U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20738741

Date: APR. 1, 2022

Motion on Administrative Appeals Office Decision

Form I-526, Immigrant Petition by Alien Entrepreneur

The Petitioner seeks classification as an immigrant investor pursuant to the Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference (EB-5) classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the Petitioner did not establish eligibility for the EB-5 classification. Specifically, the Chief determined that the Petitioner did not establish he invested the required amount of capital into [redacted] the NCE, as required by 8 C.F.R. §§ 204.6(f)(1), (j)(2). Additionally, the Chief determined the Petitioner did not invest in a new commercial enterprise or that the NCE is principally doing business, and creates jobs, in a targeted employment area. We dismissed the subsequent appeal because the Petitioner did not raise an issue with specific on appeal that was dispositive of the Petitioner's appeal. Specifically, the Petitioner did not address the Chief's determination that the Petitioner did not establish he had employment authorization while working in the U.S. from 1985 to 1999. The Petitioner now files a combined motion to reconsider and reopen the matter. On motion, she submits evidence and maintains that he has established eligibility for the classification.

Upon review, we will deny the motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). The issue before us is therefore whether the Applicant has submitted new facts to warrant reopening or established that our decision to dismiss the appeal was based on an incorrect application of law or USCIS policy. We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion.

A. Motion to Reconsider

On motion, the Petitioner requests we reconsider our dismissal because he claims the issues of "lawful means of funds" and "job creation" were not addressed in the Chief's notice of intent to deny (NOID) so he therefore presumed the issues were established and did not raise them in response to the NOID or on appeal. However, the Chief's denial decision stated the Petitioner had invested $92,500 in the NCE which was derived from his employment with an auto body business in the U.S. from 1985 until 2005 but USCIS records indicated the Petitioner had not received employment authorization until 1999. We disagree with the Petitioner's contention that the Chief's decision created a presumption that the issue of the Petitioner's employment authorization was established.

Moreover, the Petitioner has not argued our previous dismissal was incorrect based on an incorrect application of law or policy. We exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). 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). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

Here, the Petitioner has not argued our dismissal was incorrect based on an incorrect application of law or policy. The Petitioner's statement that he believed the issues waived on appeal had already been resolved or that his wife's lawful income overshadows any of his own income that was earned without authorization does not indicate our decision was based on an incorrect application of law or policy. Our previous decision determined that the Petitioner had waived this issue on appeal for failure to raise it in his appellate brief or notice of appeal and he does not cite to any pertinent precedent decision, statute, regulation, binding federal court decision, USCIS policy statement, or other applicable authority to establish that the original decision was defective in some regard. We deem all arguments not raised in the affected party's brief, including arguments raised in his Notice of Appeal, but not pursued in his brief, to be waived. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n. 1, 545 n. 7 (2d Cir. 2005). Our previous dismissal stated the reasoning for why we considered the issue waived and included a citation to supporting case law.[1] We will therefore dismiss his motion to reconsider the matter.

[1] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The courts' view of issue waiver varies from circuit to circuit. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived); *but see Hoxha v. Holder*, 559 F.3d 157, 163 (3d Cir. 2009) (issue raised in notice of appeal form is not waived, despite failure to address in the brief).

B. Motion to Reopen

In support of his motion, the Petitioner provides documents previously submitted in the record. A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.2(c)(1) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition.

On motion, the Petitioner submits some evidence previously submitted in the record. Here, we will only address the new evidence submitted by the Petitioner. On motion, the Petitioner submits an illegible copy of an employment authorization card purporting to belong to the Petitioner in 1995. However, much of the information on the card, including pertinent identifying information, is obscured and the employment authorization is not otherwise verifiable in USCIS records. We find that this new evidence is not sufficient to overcome the dispositive issues in our subsequent decisions and we will therefore deny his motion to reopen the matter. *See* 8 C.F.R. § 103.5(a)(2).

III. CONCLUSION

We will deny the Petitioner's combined motions because he has not established that we based our previous decision on an incorrect application of law or policy, or that the decision was incorrect based on the evidence in the record at the time of the decision. In addition, we will deny his motion to reopen the proceeding because the documentation he presents on motion does not demonstrate her eligibility for the classification.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.