



U.S. Citizenship
and Immigration
Services

(b)(6)



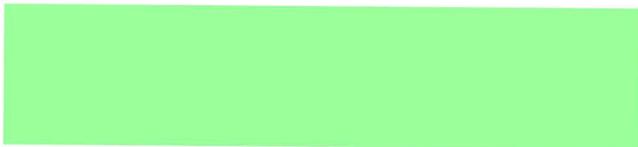
DATE: JUL 19 2013 OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Rachel M. Torino
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and rejected the petitioner's subsequent motion to reopen and motion to reconsider. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal and affirmed the director's decision in response to the petitioner's motion to reconsider. A motion to reconsider is currently before the AAO. The motion will be granted. The prior decision of the AAO will be affirmed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a field supervisor, taping foreman. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, seeking to employ the beneficiary as a skilled worker. The director determined that the record did not establish that the offered position required at least two years of training or experience as required for the classification as a skilled worker under section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). He also questioned the credibility of the petitioner's description of the duties of the offered position and further concluded that the record did not establish the petitioner's ability to pay the proffered wage. The director denied the petition accordingly on February 13, 2008.

The petitioner filed a motion to reopen and a motion to reconsider the director's decision, which was rejected on March 17, 2008 for failure to include the filing fee. A subsequent filing was accepted on April 11, 2008. On May 23, 2008, the director rejected the April 11, 2008 filing of the motion to reopen and the motion to reconsider as being untimely.

On June 24, 2008, the petitioner appealed the director's decision to the AAO, claiming that the motion to reopen and motion to reconsider had been submitted with a check for the \$585 filing fee, which was lost either by United States Citizenship and Immigration Services (USCIS) or in the mail, and that the motion to reopen and motion to reconsider should be considered timely. In support of this claim, the petitioner provided a copy of the face of a check for \$585, dated March 13, 2008 and made out to USCIS, and copies of correspondence from its counsel to the Bank of the Orient relating to this check. On June 7, 2011, the AAO dismissed the appeal.

On July 7, 2011, the petitioner filed a motion to reconsider with the AAO, contending that the delay in filing the motion to reopen and the motion to reconsider, which resulted from the loss of the filing fee, was reasonable and beyond its control and, therefore, should be excused pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i). In support of this claim, the petitioner submitted a declaration from its counsel and again provided his correspondence with the Bank of the Orient and a copy of the face of the check dated March 13, 2008. On February 12, 2013, the AAO granted the petitioner's motion but affirmed its prior decision finding that the record did not establish that the petitioner's failure to file the motion within 33 days of the director's decision was reasonable and beyond the petitioner's control. The AAO indicated that it found the scenario of a lost fee payment, as advanced by the petitioner's counsel, to be speculative and that if USCIS failed to believe that a fact stated in a petition was true, it could reject that fact, referencing the authority found in section

204(b) of the Act, 8 U.S.C. § 1154(b), as well as the holdings in *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001)

As of March 14, 2013, the matter is again before the AAO as a motion to reconsider. In a brief, dated March 13, 2013, counsel contends that the authorities relied on by the AAO do not support its assertion that his claims regarding the submission of the filing fee may be rejected and that the AAO has offered no description of the evidence on which it relied in dismissing the petitioner's July 7, 2011 motion to reconsider. Counsel further states that the petitioner has established its ability to pay the proffered wage. He also asserts that "[i]n many types of cases, legal analysis is not the end of the adjudication, regardless of whether the customer has shown legal eligibility or not, and even if the requisite hardship for a waiver has [not] been shown." Counsel claims that in cases with compelling humanitarian factors where there has been government error or delay, an exercise of discretion resulting in an "extraordinary favorable outcome" may be considered. He submits birth certificates for the beneficiary's U.S. citizen children, a letter from the principal of the school attended by one of the beneficiary's children, a statement from the beneficiary's parish priest, and letters relating to the petitioner's financial standing and charitable contributions.

