



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

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

In Re: 21340921

Date: SEP. 28, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, a city branding expert, 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 Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker (Form I-140), concluding that record did not establish that the Petitioner met the initial evidence requirements through evidence of a one-time achievement, or, in the alternative, evidence that satisfied at least three of the ten evidentiary criteria at 8 C.F.R. § 204.5(h)(3). The Director further determined that the Petitioner had willfully misrepresented material facts with respect to her authorship record. The Petitioner subsequently filed a combined motion to reopen and motion to reconsider, which the Director dismissed as untimely. The Petitioner now appeals the Director's dismissal of the combined motion.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

I. ANALYSIS

As a preliminary matter, we emphasize that the Petitioner has not appealed the denial of the Form I-140 itself, but rather the Director's subsequent dismissal of her combined motions to reopen and reconsider. Although the Petitioner's appeal includes additional evidence in support of her petition, the merits of the initial denial decision, and of the underlying petition, are not before us. The only issue before us on appeal is whether the Petitioner has established that the Director erred by dismissing her combined motions.

The record reflects that the Director denied the Petitioner's Form I-140 on March 2, 2021. The Petitioner filed her combined motions to reopen and reconsider in response to that unfavorable decision on May 28, 2021.

The applicable regulations state that a motion on an unfavorable decision must be filed within 33 days of the date U.S. Citizenship and Immigration Services (USCIS) mails the decision. *See* 8 C.F.R. §§ 103.5(a)(1), 103.8(b). During the coronavirus (COVID-19) pandemic, USCIS issued guidance that Form I-290B, Notice of Appeal or Motion, would be accepted if filed within 60 days of the unfavorable decision. Based on this extended deadline, the Petitioner’s previous motion on the Director’s March 2, 2021, decision would have been deemed timely filed if received by USCIS on or before May 4, 2021, which includes the 60-day period plus three days for mailing. As noted, the Petitioner filed the combined motions on May 28, 2021. On appeal, the Petitioner concedes that the motions were untimely filed.

With respect to a motion to reopen, “failure to file before this [30-day] 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.” *See* 8 C.F.R. § 103.5(a)(1)(i). Although the prior motion was a combined motion to reopen and motion to reconsider, the regulations do not provide discretion for USCIS to excuse the untimely filing of a motion to reconsider. Therefore, our review is limited to whether the Director should have exercised his discretion to consider the merits of the untimely motion to reopen. For the reasons discussed below, we conclude that the Director’s decision to dismiss the untimely motion was appropriate.

A review of the Petitioner’s submission on motion reveals that she provided no explanation or justification for its late filing and therefore did not meet her burden to demonstrate that the delay was reasonable. Accordingly, the Director had no basis to excuse the late filing of the motion to reopen under 8 C.F.R. § 103.5(a)(1)(i) and was not required to consider the merits of the motion. The Petitioner has not established that the Director erred by dismissing it as untimely. USCIS cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

In the brief submitted in support of the instant motion, the Petitioner asserts that the late filing was caused by “human error” that resulted in a miscalculation of the deadline for filing the motion. She asserts, however, that the error was reasonable because USCIS issued confusing guidance on pandemic-related filing flexibilities that led her to believe that she had 90 calendar days, rather than 60 days, to file the motion.

As noted, USCIS has extended filing deadlines for appeals and motions filed on Form I-290B to account for anticipated delays associated with the COVID-19 pandemic, as well as extending deadlines for other actions, such as responses to requests for additional evidence. An announcement published by USCIS on January 28, 2021, was in effect at the time the Director denied the Petitioner’s Form I-140 on March 2, 2021. That announcement states that USCIS “will consider a Form N-336 or Form I-290B received up to 60 calendar days from the date of the decision before we take any action.”¹ The Petitioner has not explained how this announcement can be interpreted as allowing an affected party to file a Form I-290B up to 90 days after the date of an adverse decision.²

¹ *See* “USCIS Extends Flexibility for Responding to Agency Requests,” (Jan. 28, 2021), <https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-3>.

² The USCIS announcement that the Petitioner characterizes as “confusing” was issued on March 27, 2020 and expired on May 1, 2020.

We acknowledge the Petitioner's assertion that the COVID-19 flexibility policy was created with the intention of giving petitioners and applicants more time to collect documentation in support of their benefit requests and appeals. The Petitioner asserts that it would be "extremely unfair and prejudicial" for USCIS to make a finding of willful misrepresentation of a material fact without providing her with a chance to respond to those allegations. However, there is no indication that COVID-19 related delays prevented her from filing her motion in a timely fashion. A review of the record reflects that the Petitioner had obtained additional documentation to submit in support of her motion to reopen well before the due date of May 4, 2021. The Petitioner's statements on appeal do not demonstrate why she required several additional weeks to file the motion, beyond the extended deadline already provided by USCIS to provide additional flexibility during the pandemic. Therefore, the Petitioner has not supported her claim that she was not afforded an opportunity to timely file a motion in response to the Director's adverse decision dated March 2, 2021. Further, the arguments submitted on appeal do not establish that the Petitioner's untimely filing of the motion to reopen was reasonable and beyond her control.

For the reasons discussed, the Petitioner has not established that the Director's dismissed her combined motions in error or otherwise overcome the basis for the prior decision.

II. CONCLUSION

It is the Petitioner's burden to establish that the late filing of her motion was reasonable and beyond her control. The Petitioner provided no justification for the untimeliness of her combined motion at the time she filed it and therefore we cannot conclude that the Director erred by dismissing it. Although the Petitioner has provided an explanation for the untimely filing of the motion on appeal, that explanation, for the reasons discussed above, is not persuasive and does not warrant the withdrawal of the Director's decision. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.