U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26053865

Date: MAR. 10, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner seeks to employ the Beneficiary under the third-preference, immigrant classification for professional workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that the Petitioner did not establish that the Beneficiary was qualified for the offered position. We summarily dismissed a subsequent appeal, and the matter is now before us on a motion to reopen and a motion to reconsider. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motions.

I. LAW

A motion to reopen is based on *new facts* that are supported by documentary evidence, and a motion to reconsider is based on an *incorrect application of law or policy*. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). If warranted, we may grant requests that satisfy these requirements, then make a new eligibility determination.

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification) with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category.

8 C.F.R. § 204.5(l). Finally, if USCIS approves a petition, a designated noncitizen may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Background

We begin with a timeline of events relating to this petition:

- July 1, 2022: The Director issued a request for evidence (RFE) relating to the Beneficiary's qualifications and the Petitioner's ability to pay him;
- August 23, 2022: The Petitioner responded to the RFE only addressing its ability to pay with no mention of how the Beneficiary qualified for the offered position;
- September 8, 2022: The Director denied the petition because the record did not demonstrate the Beneficiary was qualified for the position;
- October 3, 2022: The Petitioner filed an appeal indicating they would submit a brief and evidence within 30 days;
- October 25, 2022: The Petitioner mailed the follow-on brief and evidence, but they sent them to the incorrect address;
- November 2, 2022: The Texas Service Center Director received the follow-on materials;
- December 7, 2022: This office summarily dismissed the appeal for not identifying a specific error in law or fact noting we did not receive any follow-on materials;
- December 30, 2022: The Petitioner filed this motion to reopen and reconsider on our summary dismissal; and
- January 17, 2023: The Petitioner's follow-on material arrived at our office from the Texas Service Center.

Within the motions, the Petitioner acknowledges it mailed the follow-on appellate materials to the incorrect addresses and that they did not follow the filing instructions. We note that within the brief submitted with the motions, the Petitioner states that they not only provided the Director with material relating to their ability to pay the Beneficiary, but they incorrectly assert that they offered claims and evidence demonstrating he met the minimum requirements as represented in the labor certification. As noted in the above timeline, the Petitioner's RFE response only discussed its ability to pay the Beneficiary and offered no information relating to his qualifications for the offered position.

We further note that the Petitioner did not include all the information the regulations require on the Form I-290B, Notice of Appeal or Motion. The regulation governing appeal filings at 8 C.F.R. § 103.3(a)(2)(i) requires that an "affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions . . . ." We note that a form's instructions carry the same mandate as the regulation as all filings must be executed in accordance with the instructions on the form, which are incorporated into the regulation requiring its submission. *See* 8 C.F.R. § 103.2(a)(1).

The Instructions for the Form I-290B mandate that the basis for the appeal be included with the appeal, regardless of whether the filing party will submit a "follow-on" brief and/or additional evidence within the following directions:

> You must type or print the basis for the appeal or motion in **Part 7. Additional Information** or on a separate sheet of paper. . . .
>
> **Appeal:** Provide a statement that specifically identifies an erroneous conclusion of law or fact in the decision being appealed. **You must provide this information with the Form I-290B, even if you intend to file a brief later.** If you need extra space to complete this section, use the space provided in **Part 7. Additional Information**.

(Emphasis in original). The instructions restate this requirement multiple times. Moreover, the Form I-290B itself contains this same mandatory information under Part 3. However, the Petitioner did not adhere to this mandate, as they did not offer any basis or error on the Form I-290B. As a result, their appeal did not meet the regulatory filing requirements. This shortcoming further supports our determination to summarily dismiss their appeal.

Also stemming from the Form I-290B instructions is the requirement to file any follow-on appellate brief directly with this office, but the Petitioner also did not follow those directions. The above analysis establishes that the Petitioner did not adhere to the filing procedures when it filed the appeal. Below we address their claims as it relates to each type of motion.

B. 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). According to the Instructions for Notice of Appeal or Motion (Form I-290B, Notice of Appeal or Motion), any new facts and documentary evidence must demonstrate eligibility for the required immigration benefit at the time the application or petition was filed. A motion to reopen that does not satisfy the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

In this motion, the Petitioner does not offer new facts that are supported by documentary evidence while also demonstrating eligibility for the benefit at the time of filing. As a result, they have not met the basic requirements for this filing, and we will dismiss the motion to reopen.