The requirements for motions to reopen and reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record reflects that the motion to reconsider is properly filed and timely. The petitioner has submitted a brief rebutting the AAO's reliance on *Anetekhai v. I.N.S.*, 876 F.2d at 1220; *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. at 10; *Systronics Corp. v. INS*, 153 F.Supp.2d at 15, relying on the decisions in *Doyle v. U.S.A. I.R.S., Ebasco Services, Inc.*, 817 F.2d 1235 (5th Cir. 1987); *Davis v. Veslan Enterprises*, 765 F.2d 494, 500 n. 12 (5th Cir. 1985); *Maria Ruggiero v. Albina Costa*, 28 Mass.App.Ct.967, 551 N.E.2d 1226 (March 28, 1990); *Chung Hak Hong v. USCIS*, 662 F.Supp.2d 1195 (C.D. Cal. 2009); and *Mt. St. Helens Mining & Recovery Ltd. Partnership v. United States*, 384 F.3d 721, 727 (9th Cir. 2004). The petitioner has satisfied the requirements for a motion to reconsider. Accordingly, the motion is granted and the AAO will reconsider the matter.

The AAO now turns to a consideration of the record and whether it establishes the timely filing of the petitioner's motion to reopen and motion to reconsider or that the late filing of the motion to

reopen may be excused because the delay in filing was “reasonable and was beyond the control of the . . . petitioner,” pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i).

Counsel asserts that the AAO has offered no clear description of the evidence it relied upon to dismiss the petitioner’s previous motion other than “the presumed report that the \$585 check of March 14, 2008, was not found within the packet submitted by the petitioner’s attorney.” He contends that there has been no investigation in the petitioner’s case, “nor any process, described that would reflect a reliable basis from which to reach a reasonable conclusion.” As in *Lu-Ann Bakery Shop*, counsel asserts, he has provided an affidavit and is now submitting a second declaration and statements from two paralegals who worked on the March 14, 2008 submission of the petitioner’s motion to reopen and motion to reconsider. These statements, counsel contends, should be accepted by USCIS. In support of this claim, he points to the decision in *Doyle v. U.S.A. I.R.S., Ebasco Services, Inc.*, 817 F.2d at 1235, as well as those in *Davis v. Veslan Enterprises*, 765 F.2d at 500 n. 12 and *Maria Ruggiero v. Albina Costa*, 28 Mass.App.Ct.967, 551 N.E.2d at 1226 which, he states, relied in part on unopposed affidavits.

Counsel also asserts that courts may review USCIS decisions under section 5 U.S.C. § 706(2)(A) of the Administrative Procedures Act if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” referencing the holdings in *Chung Hak Hong v. USCIS*, 662 F.Supp.2d 1195 (2009); and *Mt. St. Helens Mining & Recovery Ltd. Partnership v. United States*, 384 F.3d at 727.

The record contains two declarations from counsel, dated June 23, 2008 and March 13, 2013, in which he states he personally wrote the check for the \$585 fee and included it in the Form I-290B, Notice of Appeal or Motion, packet sent to USCIS on March 14, 2008 by express mail. Counsel indicates that he received a Form I-797C, Notice of Action, from USCIS on April 7, 2008 notifying him that no filing fee had been attached and that during the period April 8-10, 2008, he and his staff checked with the bank to see whether the check, numbered 4598, had been cashed. The bank, he states, could not verify whether the check had been cashed and on April 10, he decided to stop payment and to resubmit the Form I-290B with a second check. In support of counsel’s statements, the record contains copies of the face of the check counsel indicates was sent to USCIS, the March 14, 2008 cover letter for the motion to reopen and motion to reconsider, and an April 10, 2008 letter counsel sent to the Bank of the Orient requesting that it stop payment on the \$585 check, as well as a Stop Payment Form, dated April 10, 2008, and a demand deposit inquiry.

The record on motion also includes a March 11, 2013 statement from [REDACTED] a paralegal in counsel’s firm, who states that on or about March 14, 2008, she prepared the Form I-290B packet and cover letter to USCIS. Ms. [REDACTED] further indicates that this submission included a law firm check, numbered [REDACTED] issued on March 13, 2008, and that she observed counsel include this check in the Form I-290B packet before she sealed the envelope. Ms. [REDACTED] also asserts that she photocopied the entire Form I-290B packet, including the \$585 check, for the petitioner’s file before passing the packet on to [REDACTED] another paralegal in counsel’s firm, on March 14, 2008 for delivery to the post office.

In a second March 11, 2013 statement, paralegal [REDACTED] states that before delivering the I-290B packet to the United States Postal Service (USPS) office for express delivery, she confirmed with [REDACTED] that the \$585 check was in the packet. Ms. [REDACTED] statement is accompanied by a copy of USPS tracking documentation and a receipt dated March 14, 2008. The tracking documentation indicates that delivery to the Nebraska Service Center occurred on March 17, 2008.

