U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33179708

Date: OCT. 30, 2024

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner, a provider of financial consulting services, seeks to employ the Beneficiary as an accountant. It requests his classification as a professional under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Texas Service Center revoked the approval of the petition with a finding of willful misrepresentation of a material fact. The Director dismissed the Petitioner's subsequent untimely motion to reopen, concluding the Petitioner did not demonstrate that the lengthy delay in filing the motion was reasonable and beyond the Petitioner's control. We dismissed the Petitioner's appeal of that decision and four subsequent motions to reopen and 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 both motions.

I. MOTION REQUIREMENTS

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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii).

II. ANALYSIS

The issues before us for these combined motions are limited to the following: (1) whether the Petitioner establishes that the dismissal of its fourth combined motion was based on an incorrect application of law or policy; and (2) whether the Petitioner presents new facts, supported by evidence, showing proper cause to reopen our decision. 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).

The record reflects that the Director initially approved this immigrant petition in 2007 but subsequently revoked its approval in 2018. In the notice of revocation, the Director observed that the Petitioner did not submit a response a notice of intent to revoke (NOIR).[1] In 2020, the Petitioner filed an untimely motion to reopen in which it claimed that it first learned of the revocation a month prior, and that it received neither the NOIR nor the revocation decision.[2] The Director dismissed the motion after concluding that the record did not demonstrate the delay in filing the motion was reasonable and beyond the Petitioner's control. In its subsequent appeal and four prior combined motions, the Petitioner has contended that the Director revoked the petition's approval without adequate notice and should have exercised discretion to excuse the untimely filing of the initial motion to reopen, pursuant to 8 C.F.R. § 103.5(a)(1)(i). For the sake of brevity, we incorporate our previous analysis of the record and will repeat certain facts as necessary to address the current motion.

In this fifth motion, the Petitioner contests the correctness of our immediate prior decision dated March 1, 2024, and of our earlier decisions, to the extent that they are referenced therein. The Petitioner sets forth multiple claims that we incorrectly applied the law or USCIS policy, which we will discuss in turn below.

A. Petitioner's Obligation to Update Mailing Address with USCIS

On motion, the Petitioner acknowledges that maintaining an updated mailing address is clearly the sole responsibility of an applicant or petitioner for cases that are pending adjudication before USCIS. However, it contends, as it has in prior motions, that USCIS has not clearly communicated guidance on a petitioner's obligation to update its address following the approval of an employment-based petition. The Petitioner asserts that, in light of the ambiguity surrounding its obligation to keep its address updated, a favorable exercise of discretion is warranted under 8 C.F.R. § 103.5(a)(1)(i). It emphasizes that the terms "reasonable" and "beyond control" are "open to interpretation" and "not restrictive or limited in their application."

The Petitioner's contentions on this point 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"). As discussed in our decision dated March 1, 2024, our prior decisions sufficiently clarify that the burden to keep mailing addresses updated with USCIS always lies with the petitioner or applicant and provided adequate support for this determination. With the current motion, the Petitioner has not shown that our prior determination on this issue involved an incorrect application of law or USCIS policy.

[1] The record reflects the notice of revocation, which was sent to the Petitioner's mailing address of record, was returned by the U.S. Postal Service and received by USCIS on December 19, 2018. The NOIR, sent to the same address, was not returned.

[2] The Petitioner indicates that the revocation of this petition's approval was referenced in a notice of intent to deny issued on March 12, 2020, in connection with a Form I-129, Petition for a Nonimmigrant Worker, seeking an extension of the Beneficiary's H-1B nonimmigrant status.

B. Revocation following Non-Receipt of NOIR

In its prior motion, the Petitioner cited to *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) in support of its assertion that revocation of a visa petition "is proper only after receipt of a properly issued NOIR." The Petitioner maintained that because it did not receive the NOIR and USCIS was aware that it was not delivered, the petition's approval was improperly revoked under *Matter of Estime*.

We concluded *Matter of Estime* does not support the Petitioner's proposition that a NOIR is only deemed to be properly served when it is received by the affected party. The Petitioner disagrees with our determination and quotes the following passage from *Matter of Estime*:

> Where a notice of intention to revoke is based on an unsupported statement ***or*** an unstated presumption, ***or*** **where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner did not respond to the notice of intention to revoke . . .**

19 I&N Dec. at 452 (emphasis in original).

The Petitioner asserts that the quoted passage is directly applicable to the facts presented here and that the revocation of the petition approval cannot be upheld under *Matter of Estime*. Specifically, the Petitioner contends that its non-receipt of the NOIR caused it "to be *unaware* of the issuance of the NOIR, resulting in them being *not advised* of the derogatory evidence (which the NOIR presumably had) and therefore resulted in a non-response from the petitioner" (emphasis in original). The Petitioner maintains that even if USCIS "followed the letter of the law and regulations . . . it is well established and factually undisputed that it did not respond to the NOIR because it did not receive the notice."

