U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 04742057

DATE: DEC. 2, 2019

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a buyer, manager, and developer of commercial and residential properties, seeks to employ the Beneficiary as a development manager. It requests skilled worker classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

After initially approving the petition, the Director of the Nebraska Service Center revoked the approval on the ground that the evidence of record did not establish that the Beneficiary met the educational requirements of the labor certification. On appeal we affirmed the Director's decision. Thereafter we denied seven motions by the Petitioner to reopen and reconsider. In the sixth motion we found not only that the Beneficiary did not meet the educational requirements of the labor certification, but that the Petitioner also did not establish its continuing ability to pay the proffered wage from the priority date of the petition onward. The seventh motion we denied on the ground that it was late filed. The matter is now before us on the Petitioner's eighth combined motion to reopen and reconsider. Upon review, we will dismiss the motions.

I. LAW

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). A motion to reconsider must be supported by a pertinent precedent or adopted decision, a statutory or regulatory provision, or a statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security (DHS) policy. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

Our denial of the last combined motions was based on the fact that they were filed 38 days after the service of our decision denying the sixth motions to reopen and reconsider, which did not comply with the regulatory requirement that a motion be filed within 33 calendar days of the date of our unfavorable

decision was mailed. *See* 8 C.F.R. § 103.5(a)(1)(i); 103.8(b). The Petitioner was specifically advised of the 33-day filing period for motions on the cover page of our decision denying the previous combined motions.

In its current motion to reopen the Petitioner submits copies of the brief and supporting documents that were late filed with its previous motion to reopen and therefore not considered in our decision denying the motion. The Petitioner asserts that these materials were not late filed in its previous motion because they were received by USCIS on August 20, 2018, which was only 20 days after our denial decision dated July 31, 2018. While the Petitioner is correct that its Form I-290B, Notice of Appeal or Motion, was originally received by USCIS on August 20, 2018, it was rejected and returned to the Petitioner along with the brief and all supporting materials because the Form I-290B did not specify what type of action the Petitioner was trying to file. A rejected benefit request does not retain a filing date. *See* 8 C.F.R. § 103.2(a)(7)(ii) By the time the Petitioner resubmitted the completed Form I-290B[1] and supporting documentation, which were received by USCIS and properly filed on September 7, 2018, the 33-day filing period had expired.

While the regulation at 8 C.F.R. § 103.5(a)(1)(i) does give us the discretion to excuse the late filing of a motion to reopen "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner," no such demonstration has been made by the Petitioner in this case. Therefore, we will not exercise our discretion to excuse the late filing of the previous motion to reopen.

In its current motion to reconsider the Petitioner does not allege that our decision denying the previous motions on the ground that they were late filed was based on any incorrect application of law or policy, as required by 8 C.F.R. § 103.5(a)(3). Nor does the Petitioner cite any precedent or adopted decision, any statutory or regulatory provision, or any statement of USCIS or DHS policy in support of its motion to reconsider.

The Petitioner cites the regulations at 8 C.F.R. § 103.3(a)((2)(v)(B)(*1*) and (*2*) which state that an appeal not filed within the time allowed must be rejected as improperly filed, but that if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion and a decision made on the merits. These regulations apply only to appeals, and therefore have no bearing on the motions currently before us.

III. CONCLUSION

The Petitioner has not shown proper cause for reopening or reconsideration of our prior decision.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[1] It appears that the Petitioner mistakenly designated its Form I-290B an appeal, which was corrected by USCIS to a motion to reopen and a motion to reconsider. An AAO decision denying a motion to reopen and/or reconsider cannot be appealed.