U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-, LLC

DATE: APR. 25, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a restaurant specializing in Italian foods and pastries, seeks to temporarily employ the Beneficiary as the chief executive officer of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity within one year of approval of the new office petition. We rejected the Petitioner's appeal of the Director's decision as untimely and denied the Petitioner's two subsequent combined motions to reopen and reconsider as neither motion overcame the reasons for rejection of the appeal.

The matter is now before us on a third combined motion to reopen and motion to reconsider. In support of its motion, counsel for the Petitioner further explains the reasons for the untimely filing of the appeal and contends that we erred by not considering a supplemental brief submitted in support of its second combined motion.

Upon review, we will deny the combined motion.

I. MOTION REQUIREMENTS

A motion to reopen is based on documentary evidence of *new facts*, 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The issue in this matter is whether we properly denied the Petitioner's second combined motion to reopen and reconsider in our prior decision, issued on October 20, 2016.

For the reasons discussed below, we will deny the motion to reopen and the motion to reconsider. While the current motion includes newly submitted evidence and assertions that we incorrectly applied the law and U.S. Citizenship and Immigration Services (USCIS) policy to the facts presented, the Petitioner has not shown proper cause for reopening or reconsideration.

A. The Petitioner's September 2016 Brief

As a preliminary matter, we will first address the Petitioner's contention that our prior decision was erroneous because we failed to consider a supplemental brief submitted in support of the second combined motion.

Based on a review of the record, it appears that this supplemental brief, which was submitted in September 2016, more than two months after the Petitioner filed the motion, was not joined with the record in time for us to have considered it in our October 2016 decision. Upon review of this supplemental brief, we find that the facts and arguments articulated therein were not sufficient to meet the requirements for a motion to reopen or a motion to reconsider and thus consideration of the brief would not have altered the outcome of our decision.

Specifically, the information contained in that brief did not establish that we erred in rejecting the Petitioner's appeal as untimely filed. An appeal must be filed within 33 calendar days of the date that USCIS served the unfavorable decision by mail. 8 C.F.R. §§ 103.3(a)(2)(i), 103.8(b). The appeal filing date is the day USCIS receives the appeal at the designated filing location, not the date the petitioner mailed the appeal. 8 C.F.R. § 103.2(a)(7)(i).

Here, the Director of the Vermont Service Center denied the petition and served the unfavorable decision by mail on March 31, 2015. USCIS received the Petitioner's appeal on May 5, 2015, 35 days after the service date of the unfavorable decision. Accordingly, we rejected the appeal as untimely. 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*). The Petitioner has not contended in this motion or in its prior motions that the appeal was actually received by USCIS at the designated filing location on or before the day the appeal was due.

In the brief in question, the Petitioner contended that prior counsel failed to timely notify the Petitioner of the Director's denial and to prepare an appeal or motion, thereby leaving the Petitioner to "urgently seek a new attorney" to contest the Director's findings. The Petitioner stated that these "urgent" circumstances were previously unknown and therefore constitute new evidence that should serve as a basis for reopening the proceedings. However, the Petitioner previously brought these circumstances to our attention and we previously acknowledged the Petitioner's claims with respect to prior counsel in our decision dated June 6, 2016. 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. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

The Petitioner also argued in the September 2016 brief that the due date for filing the appeal fell during "Holy Week," the week of religious holidays ending on Good Friday, which the Beneficiary, as a practicing Catholic, observed. Specifically, the Petitioner states, "Holy Week 2015 began on March 29, and ended on Saturday, April 4, 2015." The Petitioner therefore asked us to "acknowledge and respect [the Beneficiary's] religious beliefs" by excusing the delayed filing of the appeal.

The Petitioner's claim is not persuasive as the appeal in this matter was due on May 4, 2015, and not on April 4, 2015, during the religious holidays observed by the Beneficiary. The Director issued the unfavorable decision on March 31, 2015, and the Beneficiary previously acknowledged in an affidavit that she learned of the denial from prior counsel on April 2, 2015. Therefore, it is unclear how her observance of the Easter holidays would have delayed the Petitioner's filing of the appeal. Regardless, an appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*).

