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U.S. Citizenship
and Immigration
Services

A7

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File: SRC 03 005 50043 Office: TEXAS SERVICE CENTER Date: FEB 01 2008

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF BENEFICIARY:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: On November 18, 2002, the Director of the Texas Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on February 16, 2006, the AAO dismissed the appeal. On April 18, 2006, a motion to reconsider the AAO's decision was filed with the Texas Service Center. On September 10, 2007, the AAO dismissed the motion to reconsider pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(A), (C), and (E), and 103.5(a)(4). On October 10, 2007, the petitioner filed a motion to reopen and reconsider the AAO's decision to dismiss the motion to reconsider. Upon review, the AAO will grant the motion but will affirm its prior decision to dismiss the motion to reconsider.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a manager of construction trade workers as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company, claims to be engaged in providing construction related services.

The director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with a foreign employer. The AAO dismissed the subsequently filed appeal of the director's decision on February 16, 2006, and a motion to reconsider the AAO's decision was filed on April 18, 2006.

On September 10, 2007, the AAO dismissed the motion to reconsider for failing to meet applicable requirements. 8 C.F.R. § 103.5(a)(4). Specifically, the AAO concluded (1) that the motion to reconsider was untimely; (2) that the motion to reconsider was not signed by the affected party or the attorney or representative of record; (3) that the motion to reconsider failed to state whether or not the unfavorable decision was the subject of any judicial proceedings; and (4) that the motion was not submitted to the office maintaining the record upon which the unfavorable decision was made. 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(A), (C), and (E).

On October 10, 2007, counsel to the petitioner filed the instant motion to reopen and reconsider. Counsel asserts (1) that the motion to reconsider was timely filed or, if not, that this tardiness should be excused by the AAO under the circumstances; (2) that counsel was authorized to file the motion to reconsider on behalf of the petitioner; (3) that the failure to state whether or not the unfavorable decision was the subject of any judicial proceedings was "harmless error" and may also be excused; and (4) that the failure to submit the motion to the proper office was cured upon its submission to the Texas Service Center.

The first issue to be considered is whether the AAO erred in dismissing the April 18, 2006 motion to reconsider as untimely.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states in pertinent part that:

Any motion to reconsider an action by [Citizenship and Immigration Services (CIS)] filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider.

In this matter, the motion, which was clearly captioned as a motion to reconsider, was filed with the Texas Service Center on April 18, 2006, or 61 days after the decision of the AAO. Therefore, the AAO concluded that it was obligated to dismiss the motion as untimely. 8 C.F.R. § 103.5(a)(4). The AAO further explained its decision as follows:

The record indicates that an attempt to file the instant motion was made directly with the AAO on April 10, 2006, 53 days after the decision of the AAO. It is noted that the attempt to file this motion directly with the AAO did not establish a receipt date of April 10, 2006. As clearly explained in the AAO's decision dated February 16, 2006, further inquiries regarding the matter should have been made to the Texas Service Center. Moreover, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(E) clearly requires that this motion be filed at the office maintaining the record, i.e., the Texas Service Center, for forwarding to the official having jurisdiction, i.e., the AAO. Therefore, the receipt date for the instant motion was the day it was received by the Texas Service Center – April 18, 2006. Even if the inappropriate delivery of the motion to the AAO on April 10, 2006 established an earlier receipt date, the motion was still untimely because it was delivered to the AAO 53 days after the AAO's decision. 8 C.F.R. § 103.5(a)(1)(i).

Furthermore, counsel's argument that the AAO's receipt of the motion on April 10, 2006 combined with the alleged mailing of the decision on March 8, 2006 establishes that the motion was timely filed on the 33rd day is without merit. First, as explained above, the AAO's receipt of the motion did not establish a receipt date on April 10, 2006. Therefore, even assuming a notice date of March 8, 2006, the motion was still untimely since it was not received by the Texas Service Center until April 18, 2006, or 41 days after March 8, 2006. Second, the proper date for the AAO's decision is February 16, 2006 and not March 8, 2006, as alleged by counsel. As admitted by counsel and as indicated in the record, the AAO properly gave routine notice by mail at the time the decision was made to the petitioner's last known address, i.e., [REDACTED] 8 C.F.R. §§ 103.5a(a)(1) and (d); 8 C.F.R. § 103.2(b)(19). As the petitioner filed the appeal to the AAO *pro se*, the AAO did not send a copy to counsel. However, this address ceased to be the petitioner's address at some point prior to the dismissal of the appeal by the AAO on February 16, 2006, and the decision was returned to the AAO by the United States Post Office as undeliverable. It must be noted that the record is devoid of any evidence that the petitioner ever gave notice to CIS, including the AAO, that its address had changed. To the contrary, the AAO properly used the address used by the petitioner in the Form I-290B and its supporting documentation. After receiving the returned decision, the AAO then sent a copy of the decision to the petitioner at [REDACTED] on or about March 8, 2006. However, the AAO's gratuitous act of sending a copy of the decision to the petitioner's new address when the petitioner had neglected to notify CIS of its change of address will not serve to "move up" the date of the AAO's decision to March 8, 2006 for purposes of filing a timely motion. As the AAO properly gave notice of the February 16, 2006 decision in accordance with the regulations by sending it to the petitioner's last known address by regular mail, the date to be used in calculating the due date of the instant motion is

