U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30165493

Date: MAR. 11, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a human resources specialist, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, 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 record did not establish that the Petitioner qualified as a member of the professions holding an advance degree. We dismissed a subsequent appeal and a motion to reconsider. The matter is now before us on 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.

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). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.[1]

Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). In dismissing the prior motion, we concluded that the Petitioner had not established eligibility as an advanced degree professional because she had not demonstrated five years of progressive post-baccalaureate experience in the specialty as required by 8 C.F.R. § 204.5(k)(2). Regarding her claimed experience at [redacted] we explained that not only was the accompanying letter not from her former employer,[2] but it also described duties that were unrelated to her human resources functions and differed significantly from those described elsewhere in the record. Citing to *Matter of Ho*, 19 I&N

[1] *See* also *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

[2] *See* 8 C.F.R. § 205.5(k)(3)(i)(B).

Dec. 582, 591-592 (BIA 1988), we noted that "a petitioner must resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies."

Here, the Petitioner continues to assert that the letter from the CEO of [redacted] is sufficient to show that she was the human resources director for her former employer, [redacted] and that her role was not inconsistent with that of a human resources professional. In addition, the Petitioner submits an affirmation regarding her professional career and explains that she cannot obtain an employment verification letter from [redacted] because the company has closed, and the CEO has passed away. The Petitioner also provides an affidavit from the CEO of [redacted] confirming that the Petitioner's former employer ceased operations in 2018, another affidavit from the CEO of [redacted] and an undated letter from [redacted] as additional evidence of her work experience in human resources.

Regarding the letter from [redacted] which states that the Petitioner has been a consultant in their human resources operations since its inception in September 2013, there is no prior mention of this position on her resume, the Form ETA-750B, or in any of her statements in the record, including the affirmation submitted on motion. Where there are inconsistencies in the record, it is the Petitioner's burden to resolve these inconsistencies using independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Moreover, if the Petitioner wanted this document to be considered as evidence that she qualifies as an advanced degree professional, she should have included it with the initial petition or in response to the Director's request for evidence. 8 C.F.R. § 103.2(b)(11). *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

The Petitioner also relies on 8 C.F.R. § 103.2(b)(2)(i), which states the non-existence or other unavailability of required evidence creates a presumption of ineligibility and that the Petitioner must rebut this presumption with other secondary sources or sworn affidavits by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. The regulation further provides that affidavits, such as the two the Petitioner relies on here, must overcome the unavailability of both primary and secondary evidence. While we acknowledge the information regarding [redacted] closure and the passing of its CEO, the Petitioner has not established or explained why she could not provide any other evidence or proof of employment. We note, for example, that according to the Petitioner's own statements, she worked with upper management and oversaw 15 employees. Here, the two affidavits confirm that [redacted] went out of business, but do not establish the unavailability of both primary and secondary evidence as required by 8 C.F.R. § 103.2(b)(2)(i) and (ii).

Finally, while we acknowledge the Petitioner's contentions on motion regarding her position at [redacted] she has not provided "independent, objective evidence" to, as we explained in our prior decision, "resolve the discrepancies in the record regarding what her role at [redacted] actually entailed." The Petitioner continues to reference her personal statements, the O*NET Online report, and the letter from Plast Form in support of her duties at [redacted] The Petitioner's contentions in their current motion merely reargue facts and issues we have already considered in our previous decisions. *See e.g., Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) ("a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior Board decision").

Because the scope of a motion is limited to "the prior decision" and "the latest decision in the proceeding," we will only consider new evidence to the extent that it pertains to our latest decision dismissing the motion to reopen. 8 C.F.R. § 103.5(a)(1)(i), (ii). Here, the Petitioner has not provided new facts to establish that we erred in dismissing the prior motion. Because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision. We will not re-adjudicate the petition anew and, therefore, the underlying petition remains denied. Further, 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. 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.