U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34151662

Date: OCT. 07, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and/or an individual of exceptional ability, 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 his qualification for the EB-2 classification as an individual of exceptional ability or his eligibility for a national interest waiver. We dismissed the appeal as the Petitioner did not sufficiently challenge the Director's adverse decision regarding his eligibility for the EB-2 classification or the national interest waiver. We also dismissed two subsequent motions to reopen for untimely filing. The matter is now before us on the third motion filing, a 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 motion.

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.

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). Therefore, our review is limited to our latest decision issued on May 13, 2024. In that decision, we concluded that the Petitioner's second motion was late filed as it was received at the designated filing location on December 26, 2023, 49 days after our decision, and thus did not meet the 33-day filing deadline prescribed in 8 C.F.R. §§ 103.5(a)(1), 103.8(b).

On motion to reopen, the Petitioner does not assert any new facts to establish that we erred in our previous decision and offers the exact same documents previously submitted. Specifically, the Petitioner includes the same envelope labels created by the United States Postal Service (USPS) on

December 7, 2022, and January 24, 2023, with expected delivery dates of December 10, 2022, and January 27, 2023, respectively. However, these dates correspond to the Petitioner's appeal and appeal brief filed back in December 2022 and January 2023, rather than the current motion filed in December 2023. The Petitioner also resubmits his appeal brief, resume, educational evaluation, and a business plan, all of which were already provided at the time he filed the appeal. The Petitioner generally asserts that he does not have control over when mails get delivered and that "[v]arious unforeseen events can occur, such as heavy rains, hurricanes, snow that prevents delivery on the scheduled date, and misplacement by USPS and even by USCIS [U.S. Citizenship and Immigration Services]." But he has not claimed that such extraordinary circumstances occurred with the delivery of his motion filing or provided any new evidence on this matter. As the Petitioner has not established new facts that would warrant reopening of the proceeding, he has not met the requirements of a motion to reopen.

On motion to reconsider, the Petitioner contends that he filed the motion "within the required timeframe" and the motion was delivered timely "[i]f you check the system and review the envelope Label." However, the Petitioner does not support his claims with corroborating evidence, such as tracking sheets from USPS showing timely delivery to USCIS. Further, in researching the tracking number associated with the mailing of the Petitioner's prior motion, the USPS tracking system indicates "label created, not yet in system" and does not support the Petitioner's claim of timely delivery.

Additionally, the Petitioner asserts that we should consider his filing timely under the "mailbox rule" as he mailed the filing within the required deadline. The Petitioner explains that "[i]n contract law, there is the mailbox rule, originating from the British case Adams v. Lindsell (1818), which determined that receipt should be considered at the time the letter is sent and not when it arrives at its destination." Contrary to the Petitioner's assertions, the regulation at 8 C.F.R. § 103.2(a)(7)(i) provides that benefit requests before USCIS are considered filed on the date of actual receipt by USCIS. We lack the authority to waive the requirements of the regulations. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (as long as regulations remain in force, they are binding on government officials); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954) (noting that immigration regulations carry the force and effect of law). Here, the Petitioner has not established that the "mailbox rule" applies to proceedings before USCIS, which has superseding regulations governing dates of service and receipt.

Based on the foregoing, we conclude the Petitioner has not submitted any new evidence or claim new facts in support of the motion to reopen the proceedings. The Petitioner also 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.