February 16, 2006. Therefore, as the instant motion was filed with the Texas Service Center 61 days later, the motion was untimely and must be dismissed. 8 C.F.R. § 103.5(a)(4).

Counsel argues in the instant motion that the AAO erred in dismissing the April 18, 2006 motion to reconsider as untimely. First, counsel asserts that the petitioner gave notice to the AAO on or about August 16, 2005, as well as on or about October 5, 2005, of its new address in Boca Raton, Florida. Therefore, the AAO's February 16, 2006 decision should not be considered to have been properly served under the regulations by first class mail until it was sent to this address on or about March 8, 2006. See 8 C.F.R. §§ 103.5a(a)(1) and (d). In support of this assertion, counsel submits copies of two facsimile cover sheets addressed to the AAO. However, counsel did not submit any facsimile receipt confirmation documents or other evidence establishing that the AAO actually received either facsimile prior to the issuance of the AAO's February 16, 2006 decision. Second, while counsel concedes that the April 18, 2006 motion to reconsider should have been submitted to the Texas Service Center, and not to the AAO, within 33 days of March 8, 2006, counsel argues that 8 C.F.R. § 103.5(a)(1)(i) permits the late filing of the motion because the delay was reasonable and beyond the control of the petitioner. In this matter, counsel argues that the delay was caused by a clerical mistake.

Upon review, counsel's arguments are not persuasive and the AAO will affirm its prior decision to dismiss the April 18, 2006 motion to reconsider as untimely.

First, counsel's argument is not persuasive in establishing that the petitioner notified the AAO of its new address prior to its adjudication of the appeal on February 16, 2006. While counsel submitted two facsimile cover sheets both dated in 2005, the record is devoid of evidence establishing that the AAO actually received these alleged facsimile transmissions. The record of proceeding does not contain a copy of either facsimile cover sheet, and counsel failed to submit facsimile receipt confirmation documents or other evidence which could establish that these facsimiles were ever transmitted to and received by the AAO. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).¹ Therefore, the AAO properly gave routine notice by mail at the time the decision was made, i.e., February 16, 2006, to the petitioner's last known address, i.e., [REDACTED] 8 C.F.R. §§ 103.5a(a)(1) and (d); 8 C.F.R. § 103.2(b)(19).

¹Moreover, counsel's claim that the record of proceeding must contain the petitioner's 2005 alleged "change of address" notification because the AAO ultimately sent a copy of its decision to the Boca Raton, Florida, address on March 8, 2006 is not persuasive. As noted above, the record of proceeding does not include copies of the alleged 2005 facsimile transmissions. Also, while the record does not reveal how or why the AAO knew to send its March 8, 2006 decision to the Boca Raton address, it is noted that the records of the Department of State of Florida, which are available via the internet, indicate that the petitioner changed its mailing address with the State of Florida to the Boca Raton address on August 3, 2005. Therefore, it appears that the petitioner's new address was a matter of public record on March 8, 2006. Regardless, it must be emphasized that neither CIS nor the AAO was under any obligation to find a new address for the petitioner when the properly served decision was sent to the petitioner's last known address but returned as undeliverable.

