U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27520731

Date: AUG. 30, 2023

Motion on Administrative Appeals Office Decision

Form I-129, Petition for a 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 eight consecutive combined motions to reopen and reconsider, and we have dismissed each motion.[1] The matter is now before us on a ninth 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 motion.

On motion, the Petitioner provides a new supporting letter highlighting the "importance" of recruiting qualified mechanical engineers, as well as equitable considerations related to the "severe impact" of the dismissal of the previous motions "on the Beneficiary's life, family, and career." The Petitioner also contests the correctness of our prior decision, mainly asserting that we should consider the facts submitted with this motion in combination with the entirety of the contentions and documents provided at each prior stage and conclude that they have established eligibility for approval of the petition in an exercise of discretion. They also again contend that (1) the regulations permit a more sweeping review on motion and (2) the petition would have been approved but for the alleged mistake by previous counsel on the certified labor condition application (LCA) which originally accompanied their petition.

[1] Because additional concerns and issues in this matter have been raised by these filings, we incorporate them here by reference.

As an initial matter, contrary to the Petitioner's assertions and as we have explained in previous decisions, the scope of a motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii).

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant motions that satisfy these requirements *and demonstrate eligibility for the requested benefit* (emphasis added). *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome). A motion to reopen that does not satisfy the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

Due to the limited scope of a motion, we will only consider new evidence to the extent that it pertains to our latest decision dismissing the motion to reopen. The "importance" of the Petitioner's proffered position and the equitable considerations the Petitioner presents are not "new facts" as they are not relevant to the issues we discussed in our prior decision, and more importantly, they do not establish eligibility. Here, the Petitioner has not provided new facts to establish that we erred in dismissing the prior motion. Because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision.

A motion to reconsider must establish that our prior 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). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

We have considered the Petitioner's claims of ineffective assistance of counsel numerous times in our prior decisions. The Petitioner's contentions in their current motion merely reargue facts and issues we have already considered in our previous decisions. *See e.g., Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) ("a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior Board decision"). So the Petitioner has not established a basis to warrant reconsideration of our previous decision.

A petitioner must demonstrate eligibility as of the date of filing. 8 C.F.R. § 103.2(b)(1). The Petitioner continues to maintain that but for the ineffective assistance of its first counsel, the outcome would have differed. But the Petitioner's inconsistencies stemming from their responses to our identification of the deficiencies in their various submissions do not lead to a conclusion that they would have demonstrated their eligibility at the time of filing but for the actions of an ineffective counsel. There were and continue to be serious questions regarding the nature of the proffered position due to the varied and disparate documents and evidence submitted by the Petitioner at different stages of the proceeding prior to this motion. As explained in previous decisions, the Petitioner's submission of additional evidence has raised additional concerns and questions that they have not sufficiently overcome. Throughout the prior proceedings, we have pointed out the Petitioner's inconsistent statements and consequent ineligibility, and each time the Petitioner has filed a motion to reopen and/or reconsider attempting to cure the identified legal insufficiency to demonstrate renewed eligibility. But each of the steps the Petitioner argues are curative to the alleged ineffective assistance they initially received are in fact quite the opposite. They do nothing more than introduce new ineligibility into the record. For example, when we identified in our decision dismissing the

Petitioner's initial appeal that the submitted LCA was not correspondent with the Petitioner's proffered mechanical engineer position because it was certified for a position located within the "Engineering Technicians, Except Drafters, All Others" occupational category, the Petitioner by and through their third attorney submitted a new LCA certified after the date of the filing of the petition for the offered position at a Level I wage and alleged that they received ineffective assistance from their first attorney in the preparation of their first LCA. The Petitioner submitted a new job description, identifying courses required to complete each duty and new experience requirements when we pointed out that the record reflected the Petitioner's generic description for their "Mechanical Engineers" job duties. We noted in a subsequent motion dismissal that the Petitioner's new experiential requirement materially changed the requirements they had initially represented for entry into their proffered position and therefore cast into question the true requirements of the proffered job. We further noted that the new experiential requirement did not correspond with the new LCA[2] the Petitioner had previously submitted to attempt to cure the ineligibility stemming from their first non-corresponding LCA. In response, the Petitioner submitted yet another combined motion accompanied by a new LCA certified after the filing of the petition, this time from a different and unrelated entity. This LCA is irrelevant to the proceedings in this matter because it was not filed by the Petitioner.

An H-1B petition cannot be approved without a corresponding LCA and the corresponding LCA must be certified before the filing of the H-1B petition. *See* section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). Each successive LCA submitted was filed and certified after the filing of the H-1B petition. We cannot consider facts that only came into existence after the filing of the petition. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1988).

Finally, our exercise of discretion is governed by the applicable regulations. The regulations do not permit us to reopen or reconsider our previous decision in this matter. We will not re-adjudicate the petition anew and, therefore, the underlying petition remains denied.

Because the Petitioner has not established (1) that our previous decision was based on an incorrect application of law or policy at the time we issued it and (2) eligibility for the requested benefit, this combined motion is dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[2] This deficient LCA was prepared and submitted by the Petitioner's third attorney with their first motion and not their first attorney who they have filed a grievance against. The record does not reflect that the Petitioner has taken any steps against their third attorney for ostensibly the same conduct as their first attorney.