U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33843626

Date: SEP. 6, 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 that the record did not establish that the Petitioner qualified as a member of the professions holding an advance degree or as an individual of exceptional ability, and 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. We summarily dismissed a subsequent appeal and later dismissed two subsequent combined motions to reopen and reconsider. The matter is now before us on a third 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). 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).

In our latest previous decision dismissing the combined motions to reopen and reconsider we determined that the combined motion was untimely filed. We noted that the unfavorable decision was mailed to the Petitioner on October 30, 2023, and the Petitioner's Form I-290B, Notice of Appeal or Motion (Form I-290B), was received at the designated filing location on December 14, 2023, which was 45 days after the decision.

On this third combined motion to reopen and reconsider, the Petitioner asserts that his previous combined motion to reopen and reconsider was "sent within the required timeframe and delivered within 33 days at [the United States Postal Service (USPS)]." He states that he is requesting the reopening of the case and its reconsideration, "given that [he] used the delivery services of a government agency, the USPS[, and] once the envelope is delivered to the USPS, [he] no longer [has] control over the service provided by the agency." The Petitioner then references "contract law" and the "mailbox rule" to argue that "receipt should be considered at the time the letter is sent and not when it arrives at its destination, particularly in relation to the acceptance deadline." He further contends that "by using a federal agency like the USPS, [he] understand[s] that the government is already receiving [his] response at the time of dropoff [*sic*], as from that point onwards, [he] no longer [has] control over its final delivery." He then refers to various possible unforeseen events that may occur after dropping off documents for mailing, including misplacement by USPS or USCIS, "thus affecting the users of government agency services," to relieve himself of responsibility for delivery.

Here, the Petitioner provides no legal authority for his assertion that a form—in this case, a Form I-290B for an underlying Form 1-140, National Interest Waiver—will be considered filed with USCIS upon the date of mailing. To the contrary, the regulation provides that USCIS considers a benefit request received as of the actual date of receipt at the location designated for filing such a request. 8 C.F.R. § 103.2(a)(7)(i). Regarding where to file, the regulation clarifies that "[a]ll benefit requests must be filed in accordance with the form instructions." 8 C.F.R. § 103.2(a)(6). The instructions for Form I-290B direct petitioners to file at the applicable location listed at https://www.uscis.gov/i-290b, which redirects to https://www.uscis.gov/i-290b-addresses and indicates that those filing a motion about a decision made by the Administrative Appeals Office (AAO) should "[s]end [their Form I-290B] to the USCIS office that made the original unfavorable decision in [their] case." Accordingly, pursuant to the form instructions, the designated location for filing the Form I-290B where the original unfavorable decision was reached by the Texas Service Center, is the USCIS Phoenix Lockbox. Although the Petitioner may have dropped off his previous combined motion at USPS for mailing within the required timeframe, USCIS did not receive it at the designated filing location until 45 days after the unfavorable decision.

Further, the Petitioner argues on appeal that his Form I-290B was timely filed under the "mailbox rule" as of the date it was dropped off at USPS for mailing. However, the "mailbox rule" does not apply in these proceedings. A properly completed Form I-290B is considered filed on the date of actual receipt by USCIS. 8 C.F.R. § 103.2(a)(7)(i). We lack the authority to waive the requirements of the statute, as implemented by 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) (immigration regulations carry the force and effect of law). Moreover, the Petitioner does not submit any evidence to corroborate his assertions on appeal. While he indicates that the envelope label will show that he submitted the previous combined motion within the required deadline, he does not provide any evidence to demonstrate that it was received at the designated filing location within the required timeframe.

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). On motion to reopen, the Petitioner has not submitted new evidence to overcome our previous decision. Further, 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.