Second, even accepting the petitioner's alleged notice date of March 8, 2006, the motion was still untimely since it was not received by the Texas Service Center until April 18, 2006, or 41 days after March 8, 2006. Counsel's argument that the AAO may excuse this untimely filing under 8 C.F.R. § 103.5(a)(1)(i) as reasonable and beyond the control of the petitioner is not persuasive. As a threshold matter, the provision in 8 C.F.R. § 103.5(a)(1)(i) permitting the filing of an untimely motion if the delay was reasonable and beyond the petitioner's control only applies to motions to reopen filed under 8 C.F.R. § 103.5(a)(2). This provision does not apply to motions to reconsider. The April 18, 2006 motion is clearly captioned as a motion to reconsider. Therefore, the April 18, 2006 motion needed to have been filed within 30 days of service of the decision, plus three days for mailing. Regardless, even if the April 18, 2006 motion to reconsider could be construed to be a motion to reopen, the petitioner has failed to persuasively establish that the failure to file the motion with the Texas Service Center within the requisite 30-day time period was reasonable and beyond its control. In this matter, the petitioner attributes its failure to timely file the motion to its own "clerical mistake." This explanation does not persuasively establish that the motion's tardiness was reasonably or beyond the petitioner's control.

Accordingly, as the April 18, 2006 motion to reconsider was untimely, the AAO properly dismissed the motion pursuant to 8 C.F.R. §§ 103.5(a)(1)(i) and 103.5(a)(4).

The second issue in the present matter is whether the AAO erred in dismissing the motion to reconsider because it was not signed by the affected party or its attorney or representative of record.

The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(A) requires that motions be "signed by the affected party or the attorney or representative of record, if any." In this matter, the Form G-28, Entry of Appearance as Attorney or Representative, dated April 8, 2006, which was submitted with the motion to reconsider, only entered the appearance of counsel for the beneficiary, and not for the petitioner. Citizenship and Immigration Services (CIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a petition; the beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). As the beneficiary and the representative are not recognized parties, the AAO concluded that counsel was not authorized to file the motion to reconsider. 8 C.F.R. § 103.5(a)(1)(iii)(A). The AAO dismissed the appeal for this reason.

In the instant motion, counsel argues that the AAO erroneously concluded that counsel was not authorized to sign the motion on behalf of the petitioner. Counsel asserts in her brief that:

[T]he Beneficiary is the Petitioner's authorized representative in the United States and as such, is authorized to sign all legal documents on behalf of the Petitioner. Therefore, his signing the G-28 that was enclosed with the April 8, 2006, Motion authorized undersigned counsel to file the Motion on the Petitioner's behalf. The record will also show that both the Service Center and the AAO had previously recognized the Beneficiary as the Petitioner's authorized representative.

Upon review, counsel's argument is not persuasive in establishing that counsel was authorized to file a motion on behalf of the petitioner at the time the motion to reconsider was filed with the Texas Service Center on April 18, 2006.

As noted above, the Form G-28, Entry of Appearance as Attorney or Representative, which was submitted for the record was signed by the beneficiary, not by an authorized representative of the petitioner and not on behalf of the petitioner. Consequently, counsel was only permitted to represent the beneficiary as an individual. If the beneficiary had wanted to appoint counsel as the petitioner's legal representative, this would have needed to have been expressed clearly in the Form G-28. It was not. Since CIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a motion to reconsider, counsel was not authorized to file the motion to reconsider in this matter. 8 C.F.R. § 103.5(a)(1)(iii)(A).

Accordingly, the AAO properly dismissed the motion pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(A) and 103.5(a)(4).

The third issue in the present matter is whether the AAO erred in dismissing the motion to reconsider because the motion failed to be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." 8 C.F.R. §§ 103.5(a)(1)(iii)(C).

In the instant motion, counsel argues that this omission was a "harmless error," because the unfavorable decision has not been, and never was, the subject of any judicial proceedings.

Upon review, counsel's argument is not persuasive. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) clearly lists the filing requirements for motions to reopen and motions to reconsider. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements shall be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), the AAO was obligated to dismiss the motion for this reason. Whether the omission of the statement was "harmless error" is simply not relevant to the analysis.

Accordingly, the AAO properly dismissed the motion for failing to be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." 8 C.F.R. §§ 103.5(a)(1)(iii)(C).

The fourth issue in the present matter is whether the AAO erred in dismissing the motion to reconsider because the motion was not submitted "to the office maintaining the record upon which the unfavorable decision was made." 8 C.F.R. § 103.5(a)(1)(iii)(E). Upon review, the AAO agrees with counsel that, ultimately, the motion was submitted to the proper office, albeit not in a timely manner. Therefore, the AAO will withdraw its decision to dismiss the motion for the petitioner's failure to submit the motion to the proper office. However, as noted above, the motion was nevertheless properly dismissed by the AAO because (1) the motion was untimely; (2) the motion was not signed by the affected party or the attorney or representative of record; (3) the motion failed to state whether or not the unfavorable decision was the subject of any judicial proceedings.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion to reopen does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.