U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16699913

Date: APR. 23, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a dancer and choreographer, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). 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 Nebraska Service Center denied the petition, concluding that the Petitioner had not satisfied any of the ten initial evidentiary criteria for this classification, of which she must meet at least three. The Petitioner appealed the matter and we dismissed the appeal.[1] The Petitioner subsequently filed a combined motion to reopen and motion to reconsider, which we dismissed as untimely, followed by two additional combined motions, which we also dismissed. The matter is now before us on a fourth combined motion to reopen and motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss both motions.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that we based our decision on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) 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.

[1] *See Matter of E-G-*, ID# 1668798 (AAO Oct. 25, 2018).

II. ANALYSIS

The primary issue in this matter is whether the Petitioner has established that our decision to dismiss her third combined motion to reopen and reconsider was based on an incorrect application of law or USCIS policy.

A. Prior AAO Decisions

The record reflects that we issued our initial decision dismissing the Petitioner's appeal on October 25, 2018. The Petitioner filed her first combined motion on Thursday, November 29, 2018, 35 days after the decision was issued. A motion must be filed within 33 calendar days of the date USCIS served the unfavorable decision by mail. *See* 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b).

When computing the period of time for filing an appeal or motion USCIS counts every calendar day (including Saturdays, Sundays, and legal holidays) starting the first calendar day after the date USCIS mailed the unfavorable decision. If the *last* day of the 33-day filing period falls on a Saturday, Sunday, or a legal holiday, the period to file an appeal runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. *See* 8 C.F.R. § 1.2.

Here, we informed the Petitioner that any motion to reopen and/or reconsider our appellate decision must be filed within 33 days of our decision dated October 25, 2018. The due date for the Petitioner's motion was Tuesday, November 27, 2018, and this date did not fall on a weekend or legal holiday. Accordingly, we dismissed the Petitioner's motion, filed on November 29, 2018, as untimely.

The Petitioner has consistently argued on three subsequent motions that 8 C.F.R. § 103.5(a)(1)(i) allows for a 30-day period to file a motion, and because the 30th day in her case fell on Saturday, November 24, 2018, her motion was due on Monday, November 26, 2018. She has further maintained that since our decision was mailed, 8 C.F.R. § 103.8(b) provided her with an additional three days, and therefore her motion was due on Thursday, November 29, 2019, or 35 days after the date we issued our decision.

In dismissing the most recent motion, we emphasized that the regulation at 8 C.F.R. § 103.8(b) provides that whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon them and the notice is served by mail, three days shall be added to the prescribed period. Because we mailed our decision dismissing the Petitioner's appeal, she was not required to file her motion within 30 days. Rather, her prescribed period to submit a motion was automatically extended to 33 days.

We emphasized that this 33-day filing period was clearly communicated to her when our appellate decision was issued, and the 33rd day fell on Tuesday, November 27, 2018. As the last day of the filing period did not fall on a Saturday, Sunday or legal holiday, the regulation at 8 C.F.R. § 1.2 was not applicable to our evaluation of whether the Petitioner's initial motion was timely. Accordingly, we determined that the Petitioner had not demonstrated that we incorrectly applied this or any other regulation or USCIS policy to the facts of her case or dismissed her previous combined motion in error.

B. Motion to Reconsider

In the brief submitted in support of the instant motion, the Petitioner states:

> 8 C.F.R. § 103.5(a) spells out a 30-day period for filing of a motion to reopen and/or motion to reconsider. It does not state 33 days or add the three days for mailing first, nor does it provide for any other period. In this case, the 30th day fell on a Saturday, November 24, 2018. This is a fact and AAO admitted that the three days were added to the date of November 24, 2018.

The Petitioner maintains that "it is an error to disregard that the computing period shall run until Monday, November 26, 2018, under 8 C.F.R. § 1.2." She further argues that "AAO has no authority to automatically add the three days for mailing without verifying if the prescribed period falls on a weekend or a holiday. Disregarding 8 C.F.R. § 1.2 is a failure to properly interpret the code."

