U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-, LLC

DATE: JUNE 25, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a restaurant specializing in Italian foods and pastries, seeks to temporarily employ the Beneficiary as the chief executive officer of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. *See* 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 an executive or managerial capacity.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity within one year of approval of the new office petition. We rejected the Petitioner's appeal of the Director's decision as untimely and denied the four subsequent combined motions to reopen and reconsider, each time finding that the Petitioner did not overcome the reasons for rejection of the appeal.

The matter is now before us on a fifth combined motion to reopen and motion to reconsider. In support of its motion, the Petitioner again attempts to invoke a federal procedure doctrine which it claims gives us the discretionary authority to excuse the untimely filing of the appeal.

Upon review, we will deny the combined motion to reopen and 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 is based on legal grounds and must (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy; and (3) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

[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.

II. ANALYSIS

The issue in this matter is whether we properly denied the Petitioner's fourth combined motion to reopen and reconsider in our prior decision, which was issued on November 30, 2017.

For the reasons discussed below, we will deny the motion to reopen and the motion to reconsider. While the current motion includes newly submitted assertions that we incorrectly applied the law and USCIS policy to the facts presented, the Petitioner has not shown proper cause for reopening or reconsideration.

A. Motion to Reopen

First, as in our prior decision, we note that the Petitioner does not dispute the conclusion in four previous decisions that it filed an untimely appeal. The Director of the Vermont Service Center denied the petition and served the unfavorable decision by mail on March 31, 2015. USCIS received the Petitioner's appeal on May 5, 2015, 35 days after the service date of the unfavorable decision.[2] Accordingly, we rejected the appeal as untimely. 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*). The Petitioner does not contend in this motion or in its prior motions that the appeal was actually received by USCIS at the designated filing location on or before the day the appeal was due.

As in its prior motion, the Petitioner invokes the Federal Rules of Civil Procedure – specifically, the Doctrine of Excusable Neglect – to support the contention that we committed legal error when we rejected the Petitioner's untimely filed brief. However, the Petitioner made this argument in support of its previously filed motion; we then acknowledged and addressed this argument in our decision dated November 30, 2017. We found that a concept based in the Federal Rules of Civil Procedure does not apply to our appellate matters and pointed out that we derive our appellate authority primarily from a delegation by the Secretary of Homeland Security.[3]

The Petitioner also restates the circumstances surrounding its untimely filing, summarizing the same points that it made in support of its prior motions. However, we interpret "new facts" to mean facts that are relevant to the issue(s) that are raised on motion and that have not been previously submitted in the proceeding. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." That said, the Petitioner refers to a newspaper article where it

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[2] Appeals are due 30 days after service of the decision. 8 C.F.R. § 103.3(a)(2)(i). Because the Director's decision was served by mail, three days were added to the prescribed 30-day period. 8 C.F.R. § 103.8(b). Because the due date for the appeal fell on a Sunday, the appeal was due on the next business day, Monday, May 4, 2015. 8 C.F.R. § 1.2.

[3] *See* DHS Delegation Number 0150.1 (effective March. 1, 2003). The Secretary may delegate any authority or function to administer and enforce the immigration laws to any official, officer, or employee of the DHS. 6 U.S.C. § 112(b)(1); 8 C.F.R. § 2.1. Courts have upheld our appellate authority based on the delegation. *See United States v. Gonzalez & Gonzalez Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1083-84 (N.D. Cal. 2010) ("[T]he Secretary's delegation of appellate jurisdiction to the AAO is valid without publication in the Federal Register, so long as it is a rule of agency organization, procedure or practice."); *see also Rahman v. Napolitano*, 814 F. Supp. 2d 1098, 1103 (W.D. Wash. 2011).

claims "the Immigration Service has formally stated its displeasure" in relying on the United States Postal Service. The Petitioner contends that the article should be deemed as "new evidence" in support of this motion. We disagree and find that the article does not excuse the Petitioner's failure to comply with filing deadlines that are set forth in the regulations or other applicable law.

In sum, we find that in this proceeding, as in its previously filed motion, the Petitioner has not submitted new facts or evidence; it therefore has not met the requirements of a motion to reopen. For this reason, the motion to reopen is denied.

B. Motion to Reconsider

In support of the current motion to reconsider, the Petitioner contends that our November 2017 decision was "based upon a mistaken concept and pronouncement." In support of this argument, the Petitioner cites to the instructions for the Form I-290B, Notice of Appeal or Motion, pointing out that we have discretionary authority to excuse an untimely filed motion to reopen if the Petitioner shows that the filing meets a specific set of conditions. We find, however, that these instructions are not relevant in the matter at hand where none of the Petitioner's motions were deemed untimely. Rather, the Petitioner seeks reconsideration and reopening of a matter that stems from an untimely filed *appeal.* Neither the Form I-290B instructions nor the regulations indicate that we have discretionary authority to consider an untimely filed appeal under any circumstances.

The Petitioner also cites several published circuit and district court decisions to support its reliance on a doctrine that derives its authority from the Federal Rules of Civil Procedure. However, as we discussed in our November 2017 decision, neither the doctrine nor the federal rules apply to these proceedings, which stemmed from the filing of an untimely appeal in the case of a nonimmigrant petition. Contrary to the Petitioner's contentions, the federal rules govern only civil actions and proceedings that arise in the United States district courts. *See* Fed. R. Civ. P. 1. Moreover, as repeatedly discussed in several of our prior decisions, there are express regulations, which require the Petitioner to file an appeal within 33 calendar days of the date that USCIS served the unfavorable decision by mail. 8 C.F.R. §§ 103.3(a)(2)(i); 103.8(b). Neither the Act nor the pertinent regulations grant us the authority to extend the time limit for filing an appeal.

The Petitioner has not submitted evidence that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be denied.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause to reopen the proceeding or proper cause for reconsideration.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of D-, LLC*, ID# 1406558 (AAO June 25, 2018)