Counsel asserts that the preceding declarations should be accepted as proof that the petitioner submitted its motion to reopen and motion to reconsider with the \$585 filing fee and points to the reliance placed on affidavits by the courts in *Doyle v. U.S.A. I.R.S., Ebasco Services, Inc.*, 817 F.2d at 1235; *Davis v. Veslan Enterprises*, 765 F.2d at 500 n. 12 and *Maria Ruggiero v. Albina Costa*, 28 Mass.App.Ct.967, 551 N.E.2d at 1226.

The AAO notes the decision of the U.S. Circuit Court of Appeals for the Fifth District in *Doyle*, where the court relied on affidavits from government attorneys in assessing attorney fees under Rule 11 of the Federal Rules of Civil Procedure, and in *Davis*, where it noted that, under Rule 11, the signature of an attorney acted as a certificate that a motion is warranted by existing law or by a good faith argument for the extension of existing law. It also acknowledges the Massachusetts Appeals Court opinion in *Maria Ruggiero v. Albina Costa, supra.*, which found that a lower court had “erred in considering credibility of parties in determining motion for summary judgment where there was no indication that defendant’s unopposed affidavits were unreliable or contained other weaknesses.” It does not, however, find the deference paid to affidavits in the procedural matters considered by the courts in the preceding cases to be relevant to the matter of the timely filing of the petitioner’s motion to reopen and motion to reconsider.

The AAO also finds counsel’s assertion that an investigative process is required to reach a reasonable conclusion regarding the timeliness of the petitioner’s motion to reopen and motion to reconsider to be unpersuasive. The AAO notes, as it did in the decision it issued on February 12, 2013, that the record contains a copy of the Form I-797C, Notice of Action, issued to the petitioner on March 17, 2008, which states that the Form I-290B is being returned to the petitioner because “the proper fee of \$585.00 U.S. is not attached.” It finds this contemporaneous document, which is dated the same day as the delivery of the Form I-290B, to establish that there was no filing fee with the Form I-290B when it was received at the Nebraska Service Center.

Although the AAO acknowledges the declarations provided by counsel and two of his colleagues, it does not find these statements sufficient to overcome the evidence offered by the Form I-797C that no filing fee was found with the Form I-290B packet delivered to the Nebraska Service Center on March 17, 2008. For this same reason, these statements do not demonstrate that the petitioner’s failure to file the motion to reopen within 33 days of the director’s decision was reasonable and beyond its control, pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i).

While counsel’s statements regarding judicial authority under 5 U.S.C. § 706(2)(A) of the Administrative Procedure Act to set aside federal agency decisions found to be “arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law” are noted, the AAO finds that he has not indicated in what specific respects he believes the AAO’s decision of February 12, 2013 to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Absent such a discussion, it is not clear how the holdings in *Chung Hak Hong v. USCIS* and *Mt. St. Helens Mining & Recovery Ltd. Partnership v. United States* might relate to the present case.

The AAO has also considered counsel’s assertion that USCIS may favorably exercise discretion in the present matter based on humanitarian considerations. Although the AAO notes that USCIS has the discretion to excuse the late filing of a motion to reopen, it also observes that such discretion is to be exercised only where a petitioner establishes that the delay in filing was reasonable and beyond its control. 8 C.F.R. § 103.5(a)(1)(i). Here, the petitioner has not met that evidentiary burden and the AAO lacks the authority to excuse a late filing on any other grounds. Accordingly, it will not consider the evidence submitted by counsel with regard to the beneficiary’s family or the petitioner’s reputation.

Having reviewed the evidence of record, the AAO finds it to demonstrate that the Form I-290B submitted by the petitioner in response to the director’s February 13, 2008 denial of the Form I-140 petition was not properly filed with USCIS until April 11, 2008, 58 days after the director issued his decision. Accordingly, the record does not demonstrate that the petitioner’s motion to reopen and motion to reconsider were timely filed. Neither does it establish that the petitioner’s failure to file the motion to reopen within 33 days of the director’s decision was reasonable and beyond its control pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i).

The record does not establish that the petitioner’s original motion to reopen and motion to reconsider were timely filed and, further, fails to demonstrate that its failure to file the motion to reopen within 33 days of the director’s decision was reasonable and beyond its control. Accordingly, the AAO will affirm its prior decision.

The AAO finds that the petitioner has established on motion its ability to pay the proffered wage from the priority date onwards.

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The AAO’s decision of February 12, 2013 is affirmed. The petition remains denied.