U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19390244

Date: DEC. 22, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a chef, 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 record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. The Petitioner filed a combined motion to reopen and reconsider that decision. The Director granted the motion and again denied the petition. The Petitioner appealed that decision to us, and we dismissed the appeal.

The Petitioner contested our appellate decision in a filing which he, at various times, called both an appeal and a combined motion to reopen and reconsider. We dismissed the Petitioner's filing as untimely. The matter is now before us on another combined motion to reopen and reconsider. Upon review, we will dismiss the combined motion.

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. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration, identify errors of law or U.S. Citizenship and Immigration Services (USCIS) policy, and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

We dismissed the Petitioner's appeal on April 28, 2020. On July 30, 2020, the Petitioner filed Form I-290B to contest our decision.

On June 2, 2021, we dismissed the Petitioner's filing as untimely, stating:

> We are dismissing your Form I-290B, Notice of Appeal or Motion, because it was untimely filed. You must file a motion on an unfavorable decision within 33 calendar days of the date we mailed the decision. 8 C.F.R. § 103.5(a)(1), 103.8(b). As well, on March 30, 2020, USCIS issued Leadership Guidance providing flexibility allowing up to 60 days from the date of the decision for the submission of a Form I-290B.[1] On April 28, 2020, we mailed the unfavorable decision to you. Your Form I-290B was received at the designated filing location on July 30, 2020, which is 93 days after the decision.

On motion, the Petitioner states: "As a result of COVID-19 restrictions, USCIS has created guideline flexibility in responding to certain requests. The guidelines state[]: 'USCIS will consider a response to the above requests and notices received within 60 calendar days after the response due date set in the request or notice before taking action.'" The Petitioner asserts that this guidance added 60 days to the motion's original filing deadline of May 30, 2021, and that, therefore, his July 30, 2021 filing was timely.

The March 2020 Leadership Guidance, however, added 60 days to the response time for "certain Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" and similar requests and notices. The same guidance also specified: "Any Form I-290B received up to 60 calendar days *from the date of the decision* will be considered by USCIS before it takes any action" (emphasis added). Subsequent extensions likewise specified the same period of 60 days from the date of the decision; it did not *add* 60 days to the existing filing period.[2] We note that Form I-290B is not a "response" to a notice or request, representing continuing action in the context of an existing benefit request. Rather, it is a *filing* which initiates a new stage in the proceeding, requiring its own decision or other disposition. USCIS guidance separately refers to the Form I-290B timeframe.

For the above reasons, the Petitioner has not shown that we erred by dismissing his July 2021 filing as untimely.

When the Petitioner filed Form I-290B in July 2020, he indicated that a supplement would follow. We received the supplemental filing on August 12, 2020. After taking these actions, the Petitioner indicated in March 2021 that he intended the filing to be a combined motion to reopen and reconsider, rather than an appeal.

While the regulations permit a petitioner to supplement an appeal that has already been filed, there is no similar provision for motions. Rather, a motion to reconsider must be complete "when filed." *See* 8 C.F.R. § 103.5(a)(3). With respect to motions to reopen, the regulations acknowledge that new facts, which warrant a motion to reopen, may arise after the deadline to file a timely motion. Rather than allowing a placeholder filing followed by a supplement, however, the regulation at 8 C.F.R.

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[1] *See* "USCIS Expands Flexibility for Responding to USCIS Requests," https://www.uscis.gov/news/alerts/uscis-expands-flexibility-for-responding-to-uscis-requests.

[2] *See* https://www.uscis.gov/news/alerts for a searchable database that includes periodic extensions of the flexibility period.

§ 103.5(a)(1)(i) gives us discretion to accept an untimely motion to reopen "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." Here, the Petitioner has not established any reasonable delay, beyond his control, that prevented him from filing the motion to reopen within the 60 days permitted by the USCIS Leadership Guidance.

The Petitioner states, in his current motion, that he "reiterated his excusable delay," but the July 2020 filing included no explanation or acknowledgment of the delay in filing.

For the above reasons, the Petitioner's August 2020 supplement was not properly incorporated into the filing of a motion to reopen or a motion to reconsider.

Finally, the Petitioner's latest filing includes arguments regarding the merits of his underlying petition, and disputing the conclusions in our April 2020 appellate decision. By regulation, a motion is limited to "the prior decision" in the proceeding. *See* 8 C.F.R. § 103.5(a)(1)(i). Our April 2020 decision did not address the merits of the petition; it was limited to the procedural issue of timeliness. Therefore, any assertions of error with regard to the merits would not constitute grounds for reconsideration.

For the reasons discussed, the Petitioner has not shown proper cause for reconsideration and has not overcome the grounds for dismissal of the prior motion. We will therefore dismiss the motion to reconsider.

We will also dismiss the motion to reopen. The Petitioner cites, and quotes, the regulation at 8 C.F.R. § 103.5(a)(2), which requires the Petitioner to state new facts, but the Petitioner has not stated any new facts. Instead, the motion rests on procedural arguments. The Petitioner also resubmits the brief and exhibits that he submitted in August 2020, but these materials were already in the record and do not represent new facts or new evidence. The Petitioner's latest filing does not meet the requirements of a motion to reopen, and therefore we must dismiss that motion.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.