The Petitioner emphasized that, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*), an untimely appeal that meets the requirements of a motion to reopen or a motion to reconsider, the field office that made the unfavorable decision must treat the untimely appeal as a motion, and make a new decision on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case, the Director of the Vermont Service Center. 8 C.F.R. § 103.5(a)(1)(ii). As noted in our initial decision rejecting the appeal, the Director declined to treat the late appeal as a motion and forwarded the matter to our office.

The remainder of the September 2016 brief addressed the merits of Director's denial, which was based on adverse findings regarding the Beneficiary's proposed position in the United States. Because we rejected this appeal as untimely filed, we never reached the merits of the case and will not review the merits absent evidence that we erroneously rejected the appeal. The Petitioner has not provided this evidence and does not dispute that the appeal was untimely filed.

When a motion is filed, we are authorized to reopen and reconsider the *immediate prior* decision which, in the matter of the prior motion, would have been our June 2016 decision where we expressly noted that the sole issue before us was whether the evidence of record was sufficient to establish that the Petitioner's appeal was timely filed. 8 C.F.R. § 103.5(a)(1)(i). A motion to reopen must state new facts and be supported by documentary 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 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 requested immigration benefit. Based on the various deficiencies cited above, the Petitioner's last combined motion did meet the criteria cited in this paragraph. Therefore, even if we had considered the previously unaddressed brief, it would not have altered our decision to deny the second combined motion.

B. Motion to Reopen

In support of the current motion, the Petitioner submits two briefs dated November 7, 2016, and November 16, 2016, respectively. Both briefs state that we overlooked the September 2016 brief submitted in support of the second motion. As stated above, the previously unaddressed brief did not meet the motion requirements and therefore would not have altered our prior decision to deny the Petitioner's motion. The Petitioner also reasserts explanations for the late filing of the appeal, including its claim that the due date for the appeal fell during religious holidays observed by the Beneficiary, both of which were previously raised in the September 2016 supporting brief and which we have now addressed in the above discussion. As stated above, neither argument constitutes new facts or evidence that would merit the reopening of the prior proceeding.

The issue we addressed in the prior proceeding was whether the Petitioner provided sufficient evidence to establish that it timely filed the appeal. The Petitioner has explained various reasons for the appeal's untimely filing, but has neither claimed nor provided new evidence to show that its filing was timely.

Neither the newly submitted evidence nor the previously unaddressed September 2016 brief overcome the sole basis for our denial of the previous motion. Therefore, the Petitioner has not shown proper cause to reopen the proceeding.

C. Motion to Reconsider

In denying the prior motion to reconsider, we found that the Petitioner did not properly state the reasons for reconsideration. The Petitioner did not dispute the date the Director's original decision was issued or dispute that its appeal was untimely filed. We concluded that the documents constituting the prior motion did not articulate how our decision on appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to reject the appeal was rendered.

On motion, the Petitioner contends that our prior "oversight" in failing to address the September 2016 brief was not harmless error, but rather that it was "critical and shall significantly alter the substance" of our prior decision. We disagree. Even if we had considered the brief at the time of its submission, our decision to deny the motion to reconsider would have remained unchanged. While we acknowledge the various case law citations in the Petitioner's current brief, we find that these cases are irrelevant in the matter at hand, as they do not address the issue that is at the heart of this proceeding, i.e., our rejection of the Petitioner's untimely filed appeal. In fact, the Petitioner does not assert or provide evidence to establish that the appeal was timely filed. Rather, the Petitioner focuses primarily on establishing that our oversight of the September 2016 brief resulted in our denial of a motion that otherwise should have been granted.

As fully discussed above, the September 2016 brief would have had no impact on our October 2016 decision, as the contents of the brief in question did not establish that our June 2016 denial of the

Petitioner's initial motion to reconsider was based on an incorrect application of law or policy. Similarly, case law that counsel cites in support of the current motion does not establish that our October 2016 denial of the Petitioner's June 2016 motion to reconsider was based on an incorrect application of law or policy. Rather, as in our prior decisions in this matter, our primary focus was and continues to be the admitted untimely filing of the Petitioner's appeal. As stated earlier, an appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*).

Despite the Petitioner's repeated requests for a *de novo* review of the entire record of proceeding and the merits of the underlying case, we will not consider the merits of an appeal that was improperly filed.

The Petitioner has not submitted any evidence that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be denied.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause to reopen the proceeding or proper cause for reconsideration.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of D-, LLC*, ID# 318389 (AAO Apr. 25, 2017)