U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19804647

Date: JUL. 12, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks an EB-2 immigrant visa to classify the Beneficiary as a physical therapist, as a member of the professions holding an advanced degree and who is employed in a Schedule A, Group I occupation. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2); section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.5(a). The U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. professional nurses and physical therapists who are able, willing, qualified, and available for these occupations, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals. 20 C.F.R. § 656.5.

The Director denied the petition and a subsequent motion, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage, and that the Petitioner did not establish that it provided proper notice of the filing of a labor certification. We dismissed the Petitioner's appeal and combined motion to reopen and motion to reconsider, and dismissed a subsequently filed motion to reconsider as untimely. The matter is again before us on a motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion.

I. MOTION REQUIREMENTS

A petitioner must meet the formal filing requirements of a motion and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reconsider must establish that our 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

In dismissing the Petitioner's previous motion to reconsider, we acknowledged that USCIS extended the time within which a motion must be timely filed to 60 days, but emphasized that since the Petitioner's motion was filed 75 days after the issuance of our previous decision dismissing its combined motion to reopen and reconsider, it was untimely. *See* "USCIS Extends Flexibility for Responding to Agency Requests," https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-4 (Mar. 24, 2021); *see also* 8 C.F.R. § 103.8(b) (adding three days to filing deadlines if USCIS serves decisions or notices by mail). The Petitioner acknowledged that its motion was untimely and requested that we excuse the untimely filing because its counsel tested positive for Covid-19 and was unable to file cases during the required quarantine period. We noted, however, that while failure to file on time 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" with respect to a motion to reopen, there is no similar exception for untimely motions to reconsider. *See* 8 C.F.R. § 103.5(a)(1)(i).

On instant motion, the Petitioner contends that notions of fundamental fairness and due process apply in this case because its previous motion was only 12 days late, and such delay was beyond its control due to the illness of its counsel. While the Petitioner cites several federal cases for the proposition that immigration proceedings must afford individuals due process, such as *Mathews v. Eldridge*, 424 U.S. 319 (1976), it fails to explain how, in the exercise of discretion, USCIS has violated its due process rights.[1] The issue here is whether we erred in dismissing the Petitioner's previous untimely motion to reconsider. In our prior decision, we clearly explained that although we may excuse a late motion to reopen pursuant to 8 C.F.R. § 103.5(a)(1)(i), the regulations provide no corresponding discretion to excuse an untimely motion to reconsider. As USCIS regulations do not provide discretion to excuse an untimely motion to reconsider, we did not err in dismissing the prior motion as untimely.

The Petitioner has not overcome the basis of our previous dismissal and has not demonstrated its untimely motion to reconsider filing is subject to excusal. The Petitioner has not shown that our previous decision determining that the motion to reconsider was not timely filed was based on any incorrect application of law or USCIS policy as required for a motion to reconsider under 8 C.F.R. § 103.5(a)(3). As the Petitioner has not shown proper cause for reconsideration of our prior decision, the current motion to reconsider will be dismissed.

ORDER: The motion to reconsider is dismissed.

[1] We note that there are no due process rights implicated in the adjudication of an immigrant petition. *See Lyng v. Payne*, 476 U.S. 926, 942 (1986) (holding that "[w]e have never held that applicants for benefits... have a legitimate claim of entitlement protected by the Due Process Clause of the 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 of property rights granted to immigrants without due process; however, petitioners do not have an inherent property right in an immigrant visa).