



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF D-, LLC

DATE: OCT. 20, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a restaurant specializing in Italian foods and pastries, seeks to temporarily employ the Beneficiary as the chief executive officer of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity within one year of approval of the new office petition. We rejected the Petitioner's appeal of the Director's decision as untimely and denied the Petitioner's subsequent combined motion to reopen and motion to reconsider as it did not overcome the reasons for rejection of the appeal.

The matter is now before us on a second combined motion to reopen and motion to reconsider. In support of its motion, the Petitioner further explains the reasons for its untimely filing of the appeal and adds that there are new facts and circumstances which warrant the reopening of the petition.

Upon review, we will deny the combined motion.

## I. MOTION REQUIREMENTS

### A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a U.S. Citizenship and Immigration Services (USCIS) officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action: "[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision."

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the Petitioner must also show proper

cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), “Processing motions in proceedings before the Service,” “[a] motion that does not meet applicable requirements shall be dismissed.”

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), “Requirements for motion to reopen,” states:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence.

Further, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.” *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), “Requirements for motion to reconsider,” states:

A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] 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 [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

## II. DISCUSSION

The Director denied the Petitioner’s Form I-129, Petition for a Nonimmigrant Worker, on March 31, 2015. The Petitioner was required to file its appeal of that decision on or before Monday, May 4, 2015. The record shows that the Petitioner dated the appeal May 2, 2015, but it was received at the designated filing location on Tuesday, May 5, 2015, one day late. Accordingly, we rejected the appeal as untimely filed.

In its first combined motion to reopen and motion to reconsider, the Petitioner stated that the delay in delivery was unavoidable and not within the Petitioner’s control. Rather, the Petitioner asserted that there was an error on the part of the United States Postal Service, which did not deliver the package containing its appeal on the scheduled date. On June 6, 2016, we denied the combined motion as the

*Matter of D-, LLC*

Petitioner did not establish that we improperly rejected the appeal as untimely filed. Specifically, we determined that, based on the evidence submitted, the Petitioner had requested two-day delivery from USPS when it mailed the package on Saturday, May 2, 2015, and was advised that the package would be delivered on Tuesday, May 5, 2015.

In support of its second combined motion to reopen and motion to reconsider, the Petitioner states it dropped its package off at a local USPS central mail facility on May 2, 2015 in order to ensure delivery by Monday, May 4, 2015. The Petitioner explains that since it was a Saturday night, all clerk stations were closed, and it had to use the USPS Automated Postal Center for processing. The Petitioner states that next-day delivery should have been Monday, May 4, 2015, but instead the USPS Automated Postal Center would only print a “guarantee” of delivery for Tuesday, May 5, 2015. The Petitioner states that it had no choice but to send the appeal package via USPS and “hoped” that the appeal package would arrive on the next business day, Monday, May 4, 2015, regardless of the printed guarantee by the USPS Automated Postal Center.

The Petitioner also contends that there are new facts and circumstances which are sufficient to warrant the reopening of the Petitioner’s appeal. The Petitioner states that its majority owner and managing member, the Beneficiary’s father, passed away on [REDACTED] and as a result it is more critical that the Beneficiary’s L-1A petition is approved. The Petitioner claims that the Beneficiary’s mother is now more reliant on the Beneficiary for the management and continuing operations of the business.

A. Denial of the Motion to Reopen

Upon review, we find that the Petitioner has not provided any new facts as they pertain to the untimely filing of the appeal. The Petitioner acknowledges that it mailed the appeal too late to ensure guaranteed delivery to USCIS by the due date of Monday, May 4, 2015, and “hoped” the package would arrive on time. The Petitioner does not address our previous determination that its USPS receipt shows that it requested “Priority Mail Express 2-Day” service rather than overnight service. The Petitioner’s assertions do not meet the requirements of a motion to reopen.

We acknowledge that, with the unfortunate death of its managing member, the Petitioner is faced with new circumstances that have arisen after the filing of its previous combined motion; however, these new circumstances have no bearing on the Beneficiary’s eligibility at the time of filing the petition. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r. 1978).

“There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases.” *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions for the reopening 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. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94). A party seeking to reopen a proceeding bears a “heavy burden” of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the Petitioner has not met that burden.

**B. Denial of the Motion to Reconsider**

Upon review, we find that the Petitioner did not properly state the reasons for reconsideration. USCIS regulations specifically state that an affected party or the attorney or representative of record must file the complete appeal within 30 days of service of the unfavorable decision. *See* 8 C.F.R. § 103.3(a)(2)(i). If the decision was mailed, the appeal must be filed within 33 days. 8 C.F.R. § 103.8(b). USCIS records indicate that the Director’s decision was issued on March 31, 2015, and the Petitioner has not submitted evidence to the contrary. As the Petitioner did not file its appeal until May 5, 2015, which was 34 days after the original decision was issued, it was untimely filed. As noted, the date of filing is not the date of mailing, but the actual date of receipt at the designated filing location. 8 C.F.R. § 103.2(a)(7)(i). Neither the Act nor the pertinent regulations grant us authority to extend the 33-day time limit for filing an appeal.

We conclude that the documents constituting this motion do not articulate how our decision on appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to reject the appeal was rendered. The Petitioner has therefore not submitted any evidence that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be denied.

**III. CONCLUSION**

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). Here, that burden has not been met.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of D-, LLC*, ID# 49052 (AAO Oct. 20, 2016)