U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5671482

Date: JAN. 3, 2020

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (L-1A)

The Petitioner, a provider of solutions to detect pipeline leaks, intrusions, or obstructions, seeks to temporarily employ the Beneficiary in the United States as its president 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 Director of the Vermont Service Center denied the petition concluding that the Petitioner did not establish that it was doing business as defined by the regulations. The Director further determined that the Petitioner did not demonstrate that the Beneficiary would be employed in the United States in a managerial or executive capacity.

The Petitioner later appealed the Director's decision and we summarily dismissed the appeal. The Petitioner then filed a motion to reopen and a motion to reconsider and we denied both as untimely. The matter is now before again on a motion to reopen and a motion to reconsider.

On motion, the Petitioner contends that it untimely filed the prior motion to reopen and motion to reconsider because of circumstances beyond its reasonable control related to the "diligent care of one's nuclear family."

Upon review, we will dismiss the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other 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.

II. ANALYSIS

A. Motion to Reopen

On motion, the Petitioner asserts that it filed untimely motions to reopen and reconsider due to family issues and "delicate rules of parenting and child welfare." The Petitioner states that the Beneficiary "is the head of the family…consisting of his wife and five children," and that due to this, he "traveled back to [redacted] Arkansas from [the Petitioner's] office location in [redacted] LA" for three weeks leading up to the week of Thanksgiving 2018. The Petitioner also stated the following:

> That approaching holiday was one of an enormous stress for [the Beneficiary's] wife who since July 2017 had provided the most parenting needs for all five children as [the Beneficiary] kept much time ensuring [the Petitioner's] success. It was indeed reasonable and beyond the control for [the Beneficiary] who had to have those proceeding three weeks to be out of [redacted] and to work remotely at [redacted]..so he could equally spend time with his family.
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> [The Beneficiary] was out of town to visit his family from the week of October 22, 2018 until right after Thanksgiving week in 2018. It is in our estimation that the [United States Citizenship and Immigration] USCIS initial notice letter, needing a timely response, had arrived immediately after [the Beneficiary's] departure from [redacted] [The Beneficiary] wasn't aware the USCIS letter had arrived until his return to [redacted] about November 26, 2018.

In support of these assertions, the Petitioner provides additional evidence, including a letter from a security company overseeing its office in [redacted] stating that the Beneficiary was absent from October 26, 2018, through November 23, 2018; a residential lease for his residence in [redacted] Arkansas; and a letter from a clergyman indicating that the Beneficiary frequently commutes back and forth between [redacted] and [redacted]. In addition, the Petitioner submits a letter from [redacted] confirming the Beneficiary's use of an executive suite and resubmits documentation, such as emails and other transactional documents, it contends demonstrate that it is doing business and that the Beneficiary acts in an executive capacity.

1. Facts

Our previous appeal decision was issued on October 23, 2018 and the cover page included instructions stating the following:

> Motions must be filed on a Form I-290B, Notice of Appeal or Motion, within 33 days of the date of this decision. This time period includes three days added for service by mail.

Therefore, any motion was due on Sunday, November 25, 2018; but, if the last day of the designated 33 days to file a motion falls on a weekend, as in this case, the regulations allow us to extend the deadline to file a motion to the first business day following this date. As such, the last date by which a motion to reconsider or motion to reopen could have been filed timely was Monday, November 26, 2018. However, the current motion to reopen and motion to reconsider were received on December

7, 2019. As such, there is no doubt as to their lack of timeliness, since the motions were filed 45 days after our previous decision on October 23, 2018.

2. Timeliness of the Motion to Reconsider

The regulations require that a motion to reconsider be filed within 30 days of the decision that the motion seeks to reconsider, including three days for service by mail. 8 C.F.R. § 103.5(a)(1)(i); 8 C.F.R. § 103.8(b). There is no exception to this requirement.[1] As such, consistent with the regulations, the Petitioner's motion to reconsider was filed untimely, and our previous decision denying this motion on that basis was correct.