C. Motion to Reconsider

A motion to reconsider must: (1) state the reasons for reconsideration, (2) be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy, and (3) establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider that does not satisfy these requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

Within the Petitioner's motion to reconsider, they essentially present two positions. First, they note that even though they sent the follow-on materials to the wrong address, those documents were not rejected or returned. The Petitioner contends this is an adequate basis to meet the requirements for a

motion to reconsider because this office's decision to summarily dismiss the appeal "was incorrect based on the evidence of record at the time of the initial decision." Second, they postulate that other filings made on the Beneficiary's behalf—some of which date back to 2009 and have been destroyed—possibly contained letters from employers that could have demonstrated he was qualified for the offered position. The Petitioner relies on this as an additional example to suggest that "the record" therefore demonstrated his eligibility. Based on this reasoning, it appears the Petitioner considers "the record" to consist of every petition ever filed on this Beneficiary's behalf.

Considering the above two arguments separately, each is inadequate for the Petitioner to either prevail in this motion filing, or for them to satisfy their burden to prove the Beneficiary was qualified to occupy the offered position when it filed this petition. Evaluating their first argument (the follow-on materials were not rejected or returned), the Petitioner presumes when they failed to follow the Form I-290B instructions, their errantly mailed brief somehow made it to the record of proceeding, meaning it was in the record before us when we dismissed the appeal.

However, that is not the case. USCIS has developed processes and procedures to ensure the record is fully developed and present as it relates to the filing of follow-on briefs. And we have published that information in various locations, to include the Form I-290B instructions. When the Petitioner failed to follow those instructions, it introduced a rift in those methodologies, which should eliminate any reasonable expectation that its brief would be *promptly* united with the rest of the record in the manner the agency has designed. Here, we do not agree with the Petitioner that its failure to follow the correct process should result in an adequate basis to rest its motion to reconsider filing. Stated differently, the Petitioner has not demonstrated that our appellate decision was incorrect based on the evidence of record at the time of the initial decision.

Turning to their second argument (the Director should have consulted every petition ever filed for the Beneficiary), such a requirement would overly tax agency resources to perform such a task each time a new filing does not demonstrate a Beneficiary's eligibility. It is not enough for the Beneficiary to be qualified based on materials that might exist in the ether, and it is not the Director's responsibility to piece together the material from various places that might prove a beneficiary's qualifications. Instead, it's a petitioner's burden to provide the evidence that adequately supports their claims either at the time of filing or in response to agency correspondence. The Petitioner's burden of proof comprises both the burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998).

Were we to consider the Petitioner's above arguments collectively, "like the myth of the lemming drawn to the sea, it suffers the all too prevalent and unfortunate characteristic of attempting to meet legal standards by [sleight] of hand rather than analysis and confrontation." *Penton v. Crown Zellerbach Corp.*, 699 F.2d 737, 743 (5th Cir. 1983) (finding it is the reviewing authority's duty to examine the record as it existed at the time of the original decision without regard to facts or evidence that were not presented at that time).

Finally, even if the Petitioner had mailed the follow-on materials to the correct address (solely relating to whether the Beneficiary was qualified for the offered position), it would not have likely resulted in a favorable decision on appeal. The Director requested evidence demonstrating the Beneficiary was qualified for the position in the RFE and the Petitioner didn't provide the requested materials. In

Matter of Izaguirre, 27 I&N Dec. 67, 71 (BIA 2017) while citing *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988), the Board of Immigration Appeals (the Board) held that if a filing party was put on notice of an evidentiary requirement (by statute, regulation, form instructions, RFE, etc.) and was given a reasonable opportunity to provide the evidence, then any new evidence submitted on appeal pertaining to that requirement would not be considered, and the appeal would be adjudicated based on the evidentiary record before the lower adjudicative body. The Board has noted the proper venue for such evidence is either in a new petition filing (*Soriano*, 19 I&N Dec. at 766), or within a motion to reopen before the original adjudicative entity (*see Matter of C-*, 20 I&N Dec. 529, 530 n.2 (BIA 1992)).

Ultimately, the Petitioner's motion does not meet the applicable requirements of a motion to reconsider because it does not establish that our decision was based on an incorrect application of law or policy. *See* 8 C.F.R. § 103.5(a)(3). In particular, the Petitioner does not cite to any statute, regulation, pertinent precedent decision, binding federal court decision, USCIS policy statement, or other applicable authority while also establishing our original appellate decision was defective in some regard. Therefore, we will dismiss the motion to reconsider.

III. CONCLUSION

The Petitioner has not demonstrated that we should either reopen the proceedings or reconsider our appellate decision.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.