Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-B-&B-, INC.

DATE: NOV. 7, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a restaurant, seeks to classify the Beneficiary as an individual of extraordinary ability in the arts. This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the Petitioner's Form I-140, Immigrant Petitioner Alien Worker, and dismissed the subsequent motion. We summarily dismissed the Petitioner's appeal and denied the ensuing motion.[1]

The matter is now before us on a second motion to reconsider and a motion to reopen. Upon review, we will deny the motions.

I. LAW

A motion to reconsider is based on an *incorrect application of law or policy*, and a motion to reopen is based on documentary evidence of *new facts*. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The Petitioner, however, did not include the required 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). Accordingly, the Petitioner's motions are denied because they do not satisfy the regulatory requirements. Moreover, the Petitioner's motion to reconsider does not establish that

[1] *See Matter of G-B-&B-*, ID# 933927 (AAO Dec. 29, 2017) and *Matter of G-B-&B-*, ID# 1481340 (AAO Mar. 23, 2018).

we erred in our prior decision, nor does its motion to reopen demonstrate that the new evidence overcomes the grounds of our previous decision.[2]

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). In addition, a motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security.

The record reflects that the Director denied the petition on March 24, 2017, and dismissed the subsequent motion on July 17, 2017. The Petitioner filed Form I-290B, Notice of Appeal of Motion, on August 15, 2017, indicating that a "brief and/or additional evidence will be submitted to the AAO within 30 calendar days of filing the appeal."[3] The Form I-290B was completed and signed by the Petitioner and was not accompanied by Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, nor was there any indication of representation by counsel.[4] Although the Petitioner was required to file a brief or additional evidence on or before September 17, 2018, nothing further was submitted.[5] On December 29, 2017, we summarily dismissed the appeal because the Petitioner did not identify any specific, erroneous conclusion of law or statement of fact in the Director's decision.

The Petitioner filed a motion to reopen and motion to reconsider on February 21, 2018, 54 days after our decision.[6] Counsel asserted that the untimeliness should be excused because a copy of the decision was not mailed him.[7] However, as the record did not contain a Form G-28 on appeal and

[2] We decline the Petitioner's request for oral argument. 8 C.F.R. § 103.3(b). In addition, the Petitioner requests to inspect the record of proceedings. 8 C.F.R. § 103.2(b)(16). The procedure for filing a Freedom of Information Act request can be located at https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request.

[3] The instructions to the version of Form I-290B filed by the Petitioner specifically stated that "[i]f you do submit a brief and/or additional evidence, you may submit these materials at the time of initial filing of Form I-290B or within 30 days of filing."

[4] The record reflects that in Counsel's brief in support of his previous motion, he stated that "[t]he petitioner filed an appeal of the denied motion without legal representation."

[5] The regulation at 8 C.F.R. § 103.8(b) allows for three additional days for service by mail.

[6] The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that a motion must be filed within 30 days of the decision and in regard to a motion to reopen "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."

[7] Counsel asserts in his current motion brief that the Petitioner did not receive the decision even though the record reflects that the decision was mailed to its address of record.

the decision was mailed to the Petitioner's address of record, we denied the motions as untimely filed.[8]

We note that Counsel had the opportunity to file a timely motion. The record contains a fax cover sheet, dated January 22, 2018, from counsel submitting a "duplicate" copy of Form G-28 and requesting a copy of the decision. Counsel's previous motion brief stated that "[a]ttached is a copy of the decision mailed to counsel on January 23, 2018." Thus, counsel received the decision within the 30-day motion period but did not file the motion until almost a month later, on February 21, 2018.[9] Counsel did not provide an explanation as to why he could not file a timely motion despite his receipt of the decision within the 30-day timeframe.

On the current motion before us, Counsel argues that we "had an obligation to notify the petitioner perhaps of not of the alleged missing G-28, but at least that, if it needed to file a briefing extension request, that it needed to do so as soon as possible." Counsel contends that as a matter of policy, common courtesy, and customer service we should have "communicated with the petitioner regarding the request for an extension of time to file the brief." However, we note that USCIS did not receive a brief or request an extension within 30 days of filing the appeal.

Counsel further contends that we had an obligation to notify him of a deficient or missing Form G-28. As discussed above, the Petitioner filed the appeal without any indication of representation of counsel. Moreover, prior to the fax of his Form G-28 on January 22, 2018, the record did not reflect the Petitioner's representation by counsel on appeal, nor did the record contain a deficient Form G-28 to be corrected. In addition, Counsel asserts that "a preponderance of the evidence supports the position that a G-28 for counsel was probably filed with the AAO" and "the designated data entry staff at the AAO did receive counsel's G-28 but it was probably misplaced." Again, the record does not reflect that Counsel submitted a Form G-28 until January 22, 2018. Moreover, even if a Form G-28 "was probably misplaced," the Petitioner did not submit a brief or extension request within 30 days of filing the appeal.

In addition, Counsel asserts that his February 21, 2018, motion filing should be deemed timely "because service on counsel is the relevant date of mailing, not on the petitioner" and cites to the regulation at 8 C.F.R. § 292.5. In other words, Counsel claims that he had 33 days from the date he received the January 2018 decision. This regulation, however, relates to representative capacity and right to representation; it does not grant an additional time to file a motion after counsel enters his appearance of representation. Rather, 8 C.F.R. § 103.5(a)(1)(i) provides the relevant timeframe, requiring petitioners to file motions within 30 days of the decision the motion seeks to reconsider or reopen, which in this case, was on or before January 31, 2018.

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[8] Counsel claims a Form G-28, along with an extension request to submit a brief for the appeal, was received by USCIS on November 6, 2017. The record contains neither the request nor the notice of appearance.

[9] Counsel indicated that he read the decision online prior to receiving it from us.

For the reasons discussed above, the Petitioner did not establish he had filed timely motions and that we erred in our previous decision.

B. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

The Petitioner submits a letter claiming that it has always been the intention to hire Counsel for the appeal. Moreover, the Petitioner claims that it signed Form G-28 and sought Counsel "because from time to time we experience issues concerning the delivery of mail." Further, the Petitioner asserts that it only received the transfer notice for the appeal. The letter, however, does not demonstrate that the Petitioner provided a timely brief or extension request and that he filed a timely motion.

Accordingly, the Petitioner did not establish that its new evidence overcomes the grounds of our prior decision.

III. CONCLUSION

The Petitioner's motions do not meet the filing requirements. In addition, the Petitioner has not established that our previous decision was incorrect based on the record before us, nor does the new evidence on motion demonstrate eligibility for the benefit sought.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of G-B-&B-, Inc.*, ID# 1691557 (AAO Nov. 7, 2018)