U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32005877

Date: AUG. 29, 2024

Motion on Administrative Appeals Office Decision

Form I-129, Petition for a Nonimmigrant Worker (Extraordinary Ability – O)

The Petitioner, a software development and investment firm, seeks to classify the Beneficiary, an investment and marketing specialist, as an individual of extraordinary ability. To do so, the Petitioner pursues O-1 nonimmigrant classification, available to individuals who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

The Director of the Vermont Service Center denied the petition, concluding that the Beneficiary's role as an investment and marketing specialist did not qualify as an individual of extraordinary ability in the arts, and she did not satisfy any of the regulatory categories of evidence at 8 C.F.R. § 214.2(o)(3)(iv)(B)(l)-(6), of which at least three are required. We summarily dismissed the Petitioner's appeal.[1] The matter is now before us on untimely combined motions to reopen and reconsider.[2]

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 motions.

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 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

[1] The appeal was accompanied by a deficient Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, which listed prior counsel but was not properly executed. Consequently, as stated in our November 2023 letter to the Petitioner and prior counsel, we considered the Petitioner self-represented for the purposes of the appeal and would issue our appeal decision directly to the Petitioner, without notice to prior counsel, because the record does not include a new, properly executed Form G-28, as required. 8 C.F.R. §§ 103.3(a)(2)(v)(A)(2), 292.4(a); *see also* Form G-28 Instructions.

[2] The present motion was accompanied by a deficient Form G-28 which listed prior counsel but was not properly executed. As a result, in combination with the fact that the G-28 submitted with the underlying appeal was invalid, we sent a May 2024 letter to the Petitioner and prior counsel notifying that we consider the Petitioner to be self-represented for purposes of the motion.

proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant motions that satisfy the aforementioned requirements and demonstrate eligibility for the requested benefit.

In our November 6, 2023, decision, we stated that the Petitioner's appeal did not identify specifically any erroneous conclusion of law or statement of fact in the Director's decision. Further, while the Petitioner indicated that a brief and/or additional evidence would be submitted to the AAO within 30 calendar days of filing the appeal, the record did not show that the AAO received those materials within that period. Because the AAO did not receive a brief and/or additional evidence and the Petitioner's appellate submission did not identify specifically any erroneous conclusion of law or statement of fact, we summarily dismissed the appeal. See 8 C.F.R. § 103.3(a)(1)(v). We served the unfavorable decision by mail to the Petitioner at its address of record, informing it that any motion to reopen or reconsider our appellate decision must be filed within 33 days of the date of our decision.

The Petitioner acknowledges that its combined motions are untimely. A petitioner must file a motion to reopen or reconsider no later than 33 days after the date of the decision for which that petitioner seeks reconsideration.[3] The Petitioner's filing arrived 77 days after we mailed our dismissal of the Petitioner's appeal.

With respect to a motion to reopen, "failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." *See* 8 C.F.R. § 103.5(a)(1)(i). For the reasons discussed below, we conclude that the Petitioner filed has not demonstrated that the untimely filing was reasonable and beyond its control.

In a statement accompanying the late motion, prior counsel for the Petitioner states:

> Notice was provided to this attorney that he was removed from the pending [appeal] without explanation as to why. Accordingly, this attorney did not receive any such notifications regarding the Services['] decision . . . .
>
> The beneficiary [] notified this attorney directly, on or about December 10, that the then-pending [appeal] had been denied earlier. The result was that the requisite information was not provided to this attorney until on or about December 16 . . . . The cause of the delay in relaying this information to the attorney was caused by USCIS removing the attorney from the matter inexplicably – and therefore, severing communications with him, such that he would have been able to obtain this information in a timely fashion, discuss it with the relevant parties, and then develop a plan of action to respond . . . .

On motion, the Petitioner, through prior counsel, asserts that the motion's untimeliness should be excused because a copy of the appeal decision was not mailed to prior counsel and asks that we consider "*nunc pro tunc*" the arguments presented in its motion challenging the Director's June 2023 decision. However, as noted, we considered the Petitioner self-represented for the purposes of the appeal and issued our appeal decision directly to the Petitioner, without notice to prior counsel,

[3] *See* 8 C.F.R. § 103.5(a)(1)(i) and 103.8(b).

because the record does not include a new, properly executed Form G-28, as required. A copy of the appeal decision was mailed to the Petitioner at its address of record and could have been forwarded to the attorney by the Petitioner at any time. Therefore, we do not find that the delay in filing was reasonable or beyond the Petitioner's control. It is the Petitioner's burden to establish that the late filing was reasonable and beyond its control. The Petitioner's excuse for the untimely filing of the motion does not demonstrate that it has met this burden, and we will not exercise our discretion to excuse the late filing of its motion to reopen.

Although we will dismiss the motion to reopen as untimely, we note that it did not otherwise meet the requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2). As noted, the relevant regulation provides that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." 8 C.F.R. § 103.5(a)(2). In addition, by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(l)(i). As stated above, we summarily dismissed the Petitioner's appeal based on a failure to identify an erroneous conclusion of law or statement of fact. On motion, the Petitioner has not stated new facts relating to our summary dismissal that would warrant a reopening of the proceeding.

Rather, the Petitioner provides evidence that relates to the Director's finding that the Beneficiary's role as an investment and marketing specialist did not qualify as an individual of extraordinary ability in the arts. The Petitioner does not address, present documentation relating to, or otherwise make any assertions regarding our summary dismissal of its appeal. Specifically, it does not claim that our summary dismissal of its appeal was incorrect based on the record before us, nor did it provide new facts or evidence demonstrating that it had actually submitted a brief and/or additional evidence to our office within 30 days of filing its appeal. Thus, even if we were to consider the motion on the merits it would afford the Petitioner no relief.

The motion to reopen will be dismissed as untimely filed, pursuant to 8 C.F.R. § 103.5(a)(1)(i). With respect to the motion to reconsider, neither the Act nor the pertinent regulations grant us authority to extend the 33-day time limit for filing a motion to reconsider. Because there is no comparable authority extended to an untimely filed motion to reconsider, the Petitioner's untimely motion to reconsider will also be dismissed. *See id.*

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.