U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20613168

Date: MAR. 14, 2022

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner seeks to extend the Beneficiary's temporary employment under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish that the proffered position qualifies as a specialty occupation. The Director discussed the Petitioner's explanation of the position duties as general and vague and concluded that the evidence of the record does not establish that the proffered position qualifies as a specialty occupation. We dismissed the Petitioner's appeal affirming the Director's decision and noted that the labor condition application (LCA) was certified for the standard occupational classification (SOC) code for "Engineering Technicians, Except Drafters, All Other"[1] even though the application indicated that the position is for a mechanical engineer. The Petitioner filed a subsequent motion to reopen and reconsider, which addressed the SOC code for the first time and contained a new LCA for the SOC code for "Mechanical Engineers" at a Level I wage. We dismissed that motion to reopen and motion to reconsider and the subsequent one, which claimed for the first time that the Petitioner's initial counsel was ineffective.[2] We also dismissed the fourth and fifth motions to reopen and reconsider in part due to inconsistencies in the evidence regarding the duties and SOC code of the proffered position and requirements for the position. The Petitioner filed six motions to reopen and reconsider, five of which we have dismissed and the latest of which is currently before us.[3] Upon review, we will dismiss the motions.

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[1] Notably, the Petitioner signed the LCA, "attest[ing] that the information and labor condition statements provided are true and accurate."

[2] *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F. 2d 10 (1st Cir. 1988).

[3] Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *See INS v. Abudu*, 485 U.S. at 110.

I. LAW

A motion to reopen must state new facts to be proved and be supported by affidavits or other evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or USCIS 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 benefit sought.

II. ANALYSIS

A. Motion to Reopen

On motion, the Petitioner submits a brief and affidavits from the Petitioner and the Beneficiary. The Petitioner states on appeal that we should review all evidence, including evidence submitted in prior motions to reopen and reconsider, to provide the Petitioner with a fair opportunity to present evidence and legal arguments. By regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). The filing before us is not a motion to reopen and reconsider the denial of the petition. Instead, it is a motion to reopen and reconsider our most recent decision. Therefore, we cannot consider new objections to the earlier denial, and the Petitioner cannot use the present filing to make new allegations of error at prior stages of the proceeding.

On motion, the Petitioner contends that the previous attorney who filed the H-1B petition was negligent by submitting an LCA with incorrect information about the job offered and the prevailing wage. The Petitioner further states that but for the attorney's negligence, the Petitioner would have filed an LCA based on the job of Mechanical Engineer and offering a level III wage. As noted in several of our prior decisions, the record shows that the Petitioner has made similar claims in prior motions and we have addressed those claims in prior decisions. As noted repeatedly, the Petitioner has submitted three iterations of an LCA to demonstrate its intent when filing the petition. The first LCA is for an "Engineering Technicians, Except Drafters, All Others" occupation, SOC code 17-3029 at a level I wage. The second LCA was submitted with the Petitioner's first motion and certified after the filing of the petition in August 2018,[4] designated the proffered position as corresponding most closely to the "Mechanical Engineers" occupation, SOC code 17-2141 at a level I wage. The third LCA[5] the Petitioner claims is relevant to demonstrating its intent is an LCA which identifies the job title as a junior mechanical engineer corresponding to a "Mechanical Engineers" occupation, SOC code 17-2141 at a level III wage. Thus, in addition to the Petitioner's initial attestation that the proffered position is an "Engineering Technicians, Except Drafters, All Others" occupation, SOC code 17-3029 at a level I wage, the Petitioner's subsequent inconsistent LCAs do not consistently demonstrate the Petitioner's intent. Based on the subsequent inconsistent iterations of an LCA for the proffered position, the Petitioner' statement that a correct LCA would have been submitted but for the initial attorney's gross negligence is not in accord with the evidence in the record.

[4] An LCA that changes the occupational category for a proffered position is a material change and cannot be used as a basis to establish eligibility when the petition was filed.

[5] This LCA provided on this fifth motion is an LCA the Petitioner claims was submitted in support of an H-1B petition filed by a different but related entity on behalf of the Beneficiary and which was approved. This LCA is neither relevant nor new evidence.

The motion revises the descriptions of the proposed position, make material changes to the requirements to perform the position, and offer different iterations of an LCA that might support the petition. Rather than clarifying the record, and supporting the Petitioner's assertions, the evidence submitted is not new and raises questions regarding the validity of the position.

With regard to the circumstances at hand, the Petitioner has been issued a detailed appellate decision specifically addressing matters concerning the Petitioner's statutory eligibility. That decision was followed by a series of motions, all of which were dismissed after careful review of the documents submitted on motion. Here, the Petitioner once again reiterates arguments that were addressed and deemed to be insufficient. Accordingly, the Petitioner has not shown proper cause for reopening the petition.

B. Motion to Reconsider

As in our prior decision, we stress again that in order to have established merit for reconsideration of our latest decision the petitioner must both state the reasons why the petitioner believes the most recent decision was based on an incorrect application of law or policy; and specifically cite laws, regulations, precedent decisions, and/or binding policies that the petitioner believed we misapplied in our prior decision.

On appeal, the Petitioner states that we abused our discretion in rejecting the Petitioner's claim of ineffective counsel by applying an incorrect legal standard that is not consistent with established law. Our most recent decision ultimately concluded that the Petitioner had not met the threshold documentary requirements for asserting a claim of ineffective assistance of counsel. We also explained that even if the Petitioner had met the ineffective assistance of counsel threshold, the petition would still not be approvable due to the inconsistencies and evidence that appears to have been created to make a deficient petition conform to USCIS requirements. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

In this sixth motion, the Petitioner does not state reasons for reconsideration supported by pertinent decisions to establish that the prior decision was based on an incorrect application of law or policy. Rather its assertions disagree with outcome of the prior decisions without offering probative evidence that the prior decision was incorrect based on the evidence in the record at the time of the decision. The Petitioner does not offer evidence or argument sufficient to reconsider the matter.

III. CONCLUSION

In this matter, the Petitioner has not overcome our prior decision or shown proper cause to reopen or reconsider this matter. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.