U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19780040

Date: DEC. 15, 2021

Motion on Administrative Appeals Office Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a restaurant owner and operator, seeks to temporarily employ the Beneficiary as the managing director of its new office[1] in the United States under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the 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 a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity or that it would employ her in the United States in a managerial or executive capacity within one year. We dismissed the Petitioner's subsequent appeal of that decision, concluding that it did not demonstrate that the Beneficiary had been employed abroad in an executive capacity, as claimed.[2] The Petitioner then filed a combined motion to reopen and motion to reconsider, which we dismissed as untimely filed.

The matter is now before us on a second motion to reopen and motion to reconsider. On motion, the Petitioner argues that the prior motion should be deemed timely filed and requests that it be reopened and adjudicated on its merits.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. §1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss both motions.

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[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

[2] We reserved the Petitioner's appellate arguments regarding whether the Beneficiary would be employed in a managerial or executive capacity in the United States within one year, emphasizing that the identified ground for denial was dispositive of the appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

I. MOTION REQUIREMENTS

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

To merit reopening, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

The issues before us on motion are whether the Petitioner has submitted new facts or evidence that overcome our reasons for dismissing its prior motion as untimely and whether it has established that our decision to dismiss that motion was based on an incorrect application of law or USCIS policy.

The record reflects that we dismissed the Petitioner's appeal and mailed the decision to the Petitioner and counsel on November 25, 2020.[3] The Petitioner filed the previous combined motion to reopen and reconsider on February 26, 2021, 93 days after we issued the unfavorable decision.

The applicable regulations state that a motion on an unfavorable decision must be filed within 33 days of the date USCIS mails the decision. *See* 8 C.F.R. §§ 103.5(a)(1), 103.8(b). During the coronavirus (COVID-19) pandemic, USCIS issued guidance that Form I-290B, Notice of Appeal or Motion, would be accepted if filed within 60 days of the unfavorable decision. Based on this extended deadline, the Petitioner's previous motion would have been deemed timely filed if received by USCIS on or before January 27, 2021, which includes the 60-day period plus three days for mailing.

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). Although the prior motion was a combined motion to reopen and reconsider, the regulations do not provide discretion for USCIS to excuse the untimely filing of a motion to reconsider. Therefore, our review is limited to whether we will exercise our discretion to reopen the previous motion to reopen. For the reasons discussed below, we conclude that the Petitioner filed the motion to reopen late and has not demonstrated that the untimely filing was reasonable and beyond its control.

In the brief submitted in support of the instant motion, the Petitioner asserts that the restrictions and "unpredictable conditions" caused by the COVID-19 pandemic are beyond its control. The Petitioner further states that "[a]lthough . . . USCIS had afforded 93 and 63 additional days for certain forms and

[3] The decision dismissing the appeal is dated November 24, 2020. With the current motion, the Petitioner provides evidence that the decision was mailed on November 25, 2020.

responses, the announcement . . . was confusing and misleading as it is easy to misinterpret which forms or responses should have been filed within 63 days and which within 93 days."

As noted, USCIS has extended filing deadlines for appeals and motions filed on Form I-290B to account for anticipated delays associated with the COVID-19 pandemic, as well as extending deadlines for other actions, such as responses to requests for additional evidence. An announcement published by USCIS on September 11, 2020 and applicable at the time our initial decision dismissing the Petitioner's appeal was issued, states that USCIS "will consider a Form N-336 or Form I-290B received up to 60 calendar days from the date of the decision before we take any action."[4] The Petitioner has not explained how this announcement can be interpreted as allowing an affected party to file an appeal or motion up to 93 days after the date of an adverse decision.

Further, the Petitioner's brief explanation regarding COVID-19 related restrictions and "unpredictable conditions" is lacking detail regarding the specific reasons for its delay in filing the prior motion and is not accompanied by any supporting documentation. This statement alone does not demonstrate why the Petitioner required an additional month to file the motion, beyond the extended deadline already provided by USCIS to provide additional flexibility during the pandemic.

It is the Petitioner's burden to establish that the late filing was reasonable and beyond its control. Based on the evidence and limited explanation provided, the Petitioner has not met this burden, and we will not exercise our discretion to excuse the untimely filing of the prior motion.

III. CONCLUSION

For the reasons discussed, the Petitioner has not submitted new evidence that would warrant the reopening of its previous motion, nor has it established that our decision to dismiss the previous motion as untimely was based on an incorrect application of law or USCIS policy. Accordingly, the motions will be dismissed.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[4] *See* "USCIS Extends Flexibility for Responding to Agency Requests," (Sep. 11, 2020), https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-1 (last accessed on Dec. 15, 2021).