U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-S-&S-, INC.

DATE: OCT. 31, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a roofing contractor, seeks to employ the Beneficiary as a construction foreman. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition on the ground that it was not accompanied by a complete labor certification, a form of required initial evidence. The Petitioner filed a motion to reopen,[1] which, after being initially rejected for being filed on the wrong form version, was ultimately dismissed by the Director on the ground that it was not filed within the 30-day time period prescribed by the regulation at 8 C.F.R. § 103.5(a)(1)(i).[2] Since 43 days had passed between the date of the decision and the receipt of the properly filed motion to reopen, the Director found that the motion was not timely filed. The matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal.

The decision before us on appeal is the decision on the Petitioner's motion to reopen, rather than the merits of the underlying petition. As such, the only issue before us is whether the Director properly found that the motion was untimely.

On appeal, the Petitioner asserts that the Director should have exercised his discretionary authority under 8 C.F.R. § 103.5(a)(1), which allows USCIS to excuse the failure to file a motion to reopen by the regulatory deadline if a petitioner demonstrates that the delay was reasonable and beyond its control. According to the Petitioner, its late filing should be excused in this case because the outdated Form I-290B it initially used had only recently expired, USCIS had not posted an alert about the updated Form I-290B, and the rejection notice from USCIS was received too late for a timely motion to be filed. The Petitioner also asserts that USCIS should have accepted its original

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

[2] The regulations actually allowed 33 days for the filing since the Petitioner was served the denial decision by mail. *See* 8 C.F.R. § 103.8(b).

submission, as a timely filing of the motion to reopen because neither the Act nor the regulations mandate that the current version of the Form I-290B be used.

As noted, it is in the Director's discretion to accept a late filed motion to reopen, if the Director finds the delay to be reasonable and beyond the petitioner's control. Here, the Director declined to exercise his discretion to accept the late motion to reopen. The Petitioner has not demonstrated that the Director erred in that determination. We will therefore not disturb the Director's decision.

The Petitioner further argues that if we do not agree that the Director should have accepted the late motion, we should nonetheless exercise our authority under 8 C.F.R. § 103.5(a)(5) to reopen this proceeding on our own motion. We have reviewed the matter thoroughly, and based on the record at hand, we decline to exercise our authority under 8 C.F.R. § 103.5(a)(5).[3]

The appeal will be dismissed for the above state reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of J-S-&S-, Inc.,* ID# 6547045 (AAO Oct. 31, 2019)

[3] The Petitioner has not demonstrated that the Director denied the petition in error. According to the Petitioner, the Director improperly "relied on the new October 1, 2018 USCIS policy memo" allowing petitions to be denied if the initial evidence was insufficient to show eligibility, instead of issuing a request for evidence allowing the Petitioner to remedy any deficiencies in its initial evidence. The Petitioner's contention that the Director improperly relied on a USCIS memorandum dated October 1, 2018, is unfounded. No reference to this memorandum appears anywhere in the decision. To the contrary, the Director clearly indicated in his decision that the grounds for denying the petition rested in the federal regulations at 8 C.F.R. §§ 103.2(a)(1) and 103.2(b)(8)(ii) which specify that every benefit request to the Department of Homeland Security must be executed in accordance with the form instructions and if all required initial evidence is not submitted with a benefit request to USCIS, USCIS has the discretion to deny the benefit request for lack of initial evidence. The record shows that the Petitioner's I-140 petition was not accompanied by all required initial evidence because the labor certification was incomplete. The Director properly exercised his authority under the regulations to deny the petition for failure to comply with the regulatory requirements for initial evidence.