3. Timeliness of the Motion to Reopen

As discussed, in contrast to the regulations related to the timely filing of a motion to reconsider, the regulations specific to a motion to reopen indicate that untimeliness may be excused "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." 8 C.F.R. § 103.5(a)(1)(i). There is no question that the Petitioner filed the motion to reopen in response to our appeal decision untimely, as it was filed 45 days after the date of the appeal decision. However, consistent with the regulations, we will consider whether this delay should be excused; namely, whether the untimely filing was reasonable and beyond the control of the Petitioner.

Upon review, we conclude that we were correct in denying the motion to reopen as untimely. The Petitioner has not sufficiently articulated and documented that its untimely motion to reopen was reasonable and beyond its control. The Petitioner contends that the Thanksgiving holiday and the Beneficiary spending time with, and caring for, his wife and children in [redacted] caused him to be away from his office in [redacted] and thus, resulted in him not being aware of USCIS' denial of its motions to reopen and reconsider prior to the due date for filing additional motions. However, the Petitioner does not properly articulate why the Beneficiary's circumstances were beyond its reasonable control. In fact, the Petitioner submits additional evidence with the motion to reopen indicating that the Beneficiary has been regularly commuting back and forth between [redacted] and [redacted] since December 2017. As such, it does not appear that it was beyond its reasonable control for the Beneficiary to return to [redacted] and check correspondence or for the Petitioner to make other arrangements for another employee or individual to manage or monitor the Petitioner's correspondence during Beneficiary's approximate month long absence. Further, we do not believe that regular and reasonably foreseeable family and martial obligations of a Beneficiary were contemplated as events "beyond the control of the applicant or petitioner" referenced in the regulations.

Therefore, we conclude that our previous decision to deny the motion to reopen as untimely was correct.

B. Motion to Reconsider

[1] This is in contrast to the regulations related to the timely filing of a motion to reopen which provide that untimeliness may be excused "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." 8 C.F.R. § 103.5(a)(1)(i).

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). However, as we have noted, the Petitioner filed the previous motion to reopen and motion to reconsider 45 days after the date the prior decision had been issued. Further, as discussed, there is no provision in the regulations excusing an untimely motion to reconsider; as such, our prior decision to deny this as untimely was correct.

The only remaining issue is whether we applied the law correctly in denying the Petitioner's previous motion to reopen as untimely based on the evidence available at the time of this decision in March 2019. We note that along with the motion to reopen the Petitioner submitted a letter from the Beneficiary requesting that we pardon the lateness of the filing stating that he had "travelled out of town to be with my family" and indicating that he did not see the denial until after the due date to file additional motions. As indicated, we denied the motion to reconsider as untimely.

However, pursuant to the current motion to reconsider, the Petitioner does not articulate how our previous decision was inconsistent with applicable law or policy based on the facts at the time of this denial. At that time, the Petitioner did not sufficiently articulate why it had filed the motion to reconsider as untimely or why this untimely filing was beyond its reasonable control. Regardless, as we have noted above, we do not find that the Beneficiary's time spent away visiting family is sufficient to justify an untimely filing; for instance, it is common for businesses to make arrangements for correspondence to be monitored and processed without the presence of their president. In fact, the Petitioner's inability to process and respond to correspondence in the absence of the Beneficiary only leaves further uncertainty as to whether it is doing business and operating sufficiently to support him in an executive capacity. Indeed, the Petitioner's reliance on the Beneficiary to handle these administrative matters indicates that he is likely exclusively performing the day-to-day non-qualifying operational tasks of the business.[2]

As such, the Petitioner has not established that our previous decision to deny the motion to reopen and motion to reconsider as untimely was based on an incorrect application of law or policy based on the evidence in the record of proceedings at the time of that decision.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsidering our prior decision. The motion to reopen and motion to reconsider will be dismissed for the above stated reasons.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[2] We may only grant a motion that satisfies the motion requirements and which demonstrates eligibility for the requested immigration benefit.