With respect to the Petitioner's assertion that we have no authority to extend the filing period to 33 days, we emphasize that such authority derives from 8 C.F.R. § 103.8(b). USCIS' interpretation of that regulation as automatically adding three days to the filing period for appeals and motions in cases where our decision is served by mail is stated in the *USCIS Policy Manual*[2] and the *AAO Practice Manual.*[3] Further we did not "disregard" the regulation at 8 C.F.R. § 1.2 in this case. We determined that it did not apply because the last day of the 33-day filing period applicable to this motion did not fall on a Saturday, Sunday, or a legal holiday.

While the Petitioner continues to disagree that 8 C.F.R. § 103.8(b) automatically extends the prescribed period for filing motions and appeals to 33 days, she has not pointed to any instance in which USCIS has adopted a different interpretation of this regulation or otherwise supported her claim that it was incorrectly applied here.

Nor has she otherwise provided support for her claim that 8 C.F.R. § 1.2 should apply to the 30-day filing period provided by 8 C.F.R. § 103.3(a)(1)(i) rather than the 33-day filing period provided by 8 C.F.R. § 103.2(b)(8), which applied in this case. The extension of the filing period contemplated by the regulation at 8 C.F.R. § 1.2 applies only when the last day of a "computed" period for taking action falls on a Saturday, Sunday or legal holiday. Here, the period computed for the Petitioner to file a motion on our decision that was served by mail on October 25, 2018 was 33 days, with the 33rd day falling on Tuesday, November 27, 2018.

Finally, in our decision dismissing the Petitioner's second motion, we noted that she had cited to 8 C.F.R. § 1001.1(h), which is applicable to appeals that fall under the jurisdiction of the Board of Immigration Appeals, rather than the nearly identical regulation at 8 C.F.R. § 1.2, which is applicable to appeals before our office. In the previous motion, the Petitioner referred to a non-precedent

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[2] *See* 6 *USCIS Policy Manual* J.5, https://www.uscis.gov/policymanual (stating that the petitioner must file the appeal or motion within 30 days of the denial or dismissal, or 33 days if the denial or dismissal decision was sent by mail," and citing to 8 C.F.R. 103.5(a)(1)(i) and 8 C.F.R. 103.8(b)).

[3] *See AAO Practice Manual*, Ch. 4.6(c), https://www.uscis.gov/aao-practice-manual (stating that "[a]ppellants must file a motion within 30 days of the unfavorable decision (or 33 days if the decision is mailed)" and that "[i]f a notice is served by mail, three days are automatically added to the stated period to perform the specified act" citing 8 C.F.R. § 103.8(b)).

decision, noting that "AAO has previously sustained matters relying on 8 C.F.R. § 1001.1(h)." We emphasized in our decision dismissing the third motion that the referenced decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c).

In her brief in support of this motion, the Petitioner asserts that "AAO was mandated by *United States v. Granderson*, 511 U.S. 39, 56, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) to interpret the code consistently." She states that "if AAO has previously adjudicated a case relying on 8 C.F.R. § 1001.1(h), absent the reversal of the non-precedent decision, it should have interpreted the code consistently." We note that the Petitioner in this matter, unlike the applicant in the non-precedent decision referenced above, did not have a prescribed filing period for her initial motion that ended on a Saturday, Sunday, or legal holiday, and neither the regulation at 8 C.F.R. § 1.2 or 8 C.F.R. § 1001.1(h) applies. Based on the facts presented, the outcome of this matter was not inconsistent with the outcome in the cited non-precedent decision.

The Petitioner has not established that our decision to dismiss her third motion to reopen and reconsider was based on an incorrect application of law or USCIS policy. Accordingly, the motion to reconsider will be dismissed.

C. Motion to Reopen

Although the Petitioner indicates that she is concurrently filing a motion to reopen, she has not presented new facts or evidence for consideration in this proceeding and has not met the requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.