U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5102767

Date: JAN. 15, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Multinational Managers or Executives

The Petitioner, a developer of software applications, seeks to permanently employ the Beneficiary as its chief technology officer under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity. The Director also found that the Petitioner abandoned the petition, because the Petitioner did not submit a timely response to a request for evidence (RFE).

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with our discussion below.

I. LAW

If a petitioner's initial evidence does not demonstrate eligibility, U.S. Citizenship and Immigration Services (USCIS), in its discretion, may request more information or evidence from the petitioner. 8 C.F.R. § 103.2(b)(8)(iii). In no case shall the maximum response period provided in a request for evidence exceed twelve weeks. 8 C.F.R. § 103.2(b)(8)(iv). Additional time to respond to a request for evidence or notice of intent to deny may not be granted. *Id*. 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. 8 C.F.R. § 103.8(b).

If a petitioner does not respond to an RFE by the required date, the benefit request may be summarily denied as abandoned, denied based on the record, or denied for both reasons. 8 C.F.R. § 103.2(b)(13)(i). A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen under §103.5. 8 C.F.R. § 103.2(b)(15).

The regulation at 8 C.F.R. § 103.5(a)(2) identifies three grounds for which USCIS may grant a motion to reopen a petition denied due to abandonment:

(i) The requested evidence was not material to the issue of eligibility;

(ii) The required initial evidence was submitted with the application or petition, or the petitioner submitted a timely response to the RFE; or

(iii) The RFE was sent to an incorrect address.

If the motion does not meet any of these requirements, then there is no regulatory provision for reopening the proceeding.

The official having jurisdiction over a motion is the official who made the latest decision in the proceeding. 8 C.F.R. § 103.5(a)(1)(ii).

II. ANALYSIS

The Petitioner's initial submission did not establish eligibility; therefore, the Director issued an RFE dated September 1, 2018. In that notice, the Director advised the Petitioner that the "response must be received . . . by November 28, 2018."

The Director received the Petitioner's response to the RFE on November 30, 2018. The Director found that the "response [was] untimely," and that the petition "deserves to be denied for abandonment." The Director also cited merits issues, which are beyond the scope of this decision. The Director incorrectly advised the Petitioner that it may file an appeal of the denial decision. *See* 8 C.F.R. § 103.2(b)(15). The Petitioner then appealed this decision, stating that the RFE response was timely.

Because a denial due to abandonment cannot be appealed, the Director should not have instructed the Petitioner that it may file an appeal with the Administrative Appeals Office (AAO). We are, therefore, remanding the matter for the Director to determine whether the filing qualifies as a motion to reopen under 8 C.F.R. § 103.5(a)(2)(ii). *See* 8 C.F.R. §§ 103.2(b)(15) and 103.5(a)(1)(ii). That being said, the Director should consider the following factors:

- The Petitioner argues that the "RFE was mailed on September 1, 2018, with a due date of November 27, 2018"[1] and that the regulations add three days to the response period, and therefore "the due date was November 30, 2018. Thus, the petition was not abandoned and the RFE was timely filed."
- The RFE showed an 88-day response period between September 1 and November 28, 2018, one day longer than the non-extendable regulatory maximum of 87 days for notices sent by mail. *See* 8 C.F.R. §§ 103.2(b)(8)(iv), 103.8(b).

In this remand order, we make no finding that the Petitioner has overcome the merits-based grounds for denial of the petition. However, we note that "[a] field office decision made as a result of a motion may be [appealed] to the [AAO] *only if the original decision was appealable to the [AAO].*" *See*

[1] The Petitioner argues in its appeal brief that the due date indicated on the RFE was November 27, 2018, however, the RFE provides a due date of November 28, 2018.

8 C.F.R. § 103.5(a)(6) (emphasis added). Therefore, if, on motion, the Director determines that the Petitioner's response to the RFE was timely, yet the petition remains denied based on its merits, then the Petitioner may appeal that denial to the AAO because the original decision was denied for merits-based reasons in addition to the abandonment.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.