U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-I-T-C-

DATE: JUNE 19, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development and computer consulting services, sought to employ the Beneficiary as a programmer analyst. It requested his classification under the third-preference, immigrant category as a professional. 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" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. *See* section 205 of the Act, 8 U.S.C. § 1155 (allowing U.S. Citizenship and Immigration Services (USCIS) to revoke a petition's approval "[a]t any time" for "good and sufficient cause"). The Director concluded that the Petitioner demonstrated neither the *bona fides* of the job offer, nor the company's required ability to pay the combined proffered wages for this and other petitions. We rejected the Beneficiary's appeal as untimely.[1]

The matter is again before us on the Beneficiary's motion to reconsider. The Beneficiary asserts here, as it did on appeal, that we must treat him as an "affected party" in these proceedings under *Matter of V-S-G-*, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

Upon review, we will deny the motion.

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[1] We note that in rejecting the appeal as untimely we made no finding as to whether the Beneficiary can be considered an affected party in these proceedings and was therefore entitled to file the appeal. On appeal and again on motion, the Beneficiary argues that *Matter of V-S-G-* requires us to accept his filing. *Matter of V-S-G-*, Adopted Decision 2017-06. Beneficiaries generally cannot file appeals on their own behalf. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (excluding a beneficiary from being an "affected party" with legal standing in a proceeding). In *Matter of V-S-G-*, however, we held that USCIS must treat beneficiaries in revocation proceedings as affected parties if they qualify for "portability" under section 204(j) of the Act and properly requested to "port" to a new job or employer. *Matter of V-S-G-*, Adopted Decision 2017-06, at 14. The record, however, does not establish *Matter of V-S-G-*'s applicability to the Beneficiary. We did not issue *Matter of V-S-G-* decision until 2017. Thus, USCIS policy did not require the Director, in 2013, to determine the Beneficiary's eligibility as an affected party or to issue the NOIR and revocation decision to the Beneficiary. Further, the revocation proceedings ended in 2013 after the Director issued his decision and the Petitioner did not appeal.

I. LAW AND ANALYSIS

The motion to reconsider[2] in this case is based on our previous rejection of the Beneficiary's appeal as untimely. However, the Petitioner did not cite to any regulation that allows for a motion to be filed on a rejected appeal. When we reject an appeal, there is no merits-based decision for us to review and therefore no basis for a motion to reconsider. As such, the motion must be denied as improperly filed.

Even if we were to accept the motion, the motion could not be granted as it does not establish that the appeal was rejected in error. A successful motion to reconsider must establish a decision's misapplication of law or policy based on the record at that time. 8 C.F.R. § 103.5(a)(3). If challenging a decision that USCIS mailed, an affected party must file an appeal within 33 days of the decision's issuance. 8 C.F.R. §§ 103.3(a)(2)(i), 103.8(b). "An appeal which is not filed within the time allowed must be rejected as improperly filed." 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*).

Here, the record indicates the Director's mailing of the revocation decision to Petitioner's counsel in November 2013. *See* 8 C.F.R. § 292.5(a) (requiring USCIS to serve decisions on attorneys of record). The Beneficiary submitted his appeal more than four years later, in April 2018. The appeal was therefore untimely. On motion, the Beneficiary erroneously cites to 8 C.F.R. 103.5(a)(1)(i) for the proposition that any appeal or motion may be accepted when untimely. The Beneficiary misinterprets the cited regulation which specifically states that a motion to reopen "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;" but the same exception does not exist for appeals. As the appeal was untimely filed, it was properly rejected.

II. CONCLUSION

The regulations do not allow for a motion to be filed on a rejected appeal. Thus, the motion before us was improperly filed and must be denied.

ORDER: The motion to reconsider is denied.

Cite as *Matter of A-I-T-C-*, ID# 3606817 (AAO June 19, 2019)

[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. 8 C.F.R. § 103.5(a)(3).