U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22534851

Date: OCT. 12, 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 Form I-129, Petition for a Nonimmigrant Worker, concluding that the Petitioner did not establish that the proffered position qualifies as a specialty occupation. We dismissed the Petitioner's appeal affirming the Director's decision. The Petitioner has since filed six consecutive combined motions to reopen and reconsider, and we have dismissed each motion. The matter is now before us on a seventh combined motion to reopen and reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motions.

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 United States Citizenship and Immigration Services (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.

The review of any motion is narrowly limited to the basis for the prior adverse decision. Accordingly, we examine any new arguments to the extent that they pertain to our dismissing its sixth motion to

reopen, and whether we erred in determining that the Petitioner did not establish that we incorrectly applied law or policy in dismissing the sixth motion to reconsider.

II. ANALYSIS

A. Motion to Reopen

On motion, the Petitioner submits a brief and additional evidence. The Petitioner states on motion that we should review all evidence, including evidence submitted in prior motions to provide the Petitioner with a fair opportunity to develop and 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 a labor condition application (LCA) with incorrect information about the job offered and the prevailing 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 sufficiently 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,[1] 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[2] 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's 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.

The motion revises the descriptions of the proposed position, makes material changes to the requirements to perform the position, and offers different iterations of an LCA that might support the petition. On motion, the Petitioner states that the revised job descriptions do not change the record but instead correct an error made by previous counsel. However, as noted in prior decisions, the changes did not clarify the record but instead raised questions regarding the validity of the position due to several unresolved inconsistencies.

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[1] 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.

[2] 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.

On motion, the Petitioner references an evaluation from [redacted] professor from the Department of Electrical Engineering and Computer Science at [redacted] University, concluding that the duties to perform the position of mechanical engineer for the Petitioner are specialized and require the theoretical and practical application of a body of highly specialized knowledge. The evaluation does not discuss the inconsistencies in the record regarding the proffered position as discussed at length in our prior decisions. The evaluation does not overcome the concerns outlined in the appeal and motion decisions.

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.

As we noted in our prior decision, by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). In this case, the prior decision at issue is our decision dated March 14, 2022. In order to prevail in a motion to reconsider, the Petitioner cannot merely disagree with our conclusions, but rather it must demonstrate how we erred as a matter of law or policy in our immediate prior decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit in essence, the same brief and seek reconsideration by generally alleging error in the prior decision.)

Accordingly, although we acknowledge that the Petitioner submits a brief and evidence, we determine that the Petitioner does not directly address the conclusions we reached in our immediate prior decision or provide reasons for reconsideration of those conclusions. Likewise, the brief in support of the current motion also lacks any cogent argument as to how we misapplied the law or USCIS policy in dismissing the prior motion to reconsider.

In light of the above, we conclude that this motion does not meet all the requirements of a motion to reconsider and must therefore be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

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.