U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34736905

Date: OCT. 18, 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 either a member of the professions holding an advanced degree 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 in May 2023, concluding the Petitioner had not established eligibility for the underlying EB-2 visa classification or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We dismissed the Petitioner's appeal in November 2023 and dismissed her subsequent combined motions to reopen and reconsider in May 2024. The matter is now before us on second 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, the combined motions will be dismissed, and the petition will remain denied.

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, the May 2024 motion dismissal. 8 C.F.R. § 103.5(a)(l)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

For clarity, a summary of the procedural history of this matter is as follows. As noted above, the Director denied the petition on May 8, 2023, concluding the Petitioner had not established she is qualified for the EB-2 classification or that a waiver of the job offer requirement is in the national interest. Thereafter, the Petitioner filed an appeal, which we dismissed on November 20, 2023. As we explained, the Petitioner's brief solely addressed her eligibility for a national interest waiver, but not the underlying EB-2 visa classification. We therefore deemed the EB-2 classification issue waived

and reserved the Petitioner's appellate arguments regarding her qualification for a national interest waiver. Then, the Petitioner filed a combined motion to reopen and motion to reconsider, which we dismissed as untimely on May 21, 2024, because we did not receive the Form I-290B, Notice of Appeal or Motion, until January 11, 2024, which was 52 days after our November 20, 2023 decision.[1]

On motion, the Petitioner states that she "received the decision dated May 8, 2023, and, our response was sent within the required timeframe and delivered within 33 days at USPS." As evidence, she submits a copy of a shipping label and indicates that we should "check the system." First, we note that the May 8, 2023, decision was the Director's and not the decision which we dismissed as untimely. Second, it is the Petitioner's burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-376. Simply providing a shipping label without any accompanying documentation regarding the date of delivery is insufficient to establish that the filing was timely.[2] Third, the Petitioner's reliance on "contract law" for the proposition that "receipt should be considered at the time the letter is sent and not when it arrives at its destination" is misplaced. 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. For these reasons, the Petitioner has not established that our previous decision dismissing the motions as untimely was incorrect.

Here, 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.

[1] Notably, the untimely filed motions did not address our November 20, 2023 decision in which we deemed the underlying EB-2 classification issue waived and we reserved the national interest waiver issue. Rather, the Petitioner again asserted her eligibility for the national interest waiver. Therefore, even if it had not been untimely, it would have been dismissed.
[2] The USPS tracking system information only indicates the following: "Label Created, not yet in system. A status update is not yet available on your Priority Mail® package. It will be available when the shipper provides an update or the package is given to USPS. Check back soon."