U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10214604

Date: SEPT. 8, 2020

Motion on Administrative Appeals Office Decision

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

The Petitioner, a provider of solutions to detect pipeline leaks, intrusions, or obstructions, seeks to temporarily employ the Beneficiary in the United States as its president under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the Vermont Service Center denied the petition concluding the Petitioner did not establish that it was doing business as defined by the regulations. The Director further determined the Petitioner did not demonstrate that the Beneficiary would be employed in the United States in a managerial or executive capacity.

The Petitioner later appealed the Director's decision and we summarily dismissed the appeal. The Petitioner then filed a motion to reopen and a motion to reconsider and we denied both as untimely. The Petitioner again filed a motion to reopen and motion to reconsider that we also dismissed. The matter is now before again on a motion to reopen and a motion to reconsider.

On motion, the Petitioner contends that it untimely filed its initial motion to reopen and motion to reconsider because "the beneficiary had to attend to the wellbeing of his family at a moment when the health of his son was at risk."

Upon review, we will dismiss the motion to reopen and the motion to 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 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A. Motion to Reopen

In support of its latest motion to reopen, the Petitioner asserts it filed untimely motions to reopen and reconsider in December 2018 because the Beneficiary had to "attend to the wellbeing of his family," specifically his son. The Petitioner explains that the Beneficiary had to work from his family residence in Tennessee, as opposed to the company's office in [redacted] Louisiana, around the date upon which its initial motions were required to be filed in a timely matter. The Petitioner does not dispute the lateness of its initial motions, which were required to be filed by November 26, 2018.[1] It again submits evidence it asserts demonstrates that we should excuse this untimeliness as beyond its reasonable control.

In support of its assertions, the Petitioner provides additional evidence, including a school nurse report, as well as a letter from the same school indicating that the Beneficiary's son "suffered an injury to his thumb while playing [basketball] at recess" in September 2018. It also provides a doctor's report and a radiology report from this same time, as well as a doctor's report from April 2019 specific to his son experiencing symptoms from asthma. The Petitioner contends that these events involving his son led the Beneficiary, the president of the Petitioner, to work from home in Tennessee from October 26, 2018 through the week of Thanksgiving 2018. It states that as a result of the Beneficiary's absence from the Petitioner's office during this time, it did not receive notice of our appeal decision dated October 23, 2018.

1. Timeliness of the Petitioner Initial Motion to Reconsider

As discussed in our previous decision, the regulations require that a motion to reconsider be filed within 30 days of the decision that the motion seeks to reconsider, including three days for service by mail. 8 C.F.R. § 103.5(a)(1)(i); 8 C.F.R. § 103.8(b). There is no exception to this requirement.[2] As such, since the Petitioner's initial motion to reconsider was filed untimely and the regulations provide no exception to this timeliness requirement, we consider our previous decision as to this issue consistent with law.

2. Timeliness of the Initial Motion to Reopen

---

[1] We summarily dismissed the Petitioner's appeal on October 23, 2018 and the cover page included instructions stating:

> Motions must be filed on a Form I-290B, Notice of Appeal or Motion, within 33 days of the date of this decision. This time period includes three days added for service by mail.

Therefore, any motion was due on Sunday, November 25, 2018; but, if the last day of the designated 33 days to file a motion falls on a weekend, as in this case, the regulations allow us to extend the deadline to file a motion to the first business day following this date. As such, the last date by which a motion to reconsider or motion to reopen could have been filed timely was Monday, November 26, 2018. The Petitioner's initial motion to reopen and motion to reconsider were received on December 7, 2019, or 45 days following our appeal decision.

[2] This is in contrast to the regulations related to the timely filing of a motion to reopen which provide that untimeliness may be excused "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." 8 C.F.R. § 103.5(a)(1)(i).

As discussed, in contrast to the regulations related to the timely filing of a motion to reconsider, the regulations specific to a motion to reopen indicate that untimeliness may be excused "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." 8 C.F.R. § 103.5(a)(1)(i). As such, based on the newly submitted evidence, we will again consider whether the Petitioner's untimely motion to reopen should be excused.

