U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17561866

Date: MAR. 16, 2022

Motion on Administrative Appeals Decision

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

The Petitioner, a multimedia designer, seeks classification as an alien 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 met the initial evidence requirement for this classification through evidence of a major, internationally recognized award or meeting three of the criteria under 8 C.F.R. § 204.5(h)(3). In our decision dated May 29, 2020, we agreed with the Director and dismissed the Petitioner's appeal. He subsequently filed a motion to reconsider, which was received on August 26, 2020, 89 days after our appeal decision was issued. We dismissed the motion as untimely. The Petitioner now submits combined motions to reopen and reconsider, challenging our previous decision.

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 the motions.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

A motion to reconsider is based on an incorrect application of law or policy to the prior decision , 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.

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). A motion to reconsider must be filed within 33 of the date of the unfavorable decision. 8 C.F.R. §§ 103.5(a)(1), 103.8(b).

II. ANALYSIS

As noted above, in our most recent decision in this matter, we dismissed the Petitioner's motion to reconsider because it was not timely filed. While we acknowledged that USCIS issued guidance that allows for acceptance of Form I-290B within 60 calendar days of the unfavorable decision, due to processing and mailing delays resulting from the COVI-19 pandemic, the Petitioner's previous motion was not received until 89 days after our appeal decision was issued.

On motion, the Petitioner makes three arguments that the previous motion should not have been rejected as untimely. First, he refers to an email dated July 1, 2020 from USCIS which announced an extension of filing flexibilities initially instated on March 30, 2020. He highlights the language from that email which lists "filing date requirements for Form I-290B, Notice of Appeal or Motion" as one of several listed documents to which the flexibility applies. However, that email clearly states that a Form I-290B will be considered if "received up to 60 calendar days from the date of the decision before we take any action." Therefore, because the Petitioner's Form I-290B for his first motion was received 89 days after the date of our appeal decision, it cannot be considered to have been filed within the extended period allowed by the COVID-19 filing flexibilities policy.

Second, the Petitioner notes that an initial Form I-290B was received on July 2, 2020, 34 days after our unfavorable decision, but was rejected because it was filed on an outdated form, which he attributes to "a minor clerical error." In addition, he refers to submitted media articles regarding delays and other issues at the U.S. Postal Service during the COVID-19 pandemic, asserting that these led to a delay in his ability to refile the rejected Form I-290B. The Petitioner supports this argument by referring to 8 C.F.R. § 103.5(a)(1)(i), which allows USCIS to excuse an untimely filed motion to reopen in our discretion if the delay was reasonable and beyond the control of the petitioner. However, the regulation does not provide for discretion with regard to untimely filed motions to reconsider, which is the type of motion filed by the Petitioner after our dismissal of his appeal.

III. CONCLUSION

The Petitioner has not established that our previous decision was incorrect based upon the evidence of record or that that we misapplied relevant policy or law. In addition, after review of the new facts submitted in support of his motion to reopen, we conclude that he has not overcome the grounds for our dismissal of his previous motion. Accordingly, we will dismiss both motions.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.