U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34922176

Date: NOV. 12, 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 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 the record did not establish that the Petitioner is eligible for or otherwise merits a national interest waiver as a matter of discretion. We dismissed a subsequent appeal. Thereafter, the Petitioner filed a motion to reopen, which we dismissed as untimely. The matter is now before us on a combined motion to reopen and motion to 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). *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)(l)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

We mailed our decision dismissing the Petitioner's appeal on April 25, 2024. The Form I-290B, Notice of Appeal or Motion, was not received at the designated filing location until May 29, 2024, which is 34 days after the decision. Pursuant to 8 C.F.R. §§ 103.5(a)(1)(i) and 103.8(b), motions must generally be filed within 33 days of the adverse decision. The untimely filing of a motion to reopen may be excused in the discretion of U.S. Citizenship and Immigration Services (USCIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant. 8 C.F.R. § 103.5(a)(1)(i).

On motion, the Petitioner contends her Form I-290B "was mailed within the appropriate timeframe, but delays occurred due to reasons beyond" her control, namely postal service delays. The Petitioner further contends that Federal Express (FedEx) stated that the delivery would be on May 28, 2024. In support, the Petitioner provides a copy of her FedEx receipt, as well as a snapshot from FedEx listing three separate delivery time options for May 28th and their corresponding prices. She asserts that the FedEx receipt and tracking information demonstrate that the motion was sent well before the deadline of May 28, 2024. Moreover, the Petitioner cites to cases where we determined that the late submission was excused because the applicant showed "extenuating circumstances that justify late filings" and that "the delay in filing is reasonably justified and beyond the applicant's control." Furthermore, the Petitioner requests equitable tolling. She contends that the postal service delays are "extraordinary circumstances beyond" her control and, therefore, "[e]quitable tolling is justified in this situation because [she] acted diligently and promptly in preparing and sending the necessary documents."

Here, we did not receive the filing until May 29, 2024. Pursuant to 8 CFR 103.2(a)(7)(i), we "will consider a benefit request received and will record the receipt date as of the actual date of receipt at the location designated for filing." *See generally* 1 USCIS Policy Manual B.6(C), https://www.uscis.gov/policy-manual/volume-1-part-b-chapter-6. Importantly, the FedEx receipt shows that she dropped off the motion at FedEx on May 25, 2024 at 5:58 p.m. and that the scheduled delivery date was May 29, 2024, not May 28, 2024. Therefore, there was not a postal service delay as claimed. Here, the Petitioner has not shown that her delay in filing her motion to reopen was reasonable and beyond her control, such that her untimely filing should be excused in USCIS' discretion under 8 C.F.R. § 103.5(a)(l)(i). Furthermore, the Petitioner has not established that our previous decision dismissing the motion to reopen as untimely was incorrect.

In conclusion, the Petitioner has not provided new facts to establish that we erred in dismissing the prior motion, nor has she established that our prior decision was based on an incorrect application of law or policy at the time we issued it. Therefore, the motions 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.