U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19939015

Date: FEB. 13, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a restaurant, seeks to employ the Beneficiary as a head cook. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center revoked the approval of the petition, concluding that the record did not establish that the Beneficiary met the minimum work experience requirement stated on the labor certification. The Director further determined that the Petitioner and Beneficiary had willfully misrepresented material facts regarding the Beneficiary's work experience. The Petitioner subsequently filed a combined motion to reopen and motion to reconsider. The Director dismissed the motions concluding that the Petitioner's submission did not meet the applicable regulatory requirements at 8 C.F.R. § 103.5(a)(2) or (3). The matter is now before us on appeal. 8 C.F.R. § 103.3.

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). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

Our review on appeal is generally limited to the basis for the immediate prior decision. Accordingly, the sole issue before us is whether the Petitioner has established that the Director improperly dismissed its combined motions to reopen and reconsider.

A motion to reopen is based on factual grounds and must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) demonstrate 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).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits USCIS' authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. A motion that does not meet the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

The Director dismissed the Petitioner's combined motions after determining that its filing did not meet the regulatory requirements for a motion to reopen or a motion to reconsider. Specifically, the Director concluded that the Petitioner did not state new facts to warrant reopening, did not state the reasons for reconsideration, and did not establish that the revocation decision was based on an incorrect application of law or USCIS policy.

On appeal, the Petitioner submits a cover letter in which it generally contests the Director's revocation decision, suggesting that the previously submitted evidence was sufficient to establish the Beneficiary had the work experience to satisfy the labor certification requirements. Specifically, the Petitioner states that it is enclosing copies of previously submitted letters from the Beneficiary's co-workers which "confirm the beneficiary . . . was working as a chef for about 4 years at [redacted] restaurant in Korea," as stated on the labor certification. The Petitioner's letter in support of the appeal mentions the Director's dismissal of its combined motions only in passing. It does not address or contest the stated reasons for dismissal of the motions.

However, as noted above, the Petitioner did not appeal the revocation decision itself, but rather the Director's latest unfavorable decision, in which the Director concluded that the Petitioner's combined motions did not meet applicable filing requirements at 8 C.F.R. § 103.5(a)(2) or (3). The merits of the revocation decision, and of the underlying petition, are not before us.

Further, the record supports the Director's decision to dismiss the combined motions. The record reflects that the motion filing consisted of a Form I-290B; a cover letter that was nearly identical to the letter submitted in support of this appeal; a copy of the Director's revocation decision; copies of two letters from the Beneficiary's claimed former co-workers that were previously submitted in response to the NOIR and already considered by the Director; and a statement from the Beneficiary dated June 25, 2020. While the Beneficiary's statement post-dated the revocation decision, it was very similar in content to a statement she provided in response to the NOIR in 2018, which was already considered by the Director; it did not provide new facts to warrant reopening. Nor did the Petitioner allege that the revocation decision was based on an incorrect application of law or USCIS policy or cite to any relevant statute, regulation, caselaw or policy guidance in support of its motion to reconsider.

As such, the Director correctly concluded that the Petitioner did not meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2) or the requirements of a motion to reconsider at 8 C.F.R. 103.5(a)(3). A motion that does not meet applicable requirements must be dismissed under 8 C.F.R. § 103.5(a)(4).

For the reasons discussed, we conclude that the Petitioner has not demonstrated that the Director dismissed the combined motions to reopen and reconsider in error. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.