We disagree with the Petitioner's assertions regarding *Matter of Estime*'s applicability to this matter. In the passage quoted above, the Board contemplated the regulatory requirements applicable to inspection of evidence under 8 C.F.R. § 103.2(b)(2) (1987). The Board observed that to comply with that regulation and to be deemed properly issued, a NOIR must include a "specific statement of the facts underlying the proposed action" along with "supporting evidence" rather than being based an "unsupported statement or an unstated presumption." The Board also highlighted that regulation's requirement that an affected party be advised of any derogatory evidence considered by the former Immigration and Nationality Service (INS) of which the affected party is unaware, prior to INS' issuance of a final decision. Essentially, the Board in *Estime* concluded that a notice of revocation could not be upheld where the contents of the underlying NOIR did not comply with the substantive requirements under 8 C.F.R. § 103.2(b)(2) (1987), even in circumstances where the affected party did not respond to the NOIR. The focus of the Board's decision, however, is on the regulatory requirements applicable to the substantive contents of a NOIR, not on the procedural requirements of its service to the affected party.

Here, the Petitioner asserts that, because it did not receive the NOIR, it was unaware of and had not been advised of any derogatory evidence, and therefore the revocation cannot be upheld, notwithstanding its non-response to the NOIR. However, the Petitioner was effectively notified of the intended revocation and advised of any relevant derogatory evidence when USCIS mailed the NOIR

to its mailing address of record in compliance with the applicable revocation provision at 8 C.F.R. § 205.2(c) and the regulations governing routine service at 8 C.F.R. § 103.8(a)(1)(i). *Matter of Estime* does not support the Petitioner's position that a revocation cannot be upheld where, as here, the NOIR was properly issued and served based on applicable regulatory requirements.

C. Notice and Due Process

In our decision dismissing the Petitioner's fourth motion, we addressed its claim that procedural defects in this case have deprived it of its constitutionally protected due process rights. The Petitioner relied on *Jones v. Flowers*, 547 U.S. 220 (2006), in which the U.S. Supreme Court held that a plaintiff's failure to comply with his statutory obligation to update his address did not relieve the government of its constitutional obligation to provide adequate notice of a property forfeiture for unpaid taxes. The Court concluded that "additional reasonable steps" are required after a mailed notice is returned undelivered. *Id.* at 235. However, it found that searching government records for updated contact information is neither practicable nor constitutionally required. *Id.* at 235-236. We emphasized that the Petitioner had not cited to any case law applying *Jones* in petition revocation proceedings before USCIS.

On motion, the Petitioner asserts that it does not contend that USCIS should have searched for information held by outside parties, but instead that it should have taken a "convenient look" at its own internal records, alleging that the Petitioner's federal employer identification number would have allowed USCIS to search its own database across various cases with independent and separate records.

The Petitioner's assertion is unpersuasive. As discussed in our prior decisions, neither the regulations for agency policy require USCIS to independently search for a new address for a petitioner when a notice is returned as undeliverable. As such we concluded that even if we found that *Jones* applies in this context, the Petitioner's consistent claim that USCIS was required to search other government records, including separate records of proceeding for other cases filed by the Petitioner, would not be persuasive because each benefit request creates its own separate record of proceeding.[3]

In our prior decision, we also emphasized that USCIS acted on the returned notice of revocation by updating the online case status system for this petition to reflect that the notice was returned as undeliverable in December 2018. The update provided instructions for requesting a copy of the notice, stated that the Petitioner should make such request "immediately," and advised on how to submit a change of address to USCIS.

With the current notion the Petitioner asserts the USCIS online case status update regarding the returned notice was "hardly protective" of fundamental due process protections, especially because its updated address was "easily ascertainable." In support of this claim, the Petitioner asserts that the U.S. Supreme Court "provided guidance in this very issue" in *Robinson v. Hanrahan*, 409 U.S. 38 (1972). In the *Robinson* decision, the Court relied on its holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), where it found that notice by publication is not sufficient with respect to an

[3] *See* 1 *USCIS Policy Manual* E.2, https://www.uscis.gov/policy-manual (defining the term "record of proceeding" as "the organized official materials constituting the record of any application, petition, hearing, or other proceedings before USCIS").

individual whose name and address are known or easily ascertainable. The Petitioner maintains that publication of information regarding the revocation of a petition approval on the USCIS website is similarly insufficient, noting, once again, that USCIS easily could have easily ascertained an updated address for the Petitioner had it checked its "own database."

The Petitioner's argument is based on an incomplete reading of the Court's decision in *Mullane*. In that matter, the Court stated:

> Exceptions in the name of necessity do not sweep away the rule that, within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resorting to means less likely than the mails to apprise them of its pendency. The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses.

339 U.S. at 318.

Here, it is undisputed that USCIS informed the Petitioner of its notice of intent to revoke the approval of the petition and of the revocation decision by sending these notices by ordinary mail to their address of record, prior to the publication of any notice of non-delivery on the USCIS case status website. Moreover, publication to the case status system, which provides information that is directly accessible to the Petitioner and is linked to the unique case number assigned to its Form I-140, was in fact reasonably calculated to reach the affected party and was not akin to the type of publication contemplated in *Mullane*, where notice to affected parties was provided only through publication in a local newspaper.

While the Petitioner disagrees with the agency's policy regarding separate records of proceeding and asserts its new address was "easily ascertainable," it has not demonstrated that our prior decision is based on an incorrect application of that policy or any applicable law.

III. CONCLUSION

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). Further, although the Petitioner indicated that it was filing combined motions to reopen and reconsider, it has not provided new facts, supported by evidence, that would warrant reopening of the proceeding. *See* 8 C.F.R. § 103.5(a)(2). Accordingly, we will dismiss the motion to reopen.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.