U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 36185710

Date: SEP. 29, 2025

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a public bid procurement specialist, seeks second preference immigrant classification (EB-2) as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

Service Center Operations (SCOPS) denied the petition, concluding that the Petitioner did not establish that she was qualified for classification as an individual of exceptional ability, and did not establish her eligibility for a waiver of the required job offer, and thus of the labor certification, as a matter of discretion. We dismissed the Petitioner's appeal on its merits. The matter is now before us on combined motions to reopen and reconsider. The combined motions were initially rejected when the Petitioner's financial institution did not honor the check submitted to pay the petition's filing fees. The Petitioner has resubmitted the motions with corrected payment and a nunc pro tunc request.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

A motion to reconsider must establish that our prior 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). Because the scope of a motion is limited to the prior decision, we will only review the latest decision in these proceedings. 8 C.F.R. § 103.5(a)(1)(i), (ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

We dismissed the Petitioner's appeal on July 16, 2024. U.S. Citizenship and Immigration Services (USCIS) received the Petitioner's motion to reopen and motion to reconsider on September 13, 2024,[1] 59 days after the date of our appeal decision was issued. On October 18, 2024, USCIS rejected the Petitioner's motion filing because the payment was declined by the bank or financial institution.

The Petitioner now resubmits the rejected filing and requests that the motion be accepted nunc pro tunc. The Petitioner acknowledges that she made "a clerical oversight" or "an administrative error" that resulted "in a missed payment" but asserts that the error "was unintentional and does not reflect any lack of diligence on our part." Apart from this general assertion, the Petitioner has not offered any further explanation or cited to any legal authority showing that this "clerical error" regarding payment warrants nunc pro tunc relief and reopening or reconsideration of the proceeding.

In the immigration context, nunc pro tunc relief should ordinarily be available in the case of agency error. *Yu Biao Chen v. U.S. Atty. Gen.*, 439 F. App'x 874, 876 (11th Cir. 2011) (finding that nunc pro tunc relief is not appropriate where there was no agency error); *see also Edwards v. INS*, 393 F.3d 299, 310 (2d Cir. 2004) (quoting *Ethyl Corp. v. Browner*, 61 F.3d 941, 945 (D.C. Cir. 1995)) (allowing for nunc pro tunc relief only when it is necessary "to put the victim of agency error in the . . . position [they] would have occupied but for the error"). Here, the Petitioner's nunc pro tunc request is based on her own error in failing to submit proper payment for the motion filing. The Petitioner has not demonstrated that the circumstances involve any procedural error by USCIS or injustice resulting from it. Therefore, the Petitioner has not shown that a nunc pro tunc action is not appropriate in this case.

In addition, the Petitioner contends that "[g]iven the timeliness of the original filing and the unintentional nature of the payment oversight, we respectfully request that USCIS accept our [motion][2] as timely filed under the nunc pro tunc doctrine." In support, the Petitioner submits proof of delivery showing that the motion was originally delivered on September 13, 2024, at the designated USCIS location and her own affidavit claiming that she did not receive the appeal decision in time and she submitted the motion "within 33 days *from the date I received the decision*, rather than from the original dismissal date" (emphasis added).

However, the Petitioner's claims are not persuasive. The proof of delivery submitted by the Petitioner shows that the motion filing, received 59 days after the date of our appeal decision, was untimely per 8 C.F.R. § 103.5(a)(1)(i), which requires motions to reopen or reconsider be filed within 30 days of the decision that the motions seek to reconsider or reopen (or within 33 days if the decision is served by mail per 8 C.F.R. § 103.8(b)).

USCIS may, in its discretion, excuse the untimely filing of a motion to reopen where the record demonstrates that the delay was reasonable and beyond the control of the applicant. 8 C.F.R. § 103.5(a)(1)(i). There is no comparable authority to excuse an untimely filed motion to reconsider. *See id.* Accordingly, the late filing of the Petitioner's motion to reconsider may not be excused. With respect to the motion to reopen, the Petitioner has the burden to establish that the late filing was

[1] The date of filing is not the date of mailing, but the date USCIS received the intended motion: (1) completed, signed, and accompanied by the required fee as specified by the Form I-290B, Notice of Appeal or Motion (Form I-290B) instructions; and (2) at the location that those instructions designate for filing motions. *See* 8 C.F.R. § 103.2(a)(1) and (6).
[2] The Petitioner repeatedly refers to the motion filing as "appeal" in the brief accompanying the motion to reopen and motion to reconsider.

reasonable and beyond its control and should therefore be excused. 8 C.F.R. § 103.5(a)(1)(i). But the Petitioner has not met her burden. USCIS records do not indicate that the mailing addressed to the Petitioner, or the separate mailing addressed to the Petitioner's representative, was returned to us as "undeliverable," and the decisions were mailed to the addresses on record.[3] Moreover, the Petitioner's explanation that she "did not receive the official decision letter within the standard time frame" does not sufficiently demonstrate that the late filing was reasonable or beyond the Petitioner's control. Therefore, the late filing of the motion to reopen will not be excused. *See* 8 C.F.R. §§ 103.5(a)(1), 103.8(b).

Based on the foregoing, the combined motions will be dismissed because they are untimely filed. The Petitioner has not shown that she is eligible for nunc pro tunc relief as it was the Petitioner's error that resulted in untimely filing of the motions.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

NOTICE: Aliens who are not lawfully present, or who are otherwise inadmissible or deportable, may be subject to the commencement of removal proceedings under section 240 of the Act through the issuance of a Form I-862, Notice to Appear. Those proceedings may result in their removal from the United States and possible ineligibility for future visas or other immigration benefits.

[3] Under 8 C.F.R. § 103.8(a)(1)(i), routine service consists of mailing the notice by ordinary mail addressed to the affected party and his or her attorney or representative of record at his or her last known address.