U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12661695

Date: JAN. 21, 2021

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant E-2 Treaty Investor

The Petitioner, a construction management and interior design company, seeks to extend the Beneficiary's E-2 nonimmigrant status as a treaty investor under section 101(a)(15)(E)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(E)(ii).

The Director of the California Service Center denied the Form I-129, Petition for a Nonimmigrant Worker, because it was filed over one and a half years after the Beneficiary's E-2 status had expired and the Petitioner did not establish eligibility for a favorable exercise of discretion to excuse the delay. The Director certified the decision for us to review and address the Petitioner's claim that the delay was due to ineffective assistance of prior counsel. We affirmed the Director's decision, concluding that the Beneficiary did not demonstrate that her personal challenges and ignorance of the law constituted extraordinary circumstances that were beyond her control and that her delay in filing was commensurate with any such circumstances, as required by 8 CFR 214.1(c)(4)(i). The matter is now before us on a motion to reconsider.

Upon review, we conclude that the Petitioner has not met the requirements of a motion to reconsider. Therefore, we will dismiss the motion.

I. REQUIREMENTS FOR A MOTION TO RECONSIDER

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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

In support of the instant motion, the Petitioner asserts that our decision was incorrect because we: (1) used an incorrect definition of "extraordinary circumstances beyond the control of the applicant or petitioner"; (2) relied on "inconsistent regulations and procedures promulgated by the Department of State and Department of Homeland Security"; and (3) "misconstrued the facts" without adequately

considering the Petitioner's argument that its delay in filing the application for an extension of the Beneficiary's stay was not "commensurate with the circumstances."

First, the Petitioner objects to our reliance on definitions that were adopted by the Department of Homeland Security (DHS) in the asylum context, asserting that comparing a missed deadline to file an E-2 extension to a missed deadline for filing an asylum application "substantially distorts the analysis" and results in the creation of a "rigid standard" which should not apply where there is no "permanent effect." The Petitioner argues that we should instead use "a common sense evaluation of the facts and circumstances . . . commensurate with the benefit sought," contending that because the benefit sought in this instance is of a temporary nature, we should have applied "a lower standard than the asylum waiver requirement." The Petitioner does not, however, cite to a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or DHS policy that either identifies such a standard or supports the contention that a "lower standard" should have been applied in the present matter. 8 C.F.R. § 103.5(a)(3). Moreover, and significantly, 8 C.F.R. § 214.1(c)(4) places no limitation or constraint on how USCIS may exercise its discretionary authority, nor does it establish different standards for when it may excuse a late filing. Importantly, this regulation does not mandate or require the agency to excuse a late filing at all, even if the requirements of 8 C.F.R. § 214.1(c)(4)(1) are satisfied, but merely provides that the agency *may*, in its discretion, after considering the circumstances and the stated reason for the delayed filing, excuse a late filed request for extension of stay.

In this case, however, the Petitioner failed to satisfy 8 C.F.R. § 214.1(c)(4)(1). Although the Petitioner argues that we "misconstrued the facts" when we determined that the delay in filing was not commensurate with the circumstances, it does not point to the facts that we "misconstrued" and does not cite any legal authority to support its argument. Rather, the Petitioner merely restates the facts that were fully discussed in our prior decision and reasserts the claim that the delay in filing "was commensurate with the circumstances," basing this claim largely on prior counsel's alleged failure to inform the Beneficiary that her status had expired. This claim was considered and fully addressed in our prior decision and the Petitioner has not provided evidence showing that the facts it presented warranted a favorable disposition.

Finally, although the Petitioner appears to question the lawfulness of the regulations and procedures promulgated by the Department of State and Department of Homeland Security pertaining to the filing deadlines of an E-2 extension, in particular, that DHS's regulations conflict with those of DOS, it offers no legal authority for the argument. The AAO's decision is premised upon our proper application of DHS provisions that are binding on all USCIS employees. "The granting of a visa and the granting of admission to the United States are distinct acts undertaken by distinct agencies, the Department of State for visas and the Department of Homeland Security for admission." *Buddhi v. Holder*, 344 F. App'x 280, 284 (7th Cir. 2009) (unpublished). As noted in our previous decision, the visa validity period governs the time during which an alien may travel to and seek admission to the United States and "has no relation to the period of time the [DHS] immigration authorities at a port of entry may authorize the alien to stay in the United States." *Compare* 22 C.F.R. § 41.112(a) with 8 C.F.R. §§ 214.1(c)(1), 214.2(e)(20).

To the extent that the Petitioner challenges the validity of the statutory or regulatory scheme governing this matter, the AAO's jurisdiction is limited to that specifically granted by the Secretary of the

Department of Homeland Security. *See, e.g.*, DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1. Specifically, our jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii), as in effect on February 28, 2003. Accordingly, we have no authority to assess the lawfulness of a regulation.

In sum, we conducted a thorough review of the totality of the evidence before us and the Petitioner's stated reason for the delay in requesting the extension of stay and have determined that the Petitioner's contention that we erred in affirming the Director's decision is not supported by the record.

In light of the above, we conclude that the Petitioner's motion does not warrant reconsideration.

ORDER: The motion to reconsider is dismissed.