U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-H-O-S-, LLC

DATE: SEPT. 25, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a seller of aftermarket car parts, seeks to employ the Beneficiary as its advertising and promotions director. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(B)(3)(A)(ii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on two grounds. The Director found that the Petitioner did not establish its continuing ability to pay the proffered wage of $78,458 per year from the priority date of the petition, March 24, 2016, up to the present, and did not establish that the Beneficiary had the specific skills required by the labor certification. The Petitioner filed an appeal, which we dismissed on the grounds that the evidence submitted on appeal did not establish the Petitioner's ability to pay the proffered wage in 2016 and 2017 or the Beneficiary's qualifications for the job under the terms of the labor certification. The Petitioner then filed a motion to reopen and a motion to reconsider, which we denied as untimely filed. The matter is now before us on another motion to reopen and motion to reconsider. Upon review, we will deny the motions.

I. LAW

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 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). A motion to reconsider must be supported by a pertinent precedent or adopted decision, a statutory or regulatory provision, or a statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security (DHS) policy. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

Our denial of the previous combined motions was based on the fact that they were filed 34 days after the service of our dismissal of the appeal, which did not comply with the regulatory requirement that a motion be filed within 33 calendar days of the service date of our unfavorable decision. *See* 8 C.F.R. §§103.5(a)(1)(i), 103.8(b). The Petitioner was specifically advised of the 33-day filing period for motions on the cover page of our decision dismissing the appeal. Because the Petitioner did not meet this filing deadline, we did not consider the brief or additional evidence submitted with the motions.[1]

With its current motion to reconsider, the Petitioner does not allege that our decision denying the previous motions on the ground that they were late filed was based on any incorrect application of law or policy, as required by 8 C.F.R. § 103.5(a)(3). Nor does the Petitioner cite any precedent or adopted decision, any statutory or regulatory provision, or any statement of USCIS or DHS policy in support of its motion to reconsider. Therefore, we will deny this motion.

On motion to reopen, the Petitioner submits new facts stating that the reason it was late by a day in filing its prior motions was because it waited for one additional paycheck to the Beneficiary to clear the bank and be available as additional evidence of its ability to pay the proffered wage. The Petitioner asks that we excuse the prior late motion to reopen and reexamine our prior eligibility determination. While the regulation at 8 C.F.R. § 103.5(a)(1)(i) does give us the discretion to excuse the late filing of a motion to reopen "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner," no such demonstration has been made by the Petitioner in this case. The Petitioner submitted copies of eight paychecks with its initial motion, so even without that final paycheck the Petitioner could have submitted seven paychecks with a timely filed motion. The Petitioner's choice to delay its motion filing was not reasonable and was not beyond its control. Therefore, we will not exercise our discretion to excuse the late filing of the initial motion to reopen.[2]

[1] The brief did not allege any incorrect application of law or policy in our decision, and thus provided no grounds for a motion to reconsider. The new evidence that accompanied the brief related to the Beneficiary's qualifications for the job offered and the Petitioner's salary payments to the Beneficiary in 2018.

[2] Even if we did exercise our discretion to excuse the late filing of the initial motion to reopen and review that motion and the current motion to reopen on the merits, the evidence submitted is still insufficient to establish the Petitioner's continuing ability to pay the proffered wage from the priority date of March 24, 2016, onward. The Petitioner has supplemented the eight paychecks submitted with the initial motion with one additional paycheck from 2018, a series of sales records and shipping invoices from 2018, and a web page extract in 2018 about its business operation. The prior years of 2016 and 2017 are not addressed, and the Petitioner has still not submitted any annual report, federal tax return, or audited financial statement, the required types of evidence identified in 8 C.F.R. § 204.5(g)(2).

III. CONCLUSION

The Petitioner has not shown proper cause for reopening or reconsideration of our prior decision.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of J-H-O-S-, LLC*, ID# 1829564 (AAO Sept. 25, 2018)