U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-, INC.

DATE: OCT. 17, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a provider of information technology services, sought to employ the Beneficiary as a programmer analyst. It requested his classification under the third-preference immigrant category as a skilled worker or professional. *See* Immigration and Nationality Act (the Act) sections 203(b)(3)(A)(i), (ii), 8 U.S.C. §§ 1153(b)(3)(A)(i), (ii). These employment-based, "EB-3" categories allow a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or experience, or a bachelor's degree.

After the filing's initial grant in the professional classification, the Director of the Nebraska Service Center revoked the petition's approval. Concluding that the Petitioner willfully misrepresented a material fact involving the accompanying certification from the U.S. Department of Labor, the Director invalidated the certification. We rejected the Beneficiary's following appeal as untimely.[1]

The matter is before us again on the Beneficiary's motions to reopen and reconsider.

I. LAW AND ANALYSIS

The motion to reopen and reconsider[2] in this case are based on our previous rejection of the Beneficiary's appeal as untimely. However, the Beneficiary 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 reopen or reconsider. As such, the motions must be denied as improperly filed.

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[1] Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)1)(iii)(B) (excluding a beneficiary of a visa petition as an "affected party"). U.S. Citizenship and Immigration Services (USCIS), however, 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 Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017). The Beneficiary here asserts his standing to file under *V-S-G-,* but we note that the Beneficiary has not been recognized as an affected party.

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

Even if we were to accept the motions, the motions could not be granted as they do not establish that the appeal was rejected in error. Citing a Department of Homeland Security regulation, the Beneficiary argues that we should have treated his appeal as a motion. *See* 8 C.F.R. §103.3(a)(2)(v)(B)(*2*) (requiring treatment of an untimely appeal as a motion if it meets requirements for reopening or reconsideration). Contrary to the Beneficiary's argument, however, the regulation requires the official who made the unfavorable decision - not the AAO - to consider treating an untimely appeal as a motion. As such, the record does not demonstrate that the decision to reject the appeal was erroneous.

II. CONCLUSION

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

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of O-, Inc.*, ID# 5678541 (AAO Oct. 17, 2019)