U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34061177

Date: OCT. 10, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an entrepreneur, seeks second preference immigrant classification, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Petitioner appealed the Director's decision, which we summarily dismissed because the Petitioner did not submit a brief and/or additional evidence within 30 days of filing the appeal as he indicated he would. Nor did he otherwise identify any specific legal or factual error in the Director's decision. 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). 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).

On motion, the Petitioner claims that he timely filed his brief and submits a copy of a FedEx shipping label as proof of delivery. However, this shipping label demonstrates that the Petitioner misfiled the brief to an incorrect address and therefore does not aid his case. The Form I-290B instructions specifically require that any appeal brief and/or evidence submitted after filing a Form I-290B "must be sent directly to the AAO." *See* USCIS Form I-290B, Instructions for Notice of Appeal or Motion (rev. 05/31/24). But instead of filing the brief to our office as instructed, the Petitioner instead elected to send it to a different address altogether. As such, the brief was not before us when we adjudicated the appeal. And since there was no brief, and the record contained no other basis statement upon which to base the appeal, we summarily dismissed it.

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.

On motion, the Petitioner contests the correctness of our prior decision. In support of the motion, the Petitioner relies on the FedEx shipping label and contends that he submitted sufficient evidence to demonstrate that we erred in dismissing his appeal. But as we just discussed, this shipping label directly undermines the Petitioner's argument because it demonstrates that the Petitioner misfiled the brief. And it was *that* error that resulted in there being no brief in the file when we adjudicated the appeal. So while this shipping label does arguably constitute new evidence, it does not demonstrate that our decision to summarily dismiss the appeal was erroneous in any way. To the contrary, it confirms there was no brief in the file when we adjudicated the appeal. The motion to reopen therefore must be dismissed.

The motion to reconsider fails for similar reasons. Again, the fact that there was no brief in the file at the time of our adjudication was due to the fact that the Petitioner misfiled it to the wrong address. It was that filing error, not some error on the AAO's part, that caused the brief's absence. Had the Petitioner followed the form instructions and sent *us* the brief as instructed, the brief would have been in the file when we adjudicated the appeal, and the Petitioner would have received a merits decision. Instead, there was no brief (or any other basis statement), and so we summarily dismissed the appeal as 8 C.F.R. § 103.3(a)(1)(v) mandates.

The Petitioner, therefore, has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Because the Petitioner failed to follow the form's instructions regarding where to submit the appeal brief, we conclude that our decision to summarily dismiss the appeal was a correct one. In other words, our determination that the record lacked a brief was correct. The Petitioner therefore has not demonstrated that our summary dismissal decision was based on an incorrect application of law or USCIS policy and that our decision was incorrect based on the evidence in the record at the time of the decision. The motion to reconsider therefore must be dismissed as well.

Although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has not established eligibility. And 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 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.