U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25426819

Date: FEB. 14, 2023

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 seven consecutive combined motions to reopen and reconsider, and we have dismissed each motion. The matter is now before us on an eighth combined motion to reopen and reconsider.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the motions.

I. LAW

A motion to reopen is based on new facts that are supported by documentary evidence, and a motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3).

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean those that are relevant to the issues raised on motion and that have not been previously submitted in the proceeding, which includes within the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not

constitute "new facts." A motion to reopen that does not satisfy the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider on the other hand must: (1) state the reasons for reconsideration, (2) be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy, and (3) establish 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). A motion to reconsider that does not satisfy these requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

The review of a motion is limited to the basis for the prior adverse decision. The regulations at 8 C.F.R. § 103.5(a)(1)(i) generally require that the decision a motion seeks to reopen or reconsider must have taken place within the prior 30 days. So we follow the regulations as written and limit our review to the prior decision made within 30 days of filing the motion. We evaluate any new facts, arguments or allegations of error in the application of law or service policy in connection with our decision upon which the current motion was filed. We may only grant a motion that satisfies these requirements and demonstrates eligibility for the benefit sought.

II. ANALYSIS

A. Motion to Reopen

The Petitioner has not provided us with new facts warranting reopening the proceedings here. We interpret "new facts" to mean those that are relevant to the issues raised on motion and that have not been previously submitted in the proceeding. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." The Petitioner's brief encourages us to look beyond our prior decision and expand our examination to encompass the original denial of the petition and our subsequent appeal and motion dismissals to find the new facts it says support a motion to reopen. We do not have the authority to do so. The regulations at 8 C.F.R. § 103.5(a)(1)(i) generally require that the decision a motion seeks to reopen or reconsider must have taken place within the prior 30 days and we follow the regulations as written. The denial of the petition, the dismissal of the appeal and six out of the previous seven motion dismissals occurred well outside of the 30-day window provided for in the regulation at 8 C.F.R. § 103.5(a)(1)(i).

All parties to a matter deserve an opportunity to be heard. But once proceedings provide that fair opportunity, a strong interest exists to bring the matter to a close. *INS v. Abudu*, 485 U.S. 94, 107 (1988). So a party seeking to reopen the proceedings bears a "heavy burden" of proof. *Id.* at 110.

The Petitioner does not provide any new facts that relate to our decision to dismiss Petitioner's seventh motion. In this eighth in the Petitioner's series of motions, it submits a brief repeating the "new facts" it said it submitted in its previous appeal and motions. Facts that are repeated and were provided previously are not "new facts" by definition and we decline to consider them.

And, even if any of the facts that the Petitioner submits could be considered new ones, they would not change the outcome of this case if the proceeding were reopened. The Petitioner attempted to "correct and clarify" the record by submitting revised job descriptions and "corrected" labor condition applications (LCA) at various stages of the previous proceedings. We noted in our previous decision

that the changes the Petitioner submitted previously did not correct and clarify the record. Instead, they raised unresolved questions regarding the validity of the Petitioner's proffered job and its claimed status as a specialty occupation. 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. But it is important to note that even if the Petitioner were to resolve every inconsistency we have identified from the dismissal of the appeal through to the seventh motion dismissal, the petition would remain unapprovable. 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). The LCA submitted with the petition did not correspond with the H-1B petition. Each successive LCA submitted was filed and certified after the filing of the H-1B petition. One of the two subsequent LCAs submitted by the Petitioner was submitted and certified on behalf of a related entity and not the Petitioner itself. 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). Moreover, new facts must still demonstrate eligibility as of the date of filing. 8 C.F.R. § 103.2(b)(1). The facts the Petitioner wants us to evaluate came into existence after the filing of the petition and do not demonstrate eligibility at the time of filing. They would not change the outcome of the case even if the proceedings were reopened. So there is no factual or legal basis for us to consider reopening the matter before us.

B. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). The Board of Immigration Appeals generally requires that a motion to reconsider assert an error was made at the time of the previous decision. The very nature of a motion to reconsider is the claim that the original decision was defective in some regard. *See Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006).

The Petitioner's sole assignment of legal error is rooted in our previous analyses of its claims of ineffective assistance of prior counsel on the initial H-1B petition and the corresponding applicability of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *Lozada* does not provide a framework for establishing ineffective assistance of counsel. It is simply a minimum evidentiary framework to provide us a basis upon which to evaluate whether the alleged ineffective assistance rendered the proceeding "fundamentally unfair" and whether the parties were "prejudiced by [the former] representative's performance." *Id.* at 638.

We have considered the Petitioner's claims of ineffective assistance of counsel numerous times in our prior decisions. The record of proceedings notably contains three separate LCAs submitted by the Petitioner at different stages of the proceedings to address its true intention at the time of filing the H-1B petition. Over the course of these proceedings, the Petitioner has changed its representative four times and has been represented by five different attorneys. The first LCA was certified for a position located within the "Engineering Technicians, Except Drafters, All Others" occupational category. The attorney who the Petitioner alleges provided ineffective assistance prepared this LCA. The other two LCAs the Petitioner submitted at various points in prior proceedings do not advance the argument that, but for the ineffective assistance of its first counsel, the Petitioner's outcome would have differed. The Petitioner's third attorney submitted the second LCA with its first motion. Since the Department

of Labor (DOL) certified that LCA after the Petitioner filed the initial H-1B petition, it could not support approval of the petition. A different but related entity filed the third LCA the Petitioner submitted in connection with its fifth motion. This LCA is irrelevant to the proceedings in this matter because it was not filed by the Petitioner.

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. The actions of the initial counsel when considered together with the Petitioner's subsequent steps do not lead to the conclusion that the Petitioner was "prejudiced by [the former] representatives performance" or that the proceedings were "fundamentally unfair." *Id.*

Disagreeing with our conclusions without showing that we erred as a matter of law is not a ground to reconsider our decision. *See O-S-G-*, 24 I&N Dec. at 58. The Petitioner has not demonstrated how we erred in our application of *Lozada* to our decision on the Petitioner's prior motion. So the Petitioner has not shown proper cause for reconsidering our decision on its previous motion.

III. CONCLUSION

The Petitioner should note that the filing of a motion to reopen or reconsider does not provide any interim benefits such as staying the execution of any decision or extending a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv). The Petitioner has not demonstrated that we should either reopen the proceedings or reconsider our decision.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.