new facts supported by affidavits or other

[1] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The courts' view of issue waiver varies from circuit to circuit. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived); *but see Hoxha v. Holder*, 559 F.3d 157, 163 (3d Cir. 2009) (issue raised in notice of appeal form is not waived, despite failure to address in the brief).

documentary evidence to establish that we erred in dismissing his prior motion to reopen. *See* 8 C.F.R. § 103.5(a)(2). Therefore, we conclude the Petitioner has not shown proper cause for reopening the proceeding.

B. Motion to Reconsider

As indicated above, to have established merit for reconsideration of our latest decision, a petitioner must both state the reasons why they believe the most recent decision was based on an incorrect application of law or policy and specifically cite laws, regulations, precedent decisions, or binding policies that the petitioner believed we misapplied in that prior decision. Thus, to prevail in his motion to reconsider, the Petitioner cannot merely disagree with our conclusions but rather must demonstrate how we erred as a matter of law or policy in that immediate prior decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit, in essence, the same brief and seek reconsideration by generally alleging error in the prior decision).

The Petitioner contends that we should exercise our discretion to consider the issue of lawful source of funds although it was not raised on appeal because his source of funds was lawful and because our failure to consider the issue of lawful source of funds would result in extreme injustice to the Petitioner. To support this claim, the Petitioner cites various case law, including *National Ass'n of Social Workers* v. *Harwood*, 69 F.3d 622, 627 (1st Cir. 1995) (stating that the rule against new issues on appeal is a matter of discretion and an appellate court may decline to exercise it); *Universal Title Ins. Co.* v. *United States*, 942 F.2d 1311, 1314-15 (8th Cir. 1991) (holding that appellate courts may review an issue not raised below in certain situations, including where the proper resolution is beyond any doubt or where injustice might otherwise result); *Readco, Inc.* v. *Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir. 1996) (stating that the general rule of not considering matters not raised before the district court may be disregarded where consideration of the issue is necessary to avoid manifest injustice or where the issue is purely legal and there is no need for additional facts finding).

The case law cited by the Petitioner reiterates the general rule that an appellate court will not consider an argument raised for the first time on appeal and provides exceptions to the general rule, for example, where the proper resolution is beyond any doubt, where injustice might otherwise result, or where the issue is purely legal and there is no need for additional facts finding. However, the case law does not support that we erred in dismissing the Petitioner's prior motion, concluding that the Petitioner did not demonstrate that our prior motion decision was based on an incorrect application of law or policy or was incorrect based on the evidence before us when we issued the prior motion decision.

The Petitioner does not provide the reasons why he believes our prior decision dismissing his motion to reopen was based on an incorrect application of law or policy. Nor does he cite laws, regulations, precedent decisions, or binding policies to support that we erred in dismissing his prior motion to reopen. Likewise, the Petitioner's brief in support of the current motion lacks any cogent argument as to how we misapplied the law or policy in dismissing his prior motion to reopen.

The Petitioner has not shown that our prior motion decision contains errors of law or policy or that the decision was incorrect based on the record at the time of that decision. *See* 8 C.F.R. § 103.5(a)(3). Therefore, we conclude the instant motion does not meet the requirements of a motion to reconsider.

III. CONCLUSION

On motion to reopen, the Petitioner has not provided new facts supported by affidavits or other documentary evidence to establish that we erred in dismissing his prior motion to reopen. Because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision. On motion to reconsider, the Petitioner has not established that our previous motion decision was based on an incorrect application of law or policy at the time we issued our prior decision. Accordingly, the motions will be dismissed. *See* 8 C.F.R. § 103.5(a)(4). We will not re-adjudicate the petition anew, and the underlying petition remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.