identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

A2

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 02 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition on February 15, 2007. The petitioner filed an untimely motion to reopen/reconsider on May 30, 2008. The director dismissed the motion to reopen/reconsider on July 14, 2008. The petitioner then filed a timely appeal on August 11, 2008, which the director treated as a motion to reopen/reconsider. The director dismissed the second motion to reopen/reconsider on November 11, 2008. The petitioner has now filed another timely appeal on December 8, 2008, stating that the director should have forwarded the appeal filed on August 11, 2008 to the AAO. The issue is now before the Administrative Appeals Office (AAO). The director's November 11, 2008, decision with regard to the denial of the motion to reopen/reconsider will be withdrawn. The AAO will adjudicate the appeal filed on August 11, 2008 based on the record of proceeding. The appeal will be dismissed.

The regulation at 8 C.F.R. § 103.3(a)(2) states in pertinent part:

> (iii) *Favorable action instead of forwarding appeal to AAO.* The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. . . .
> (iv) *Forwarding appeal to AAO.* If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the related record of proceeding to the AAO in Washington, DC.

In the instant case, the reviewing official determined that favorable action was not warranted. Therefore, the director should have forwarded the appeal to the AAO instead of treating it as a motion to reopen/reconsider. As such, the only remaining issue being considered on appeal is whether the director erred in dismissing the petitioner's motion to reopen/reconsider that was filed on May 30, 2008.

On July 14, 2008, the director dismissed the petitioner's motion to reopen/reconsider because the petitioner did not file the motion to reopen/reconsider within 30 days of the director's decision to deny the petition. According to 8 C.F.R. § 103.3(a)(1)(i):

> Any motion to reconsider an application by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

Therefore, USCIS does not have the discretion to accept a motion to reconsider that is not filed within 30 days of the decision, but it does have the discretion to accept a motion to reopen that is filed after 30 days of the decision where the petitioner demonstrates that the delay was reasonable and beyond the control of the applicant or petitioner.

As stated above, the H-1B petition was denied on February 15, 2007. The petitioner did not file an appeal, but instead filed a motion to reopen/reconsider on May 30, 2008, which was not within 30 days of the director's decision. Therefore, the director was correct in dismissing the motion to reconsider. The only remaining question is whether the petitioner's delay in filing a motion to reopen should have been excused as reasonable and beyond the control of the petitioner.

In support of the motion to reopen, counsel argues that the petitioner did not receive notification of the director's decision to deny the petition issued on February 15, 2007. Counsel states that the petitioner relied on the USCIS case status web site, which, as of December 27, 2007, indicated that the petition was still pending. Counsel further states that it was not until the petitioner received a notice on January 11, 2008 in response to a request that the petition be upgraded to premium processing that it found out a decision had already been rendered on the petition. The beneficiary then learned on January 14, 2008, through a USCIS case status update, that the petition had been denied on February 15, 2007. The petitioner contacted USCIS in January and May 2008 to obtain a copy of the denial. However, counsel argues that as of the date the motion to reopen was filed on May 30, 2008, the petitioner still had not received a copy of the denial issued on February 15, 2007.

According to the record of proceedings, the petitioner filed its H-1B petition on behalf of the beneficiary without representation of counsel. The director's notice of decision was mailed to the attention of [redacted] at the petitioner's address listed in the Form I-129, which is slightly different from the petitioner's address listed on the Form G-28 submitted with the petitioner's appeal as well as the petitioner's address listed on its November 2, 2006 support letter. Specifically, the Form G-28 submitted on appeal indicates the petitioner's address as [redacted] However, the petitioner's Form I-129 omits the "S." after [redacted] and instead lists the address as just [redacted] NJ, [redacted] The petitioner's support letter also omits the "S." and puts in a different suite number, so that the address reads: [redacted][1] As no Form G-28 was on file when the petition was denied, USCIS did not err and in fact was correct in sending the decision to the address the petitioner listed on the Form I-129. If the address on the Form I-129 was incomplete or incorrect, this was the petitioner's error. Moreover, even though the petitioner definitively learned on January 14, 2008 that the petition had been denied, the petitioner did not file the motion to reopen until May 30, 2008, over four months later. The AAO finds that the delay was not reasonable or beyond the petitioner's control and, therefore, the director was correct in dismissing the motion to reopen as late filed.

However, the AAO notes that even if the director had accepted the petitioner's motion to reopen, the motion to reopen would have to be dismissed because a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.3(a)(2). The petitioner did not provide any new facts in support of the motion to reopen that would support the petition being approved. More specifically, the petitioner in this case did not provide new evidence that demonstrates that the beneficiary was eligible for an exemption from the normal six-year limit on H-1B nonimmigrants imposed by section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), at the time the petition was filed.

---

[1] It is noted that the petitioner's support letter actually has two different addresses. The first being the "From" address just indicated. The second being [redacted]

The AAO notes that in general section 214(g)(4) of the Act provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000) removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030A(a) of DOJ21, § 106(a) of AC21 reads:

> (a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), *if 365 days or more have elapsed since the filing of any of the following:*
>
> (1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).
>
> (2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

(emphasis added).

According to the record of proceedings, the beneficiary has been in the U.S. in H-1B status since November 3, 2000, and the petitioner has not provided evidence that the beneficiary is eligible to recapture any H-1B time spent outside the United States. The petitioner requested one additional year of H-1B time under AC21 in the petition it filed on November 3, 2006. However, the petitioner's approved labor certification application filed on behalf of the beneficiary was accepted for processing on May 11, 2006. Therefore, 365 days had not elapsed between the time the labor certification application was accepted for processing and the date the request for an H-1B extension filed under AC21 was filed.

Accordingly, as the petitioner did not indicate in the motion to reopen any new facts to overcome the director's finding in the decision for denial that the beneficiary is not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants under section 214(g)(4) of the Act, the petitioner's motion to reopen would not be approvable even if it were accepted as late filed for consideration.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The director's November 11, 2008 decision is withdrawn. The appeal filed August 11, 2008 is dismissed. The petition is denied.