U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25819934

Date: FEB. 10, 2023

Motion on Administrative Appeals Office Decision

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

The Petitioner, a youth minister, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 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 that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We dismissed a subsequent appeal, determining that the Petitioner had not sufficiently demonstrated the national importance of her proposed endeavor under the first prong of the analytical framework described in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). We dismissed the Petitioner's subsequent motion to reopen and motion to reconsider reaffirming our previous determination. Thereafter, the Petitioner filed a second combined motion to reopen and reconsider, which we dismissed as untimely. The matter is now before us again on a third 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 motions.

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and 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). Further, the review of any motion is narrowed to the basis for the prior adverse decision. Accordingly, we will examine any new facts and arguments to the extent that they pertain to our most recent decision, the dismissal of the prior combined motion to reopen and motion to reconsider as untimely.

In dismissing the Petitioner's previous combined motion to reopen and reconsider, we explained that U.S. Citizenship and Immigration Services (USCIS) extended the time within which a motion must be timely filed to 90 days. However, since the Petitioner's motion was filed on September 16, 2022,

175 days after the issuance of our March 25, 2022 decision, it was untimely.[1] While 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 beyond the control of the applicant, the regulations provide no corresponding discretion to excuse an untimely motion to reconsider. 8 C.F.R. § 103.5(a)(1)(i).[2]

The Petitioner, through counsel, contends that she was ill and recovering from surgery, but does not further describe how that impacted her ability to file the prior motion or provide any supporting documentation. Counsel further asserts that she "miscalculated the extension period under" the COVID-19 flexibilities guidance and believed she had an additional 60 days to file the motion but does not sufficiently explain why the motion was initially rejected and ultimately filed 175 days after the issuance of our decision or submit any related evidence. Although Petitioner's counsel cites to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), she further states that "no bar complaint need be filed or will be filed" since she admits to the error.[3] We disagree. Counsel's acceptance of responsibility for error does not satisfy the requirement to file a complaint with the appropriate disciplinary authority, particularly where the ineffective assistance allegation is provided by the same attorney. *Matter of Melgar*, 28 I&N Dec. 169, 170 (BIA 2020).

While we acknowledge the Petitioner's statements, she has not established that the filing delay was reasonable or beyond her control. Furthermore, the USCIS COVID-19 flexibilities guidance specifically stated that the agency will consider a Form I-290B, Notice of Appeal or Motion, if the "form was filed up to 90 calendar days from the issuance of a decision." Accordingly, the Petitioner has not shown proper cause for reopening the proceedings.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

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[1] *See* "USCIS Extends Flexibility for Responding to Agency Requests," https://www.uscis.gov/newsroom/alerts/uscis-extends-covid-19-related-flexibilities-0 (Oct. 24, 2022); *see also* 8 C.F.R. § 103.8(b) (adding three days to filing deadlines if USCIS serves decisions or notices by mail).

[2] Therefore, we will not address the motion to reconsider any further.

[3] *In Lozada*, the Board established a framework for asserting and assessing claims of ineffective assistance of counsel. These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claim and to deter meritless claims. *Id.* As the Petitioner has provided no evidence that she complied with the requirements, we will not address this claim any further.