U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11244570

Date: NOV. 30, 2020

Motion on Administrative Appeals Office Decision

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

The Petitioner, a logistics company that also exports modified vehicles, seeks to continue the Beneficiary's temporary employment as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity. The Director then reopened the proceeding on the Petitioner's motion and issued a denial on the same grounds. We dismissed the Petitioner's appeal of that decision. The Petitioner subsequently filed a combined motion to reopen and reconsider, which we dismissed as untimely filed.[2] The matter is now before us on a second motion to reopen and reconsider in which the Petitioner contends that the lateness of its prior untimely motion may be excused because such lateness was beyond its control.

Upon review, we will reopen the matter in order to consider the merits of the previously filed motion to reopen. However, for the reasons discussed below, the combined motion currently before us will be dismissed and the petition will remain denied.

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from September 1, 2017 to August 31, 2018. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

[2] The record reflects that the Petitioner initially mailed its previous motion filing to our office despite our clear instruction that motions should not be mailed directly to the AAO. Accordingly, we returned the motion to the Petitioner. Although the Petitioner subsequently mailed the motion to the address indicated on the instructions for the Form I-290B, Notice of Appeal or Motion, the motion was not received at the designated filing location within the allowed 33-day filing period, thus causing the motion to be filed untimely.

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).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reconsideration, 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

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). In this case, the prior decision at issue is our dismissal of the previous combined motion, which was untimely filed.

A. Motion to Reconsider

Although the Petitioner indicates that it is filing a combined motion to reopen and reconsider, the Petitioner does not contend that the dismissal of the previous motion was incorrect based on the evidence of record at the time of the initial decision. The Petitioner concedes that the previous motion was untimely and does not claim that our dismissal decision was based on an incorrect application of law or policy. The motion to reconsider does not satisfy the regulatory requirements at 8 C.F.R. § 103.5(a)(3) and will be dismissed.

B. Motion to Reopen

The Petitioner's motion to reopen is based on a claim that the delayed filing of its previous motion may be excused at our discretion. Specifically, the regulations permit the review of an untimely filed motion to reopen where the untimeliness is shown to have been reasonable and beyond a petitioner's control. See 8 C.F.R. § 103.5(a). The Petitioner has established with the current motion to reopen that the late filing of its first motion to reopen was beyond its control. We will therefore reopen the matter for the purpose of reviewing the merits of the first motion to reopen.[3]

The sole issue we will discuss is whether the Petitioner submitted new facts or evidence in support of the previously filed motion to reopen demonstrating that the Beneficiary would be employed in an executive capacity.

[3] There is no comparable provision with respect to a motion to reconsider. 8 C.F.R. § 103.5(a). As such, we cannot excuse the untimely filing of the Petitioner's previous motion to reconsider and will not address the merits of that motion here.

1. AAO Appellate Decision

In our appellate decision, we discussed the Beneficiary's job duties, the Petitioner's staffing levels and organizational structure, the duties performed by the Beneficiary's subordinates, the nature of the business, and evidence of the company's business activities, and concluded that the Petitioner did not meet its burden to establish that the Beneficiary would be employed in an executive capacity as defined at section 101(a)(44)(B) of the Act. With respect to the nature of the Petitioner's business activities, we observed that there was a lack of clarity and consistency in the record, noting, for example, discrepancies between government filings such as business licenses and actual invoiced activities. We further determined that there was a lack of evidence regarding the Beneficiary's day-to-day duties and those of his subordinates and the record did not support the multi-tiered management structure depicted in the Petitioner's organizational chart.

2. Previous Motion to Reopen

In support of its prior motion to reopen, the Petitioner provided a declaration from the Beneficiary and indicated that it was submitting copies of previously submitted evidence intended to clarify the nature of the company's business activities. A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

The Beneficiary's declaration was limited to a discussion of the Petitioner's business activities. For example, he explained why the Petitioner's business license indicates that the company is engaged in the "wholesale distribution of ice cream machinery" despite a lack of supporting evidence that the company engages in this activity. The Petitioner's motion did not present new facts related to the day-to-day duties performed by the Beneficiary in his capacity as CEO or the duties performed by the Petitioner's employees within the context of the company's actual business activities. However, evidentiary deficiencies in these areas significantly contributed to our dismissal of the Petitioner's appeal.

Accordingly, upon review, the Petitioner's first motion to reopen did not include new facts that adequately addressed the reasons for dismissal of the appeal and did not establish that the appeal should be reopened. For this reason, we will not disturb our decision to dismiss the appeal and the petition will remain denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.