U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19595948

Date: JUL. 06, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a software engineer under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After initially approving the petition, the Director of the Texas Service Center revoked the approval.[1] The Director found that the Petitioner did not establish that the Beneficiary possessed the required education and experience for the offered position, and that the job offer was *bona fide*. The Director further concluded that the Petitioner and the Beneficiary willfully misrepresented material facts concerning the Beneficiary's qualifying education and employment experience. The Beneficiary submitted a subsequent motion to reopen and reconsider the matter, which was rejected as improperly filed. [2] The Director dismissed a subsequent motion to reopen and reconsider filed by the Beneficiary as untimely.

The matter is now before us on the Beneficiary's appeal.

In these proceedings, it is the Appellant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this

[1] At any time before a beneficiary obtains lawful permanent residence, however, U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

[2] Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (excluding a beneficiary of a visa petition as an "affected party"). U. S. Citizenship and Immigration Services (USCIS), however, treats beneficiaries as affected parties if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017). "A beneficiary's request to port is 'proper' when USCIS has evaluated the request and determined that the beneficiary is indeed eligible to port prior to the issuance of a NOIR [notice of intent to revoke] or NOR [notice of revocation]." USCIS Policy Memorandum PM 602-0152, *Guidance on Notice to, and Standing for, AC 21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* 5 (Nov. 11, 2017), https://www.uscis.gov/legal-resources/policy-memoranda. Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when USCIS makes a favorable determination that the beneficiary is eligible to port. *Id.*

matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

As an initial matter, we note that our review on appeal is generally limited to the basis for the underlying adverse decision. Thus, we consider whether the Director properly dismissed the Beneficiary's motion to reopen and reconsider as untimely.

Any motion must be filed within 30 days of the unfavorable decision (or 33 days if the decision is mailed). *Id.*; 8 C.F.R. § 103.8(b). USCIS may excuse failure to timely file a motion to reopen if the applicant demonstrates that the delay was reasonable and was beyond his or her control. 8 C.F.R. § 103.5(a)(1)(i). However, the regulations do not provide a corresponding discretion to excuse an untimely motion to reconsider.

Because of the COVID-19 pandemic, USCIS may consider a Form I-290B, Notice of Appeal or Motion, filed within 63 calendar days of an unfavorable decision issued between March 1, 2020, and October 31, 2021.[3]

The record reflects that subsequent to the approval of the petition, the Acting Director of the Texas Service Center notified the Petitioner of her intent to revoke the petition's approval. After considering the Petitioner's response to the notice, the Director revoked the petition's approval.

The Beneficiary submitted a motion to reopen and reconsider the Director's decision on November 6, 2020. USCIS records indicate that the filing was rejected on December 16, 2020, as the "check/money order date either has expired or it is in the future."[4]

More than 150 days from the date of the Director's notice of revocation, the Beneficiary filed a motion to reopen and reconsider the Director's decision on February 5, 2021. Although this motion was filed within 50 days of the rejected I-290B, the Director dismissed the Beneficiary's motions as untimely, noting that the record did not include evidence that the first Form I-290B was improperly rejected. A rejected benefit request does not retain a filing date. 8 C.F.R. § 103.2(a)(7)(iii). Also, the Director noted that the second Form I-290B was not timely and filed within 63 days of the underlying unfavorable decision, the original revocation.

On appeal, the Beneficiary again does not allege USCIS error or provide evidence that the first Form I-290B was improperly rejected. The Beneficiary does not provide a copy of the filing fee check or money order to establish that it was properly dated or assert that USCIS otherwise erred in rejecting the filing. A rejected benefit request does not retain a filing date. 8 C.F.R. § 103.2(a)(7)(iii). Thus, the Beneficiary's initial Form I-290B, which USCIS received on November 6, 2020, and ultimately rejected cannot be considered filed on that date. Rather, the Form I-290B filing date is February 5, 2021, when USCIS received the re-submitted motion and accepted it for processing. Because that date is outside the 33-day period mandated by the regulations (and outside the 63-day period allowed by the USCIS COVID-19 response), we agree with the Director's determination that the motion was untimely filed. Furthermore, as the Beneficiary did not provide an explanation for the delay in filing

[3] *See* https://www.uscis.gov/newsroom/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-1.
[4] *See generally* 8 C.F.R. § 106.1; *see also* https://www.uscis.gov/forms/filing-fees.

the motion, he also did not establish that the delay was reasonable and that the late filing should be excused as a matter of discretion. Consequently, we will dismiss the appeal.[5]

ORDER: The appeal is dismissed.

[5] Even if we considered the previous motions to have been properly and timely filed, which we do not, we would dismiss the appeal on the merits. As stated on the labor certification, the offered position of software engineer requires 60 months of post-baccalaureate experience in the job offered job, or in a "mid to senior IT profession." However, as noted in the NOIR, several inconsistencies in the record cast doubt on the Beneficiary's claimed qualifying experience. These inconsistencies remain unresolved on appeal.

The Petitioner asserts that the Beneficiary earned his bachelor of engineering degree in January 1998. Therefore, the Beneficiary's qualifying post-baccalaureate experience must be calculated between January 1998 and November 2, 2005, the date the labor certification was filed. *See* 8 C.F.R. § 204.5(d). The record includes letters from the Beneficiary's previous employer [redacted], stating that the Beneficiary was employed from July 1997, first as a programmer until December 16, 1999, and then as a senior programmer, until September 4, 2000 (the dates the letters were signed). However, neither letter documents the Beneficiary's job duties in these roles, or that his employment as a programmer was in the job offered or in the alternate occupation of a "mid to senior IT profession."

On the labor certification, the Petitioner asserts that the Beneficiary also gained qualifying experience working full-time with [redacted] from November 6, 2000 to August 31, 2005. The record includes the Beneficiary's 2004 Internal Revenue Service Form W-2, Wage and Tax Statement, demonstrating that [redacted] paid the Beneficiary total wages of $21,888 in 2004. This amount casts doubt on the Petitioner's claim that the Beneficiary's qualifying employment with [redacted] was full-time for each claimed year. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the record before us, the Petitioner has not demonstrated that the Beneficiary gained the required 60 months of post-baccalaureate experience before the date the labor certification was filed, November 2, 2005. Therefore, the Petitioner has not established that the Beneficiary meets the minimum requirements for the offered position as described on the labor certification and the appeal would be dismissed on this basis.