U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 08977685

DATE: JULY 7, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, an information technology business, sought to employ the Beneficiary as a programmer analyst. It requested professional classification of the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The petition was initially approved by the Director of the Texas Service Center. However, the Director of the Nebraska Service Center subsequently revoked the approval after the Petitioner failed to respond to a notice of intent to revoke (NOIR) that discussed elements of suspected fraud in connection with the petition and the associated labor certification. The Beneficiary filed an appeal six years later, which we rejected as untimely. The Beneficiary then filed a motion to reopen and a motion to reconsider,[1] which we denied as improperly filed because there was no merits-based decision to review after our rejection of the appeal.

The matter is now before us on another motion to reopen and motion to reconsider by the Beneficiary. We will dismiss the motions for the reasons discussed herein.

I. ANALYSIS

The threshold issue in the proceedings is whether the Beneficiary has standing to file the motions to reopen and reconsider. Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). However, U.S. Citizenship and Immigrations Services treats beneficiaries as "affected parties" if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. *See also Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). The Beneficiary in this case asserts his standing to file under section 204(j) of the Act and *Matter of V-S-G-*. We do not agree.

[1] A motion to reopen must state new facts and be supported by documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must demonstrate 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. *See* 8 C.F.R. § 103.5(a)(3).

The I-140 petition was initially approved in August 2007, and the Beneficiary filed an application to adjust status (Form I-485) in the same month. The Nebraska Service Center issued the NOIR to the Petitioner in June 2012, and the petition's approval was revoked following the Petitioner's non-response on August 21, 2012. The revocation decision informed the Petitioner that it could file an appeal with the AAO or a motion to reopen or reconsider with the Nebraska Service Center, in either case within 18 days of the date of the revocation. No appeal or motion was filed by the Petitioner. The Beneficiary's I-485 application was also denied in August 2012, right after the revocation decision on the I-140 petition. No motion to reopen or reconsider was filed by the Beneficiary on his I-485 application.

Based on the date of revocation in 2012, the Beneficiary was not entitled under the law to receive a separate NOIR or notice of the revocation from USCIS. Not until 2017, when the AAO's Adopted Decision in *Matter of V-S-G-, Inc.* was issued, did an "affected party" beneficiary gain standing to receive a separate NOIR and notice of revocation. *See* USCIS Policy Memorandum PM-602-0152, *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* (Nov. 11, 2017), http://www.uscis.gov/laws/policy-memoranda. Moreover, *V-S-G-* did not accord the Beneficiary retroactive standing in 2017 to file an appeal which, under applicable regulations, had to be filed by the Petitioner no later than September 2012.

Accordingly, the Beneficiary does not have standing to file an appeal or motion in this matter. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B).

The Beneficiary asserts that the law allows for motions to be filed on decisions issued in error, and cites the regulation at 8 C.F.R § 103.5(a)(1)(i) which provides, in pertinent part, that:

> . . . when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision. . . . Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before the 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.

The regulations go on to state that "[t]he official having jurisdiction [of a motion to reopen or reconsider] is the official who made the latest decision in the proceeding." 8 C.F.R § 103.5(a)(1)(ii).

The Beneficiary contends that his initial motion(s), contesting our rejection of the untimely appeal of the revocation decision, were improperly transferred from the Nebraska Service Center to the AAO. The Beneficiary claims that his motion(s) should have stayed at the Nebraska Service Center for the Director to decide whether to reopen or reconsider in accordance with the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2), which provides that:

> If an untimely appeal meets the requirements of a motion to reopen as described in § 103.5(a)(2) of this part or a motion to reconsider as described in § 103.5(a)(3) of this

part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

According to the Beneficiary, therefore, the AAO should not have rejected the appeal as untimely, and should now grant the Beneficiary's motion(s) by reversing our denial of the previous motions and returning this matter to the Nebraska Service Center for an adjudication of the untimely appeal in compliance with the foregoing regulations.

We are not persuaded. The Beneficiary's Form I-290B, Notice of Appeal or Motion, designated as an appeal rather than a motion, was filed on October 25, 2018, more than six years after the revocation decision, and almost one full year after the AAO's issuance of *Matter of V-S-G-, Inc.* The appeal was initially sent to the Texas Service Center, subsequently transferred to the Nebraska Service Center, and then transferred to the AAO. Thus, the appeal was before the Nebraska Service Center, the office that issued the revocation decision, before being transferred to the AAO. The Nebraska Service Center was under no legal obligation to treat the untimely appeal as a motion for the purpose of adjudicating it on the merits. The regulation at 8 C.F.R § 103.5(a)(1)(i) states that "the official having jurisdiction **may, for proper cause shown**, reopen the proceeding or reconsider the prior decision [emphasis added]." Thus, the burden is on the appellant and the Director's decision is discretionary. In this case, since the deadline for the *Petitioner* to file an appeal or motion after the revocation decision was in September 2012 and the standing granted beneficiaries in limited circumstances by the *V-S-G-* decision in 2017 was not retroactive, we conclude that the Director of the Nebraska Service Center properly exercised his discretion not to reopen or reconsider the revocation decision from 2012 based on an untimely and improper appeal filed by the Beneficiary, a non-party, in 2018.

The Beneficiary requests a refund of the filing fees for his two motions to reopen and reconsider based on the argument that his preceding appeal was mishandled by USCIS. "Filing fees generally are non-refundable and ... must be paid when the benefit request is filed." *See* 8 C.F.R. §103.2(a)(1). As discussed in this decision, there has been no procedural error in these proceedings. Therefore, the filing fees will not be refunded.

II. CONCLUSION

The Beneficiary does not have standing in this matter to file a motion to reopen. Furthermore, even if he had standing, which he does not, the Beneficiary has not stated any new facts in support of his motion to reopen. Nor has the Beneficiary shown that our previous decisions rejecting the appeal and denying the initial motion to reconsider were based on any incorrect application of law or policy. Likewise, the Beneficiary has not shown that the Nebraska Service Center committed any error of law or policy in declining to treat his late filed appeal as a motion to reopen or reconsider. Accordingly, the current motion(s) will be dismissed.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.