U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33839246

Date: SEP. 06, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an educator and 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 did not establish that she qualified for the underlying EB-2 classification as a member of the professions holding an advanced degree or an individual of exceptional ability. In the decision, the Director noted that they did not receive a response to the request for evidence (RFE) and the Petitioner did not overcome the deficiencies addressed in the RFE regarding her qualification for the EB-2 classification. The Director did not reach a conclusion regarding the Petitioner's eligibility for a national interest waiver.

The Petitioner subsequently filed an appeal claiming that her qualification for the EB-2 classification and eligibility for the national interest waiver were submitted in her RFE response but that such evidence was not filed timely due to unforeseen delays by the United States Postal Services (USPS) beyond the Petitioner's control. We dismissed the appeal, adopting and affirming the Director's decision,[1] and concluded that the Petitioner did not provide sufficient evidence to establish that her RFE response was "in fact mailed to USCIS [U.S. Citizenship and Immigration Services], and within the required due date." The matter is now before us on 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

[1] Our prior decision adopted and affirmed the Director's analysis and decision regarding the first *Dhanasar* prong even though the Director did not reach any conclusion regarding her eligibility for a national interest. However, the Petitioner does not address this oversight and has abandoned any challenge regarding this matter. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

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 to reopen, the Petitioner does not offer any new evidence or new facts establishing eligibility. Instead, the Petitioner submits the same evidence already in the record: 1) the notarized affidavit by the attorney's secretary stating that the Petitioner's RFE response was dropped off at USPS on June 20, 2023; 2) USPS tracking document showing that the Petitioner's RFE response was delivered to USCIS on June 23, 2023; 3) the appeal letter dated September 11, 2023, explaining that the RFE response was delivered one day late due to "reasons within USPS's responsibility and outside of the self-petitioner control"[2]; and 4) the RFE response letter dated June 20, 2023, that provides additional claims regarding the Petitioner's qualification for the EB-2 classification and eligibility for a national interest waiver. As the Petitioner has not offered new evidence or claimed new facts, she has not met the requirements of a motion to reopen.

On motion to reconsider, the Petitioner contests the correctness of our prior decision. The Petitioner claims that our prior decision overlooked the evidence submitted on appeal and erroneously concluded that the evidence was insufficient in demonstrating the Petitioner mailed her RFE response to USCIS. Furthermore, the Petitioner contends that our prior decision failed to analyze the evidence contained in the RFE response relating to the projected U.S. economic impact of her endeavor.

Although the record demonstrates that the Petitioner mailed the RFE response to USCIS on June 20, 2023, we conclude that the Petitioner has not established that the RFE response was delivered timely. The Petitioner admitted that the RFE response was not timely delivered to the USCIS and claimed that the delay was beyond her control.[3] On motion, the Petitioner contends that we should have considered the additional evidence included in the RFE response despite its lateness because USPS and USCIS are both federal agencies "[offering] each other the full faith and credit" according to the U.S. Constitution and USCIS should "assume the delivery as guaranteed" as promised by USPS. However, the full faith-and-credit provisions of 28 U.S.C. § 1738 apply to courts, not federal administrative agencies such as USCIS. *See NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320 (3d Cir. 1991), *cert. denied*, 502 U.S. 820 (1991) ("federal administrative agencies are not bound by section 1738 because they are not 'courts'"); *American Airlines v. Dept. of Transportation*, 202 F.3d 788, 799 (5th Cir. 2000) *cert. denied*, 530 U.S. 1284 (2000) (finding that section 1738 did not apply to the Department of Transportation because it is "an agency, not a "court"). Moreover, the Petitioner does not cite to any other legal authority that excuses late filing due to the mail carrier's failure to deliver on time or that such incident rises to the level of extraordinary circumstances.[4]

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[2] The Petitioner explained that the RFE response was to be delivered by USPS by overnight express mail, on June 21, 2023, but USPS failed to deliver it timely, and the response arrived one day late, on June 23, 2023.

[3] The Director initially provided a deadline of April 23, 2023, for the RFE response. With the added 60 days from the COVID flexibilities, the RFE response was due on June 23, 2023.

[4] The Supreme Court has clearly held that filing deadlines must be strictly applied. *United States v. Locke*, 471 U.S. 84, 101 (1985). While recognizing that such deadlines "necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them," the Court has emphasized that if the deadlines are to have any meaning, they must be enforced. *Id.* According to the Court, "[a] filing deadline cannot be complied with, substantially or otherwise, by filing late-even by one day." *Id.*

We further reject the Petitioner's claims on motion that our appellate decision failed to analyze the evidence contained in the RFE response relating to her endeavor's economic impact as any evidence in the late-filed RFE response was not part of the record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The Petitioner has not cited to any statutory or regulatory authority, case law, or precedent decision to support her claim that the late-filed RFE response should be included in the record of proceedings and be evaluated by our prior decision on the merits. Therefore, we affirm our prior decision and conclude that the Petitioner has not established eligibility for the national interest waiver based on the record at the time of decision.

Based on the foregoing, the Petitioner did not submit any new evidence or claim new facts in support of the motion and therefore, she did not meet the requirements of a motion to reopen. 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).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.