U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33855150

Date: SEPT. 11, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, an operations manager and automotive repair mechanic, seeks employment-based second preference (EB-2) immigrant classification as 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, concluding the record did not establish that the Petitioner qualifies for the underlying EB-2 immigrant classification. We dismissed the Petitioner's appeal. The Petitioner subsequently filed two additional combined motions to reopen and reconsider, which we dismissed in both instances as untimely filed. The matter is now before us on the Petitioner's third 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.

I. MOTION TO REOPEN

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).

We dismissed the Petitioner's second motion based on a determination that it was untimely filed. We mailed our decision dismissing the Petitioner's first motion on November 6, 2023. A motion on an unfavorable decision must be filed within 33 days of the date U.S. Citizenship and Immigration Services (USCIS) mailed the decision. 8 C.F.R. § 103.5(a)(1), 103.8(b). Therefore, any motion requesting reopening and/or reconsideration of our decision was due on or before December 11, 2023. The USCIS designated filing location received the Petitioner's second motion on December 20, 2023, 44 days after the date of our decision.

In a statement submitted with the instant motion to reopen, the Petitioner asserts that "[his] response was sent within the required timeframe and delivered within 33 days." He points to a U.S. Postal Service (USPS) Click-N-Ship Label Record printed on December 4, 2023, and claims it "shows that [he] submitted the summary along with new evidence." With his motion, the Petitioner also provides copies of USPS label records printed on March 6, 2023, and April 10, 2023, as well as other documents pertaining to his appeal and prior motions.[1]

The referenced USPS label record reflects a "ship date" of December 4, 2023, and an expected delivery date of December 6, 2023. However, the instructions accompanying it state that users must either schedule a package pickup, hand the package to the individual's letter carrier, take it to a post office, or drop it in a USPS collection box. Users are further instructed to "[m]ail your package on the 'Ship Date' you selected when creating this label."

While the USPS label record demonstrates that the Petitioner created a mailing label on December 4, 2023, there is no indication the package was, in fact, mailed on that date and delivered to a USCIS facility on the expected delivery date of December 6, 2023. Of significant note, the Petitioner has not provided a USPS delivery confirmation bearing *this* mailing label's tracking number or any other evidence of an actual timely delivery. Again, USCIS did not receive the filing until December 20, 2023.

The Petitioner relies on the "mailbox rule" to argue that he *mailed* his motions within the required timeframe and, thus, timely filed them. However, the common law "mailbox rule" does not apply in USCIS proceedings, which are instead governed by the regulation at 8 C.F.R. § 103.2(a)(7)(i) stating that a petition or application is considered to have been filed on the date of actual receipt by USCIS, not the date it was mailed. As noted previously, to properly file the motion, the Petitioner needed to ensure that it was *received* at the USCIS designated filing location within 33 days of our November 6, 2023, decision, or no later than December 11, 2023. The Petitioner's argument that he timely *mailed* the motions, even if established, is therefore irrelevant. Again, he has provided no evidence to show that they were, in fact, received by USCIS within the required period and, thus, timely filed.

Finally, the regulation at 8 C.F.R. § 103.5(a)(1)(i) states that the untimely filing of a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. Here, the Petitioner did not provide an explanation for the untimely filing other than to assert that he no longer had control over the motions' final delivery once he delivered the package to USPS. However, as discussed above, he has not provided evidence that he, in fact, mailed the motions within the required timeframe. Therefore, the Petitioner has provided no basis for us to excuse the late filing of his motion to reopen as a matter of discretion.

Accordingly, the Petitioner has not provided new facts or new evidence in support of the motion to reopen that would overcome our decision to dismiss his prior motion as untimely filed.

[1] For example, the Petitioner attached another individual's business plan. Since it is not relevant, we will not discuss it further.

II. MOTION TO RECONSIDER

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). Although the Petitioner filed a combined motion to reopen and reconsider, he does not assert that our prior decision was based on an incorrect application of law or policy, or that it was incorrect based on the record before us when we issued our prior decision. The Petitioner has not met the requirements of a motion to reconsider.

III. CONCLUSION

For the reasons discussed, the Petitioner has not provided proper cause for reopening or reconsideration of our prior 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.