U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27887058

Date: AUG. 2, 2023

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. The company requests his classification under the third-preference, immigrant visa category for professionals. *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 initially approved the petition, but subsequently revoked the approval, concluding that the Petitioner and Beneficiary concealed family relationships between the Beneficiary and the company's principals and that the Petitioner failed to demonstrate the availability of the offered position to U.S. workers. The Director also dismissed the following motion to reopen, concluding that the Petitioner did not demonstrate that its delay in filing the motion was reasonable and beyond its control. We dismissed the subsequent appeal, then later dismissed the Petitioner's motions to reconsider and reopen the proceeding. The matter is now before us again on motions to reopen and reconsider our most recent decision.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss both motions.

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 decision was 1) based on an incorrect application of law or policy, and 2) incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). The scope of any motion is limited to review of "the prior decision." *See* 8 C.F.R. § 103.5(a)(1)(i). As noted, we dismissed the prior combined motions because the motion to reopen did not present a new fact, supported by documentary evidence, and the motion to reconsider did not identify a law or policy that we incorrectly applied to the evidence in the record.

Thus, our analysis for these combined motions is limited to the following: (1) whether the Petitioner establishes that the dismissal of the previous combined motions was based on an incorrect application of law or policy; or (2) whether the Petitioner presents a new fact, supported by evidence, that shows proper cause to reopen our decision on the previous combined motions. 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).

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *See INS v. Abudu*, 485 U.S. at 110.

As noted above, the Director revoked the previous approval of this petition. In our October 2021 decision on appeal, we concluded that USCIS provided adequate notification of that revocation, and that the Petitioner had not demonstrated that its delay in filing a motion to reopen that revocation decision, filed more than 15 months later, was reasonable and beyond its control. In August 2022, we dismissed the Petitioner's combined motions as they did meet the applicable requirements. 8 C.F.R. § 103.5(a)(4). For the sake of brevity, we incorporate our previous analysis of the record and will repeat only certain facts and evidence as necessary to address the Petitioner's assertions on motion to reconsider and new evidence submitted in support of his motion to reopen.

I. MOTION TO RECONSIDER

In its previous motion to reconsider, the Petitioner asserted the USCIS resources about updating addresses that we referred to in our appellate decision were ambiguous as to whether they also apply to instances where a petition or application has already been approved, and that it was therefore unaware of any requirement and not obligated to provide a new address after approval of this petition. In dismissing the motions, we reiterated that all of the USCIS resources emphasized the importance of updating addresses, with the DHS Ombudsman website stressing that "It is the sole responsibility of the applicant/petitioner to ensure USCIS has the correct address information on file." We concluded that the Petitioner had not shown that our previous decision that the untimely filing of its initial motion to reopen was not reasonable or beyond its control was incorrect. 8 C.F.R. § 103.5(a)(1).

We further determined that the regulation at 8 C.F.R. § 103.5(a)(1) does not require, as the Petitioner suggested on motion, that USCIS consider whether the Petitioner would have timely a filed motion to reopen the revocation of its petition if it would have received the notice.

Finally, the Petitioner argued that since USCIS is one agency, it was reasonable for the Petitioner to believe that the new address it used in its nonimmigrant visa petitions would be shared and applied to its immigrant visa petition as well. But as reiterated in our previous decision, each benefit request creates its own, separate record of proceeding, and officers are expected to consider that record only when adjudicating a petition or application. *See 1 USCIS Policy Manual* E.2.

We dismissed the previous motion to reconsider, concluding the Petitioner had not established that our most recent decision was based upon an incorrect application of law or policy, or that it was incorrect based upon the record at the time the decision was made.

Turning to the instant motion to reconsider, the current brief does not directly address the conclusions from our August 2022 decision to dismiss the combined motions. In support of the instant motions, the Petitioner does not contest our previous conclusion that USCIS followed its own regulatory

procedures in revoking the petition. Instead, it submits a brief contending that in following these procedures USCIS "violated [the Petitioner's] constitutionally protected due process rights." However, we discussed the applicability of its due process rights under the Fifth Amendment of the United States Constitution in our appellate decision, not in our most recent decision dismissing the combined motions.

In our appellate decision we observed that the Petitioner did not demonstrate that it had any additional expectations of due process beyond USCIS' regulatory requirements, noting most courts have found that noncitizens lack protectable, constitutional interests in immigrant visa petitions. *See Mantena v. Johnson*, 809 F.3d 721, 736 (2d Cir. 2015) (noting "the doubts cast by many courts on the liberty and property interests implicated in an immigrant visa"). On appeal, we determined that the record demonstrated that USCIS provided the Petitioner with sufficient due process protections through following our regulatory notice procedures. Since the Petitioner did not challenge our conclusions in this regard in its previous motions, we consider this issue waived. *Cf Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012), (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived).

In short, we did not address the issue of the Petitioner's constitutional "due process rights" in our decision dismissing the previous motions, because the Petitioner did not raise this issue within its motions.[1] The purpose of a motion to reconsider is to show error in the most recent prior decision. The Petitioner's latest motion to reconsider does not meet this standard. 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).

II. MOTION TO REOPEN

As discussed above, a motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Resubmitting previously provided evidence or reasserting previously stated facts do not meet the requirements of a motion to reopen. The new facts must also be relevant to the grounds of the unfavorable decision, which in this case is the Petitioner's previous combined motions, which we dismissed.

In our previous decision dismissing the Petitioner's motion to reopen we first concluded that while it provided additional evidence on motion, this new information was not material to the issue of whether USCIS provided adequate notice of the revocation to the Petitioner. Next, we observed that the Petitioner's brief on motion reiterated arguments made in its appeal that the Petitioner's delay in filing its initial motion to reopen was reasonable since it filed the motion as soon as it learned of the revocation. As these claims had been previously presented, we dismissed the motion because to

[1] If we had, we would have likely concluded that there are no due process rights implicated in the adjudication of a benefits application or petition. *See Lyng v. Payne*, 476 U.S. 926,942 (1986) (holding that "[w]e have never held that applicants for benefits, as distinct from those already receiving them, have legitimate claim of entitlement protected by Due Process Clause of Fifth or Fourteenth Amendment"); *see also Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (explaining that the Fifth Amendment protects against the deprivation without due process of property rights granted to noncitizens; however, petitioners do not have an inherent property right in an immigrant visa).

reopen because it did not state new facts, and therefore failed to meet the requirements at 8 C.F.R. § 103.5(a)(2).

In the instant motion to reopen, the Petitioner presents arguments and references a district court decision in support of its assertion that USCIS violated its "due process rights" in following its own regulatory procedures in revoking this petition.[2] We incorporate our foregoing discussion above, in which we determine that since the Petitioner did not challenge our conclusions in this regard in its previous motions, we consider the issue waived. *Cf Matter of R-A-M-*, 25 I&N Dec. at 657.

As discussed, we will only consider new evidence to the extent that it pertains to our latest decision dismissing the motion to reopen. Here, the Petitioner has not provided new facts to establish that we erred in dismissing its prior motions. Because the Petitioner has not established new facts that would warrant the reopening of the proceeding, we have no basis to reopen our prior decision. While the Petitioner requests that we "consider the entire record in these proceedings while adjudicating the instant [motions]," we will not re-adjudicate the application anew and, therefore the underlying petition remains denied. The motion to reopen will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.

[2] We note that in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715, 719-20 (BIA 1993).