Upon review, we conclude that we were correct in denying the Petitioner's initial motion to reopen as untimely and that we were subsequently correct in not excusing this untimeliness as beyond its reasonable control. The Petitioner provides inconsistent assertions on the record as to why it filed an untimely motion to reopen in December 2018. In support of its previous motion, the Petitioner stated that the Beneficiary was forced to work from his home due to the Thanksgiving holiday indicating he was spending this time with, and caring for, his wife and children. The Petitioner did not specifically discuss the health of the Beneficiary's son nor did it submit evidence related to this, beyond generically indicating that he was caring for his family. As an initial consideration, this inconsistency in the Petitioner's and Beneficiary's assertions leaves substantial question as to the veracity of its statements and whether the untimeliness of its initial motion to reopen was beyond its reasonable control. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id.

In addition, beyond the Petitioner's and Beneficiary's apparent inconsistent statements, the newly submitted evidence provided in support of this motion does not demonstrate that the untimeliness of its initial motion should be excused as being beyond its reasonable control. First, it is not clear how a doctor's visit by the Beneficiary's son for asthma symptoms from April 2019 relates to filing a timely motion in November 2018. In addition, the same could be said about a thumb injury to the Beneficiary's son in September 2019 approximately one month prior to our appeal decision issued a in October 2018. Although the apparent thumb injury to the Beneficiary's son was certainly unfortunate, the supporting evidence provided with this motion, including a doctor's report and radiology results, reflect that this injury was rather minor.[3]

As such, as we discussed in our prior decision, it does not appear that it was beyond the Petitioner's reasonable control to make arrangements for another employee or individual, beyond the Beneficiary, to manage or monitor its correspondence during his absence from the office, regardless of the reason. Further, although we sympathize with the Beneficiary and his son, regular and reasonably foreseeable family obligations do not form the basis as events "beyond the control of the applicant or petitioner" referenced in the regulations.

Therefore, we conclude that our previous decision to deny the Petitioner's initial motion to reopen as untimely was correct.

B. Motion to Reconsider

[3] The doctor's summary from September 20, 2018 indicates that the Beneficiary's son was to wear an ACE bandage on this affected thumb, apply a cold compress, and take Motrin as needed. The radiology report reflected no significant injury.

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). However, as we have noted, the Petitioner filed the previous motion to reopen and motion to reconsider 45 days after the date the prior decision had been issued. As discussed, there is no provision in the regulations excusing an untimely motion to reconsider; as such, our prior decision to deny the Petitioner's first motion to reconsider was clearly consistent with applicable law.

The only remaining issue is whether we applied the law correctly in denying the Petitioner's previous motion to reopen as untimely based on the evidence available at that time. However, the Petitioner does not clearly articulate how our previous decisions are inconsistent with applicable law or policy based on the facts at the time. For instance, at the time of its initial untimely motion to reopen, the Petitioner did not sufficiently articulate why it was untimely filed or why this untimely filing was beyond its reasonable control. Regardless, as we have noted above, we do not find that the Beneficiary's time spent away visiting family or perhaps helping his son with a minor thumb injury is sufficient to excuse an untimely filing. As noted, it is common for businesses to make arrangements for correspondence to be monitored and processed without the presence of their president. Again, the Petitioner's inability to process and respond to correspondence in the absence of the Beneficiary only leaves further uncertainty as to whether it is doing business and operating sufficiently to support him in an executive capacity, the Director's bases for denying the petition. In fact, the Petitioner does not specifically address the Director's decision or our previous summary dismissal of its appeal.[4]

As such, the Petitioner has not established that our previous decisions to deny its initial motion to reopen and motion to reconsider as untimely, and our determination not to excuse this untimeliness, was based on an incorrect application of law or policy.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsidering our prior decision. The motion to reopen and motion to reconsider will be dismissed for the above stated reasons.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[4] We may only grant a motion that satisfies the motion requirements and which demonstrates eligibility for the requested immigration benefit.