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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: **SEP 12 2007**  
LIN 06 157 52180

IN RE: Petitioner: [redacted]  
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to  
Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:  
SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to  
the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reconsider.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing for an appeal is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

On appeal, the petitioner asserts that the director's decision was "undated" and submits a copy of the denial notice showing no date. The decision is stamped as received by the petitioner on April 3, 2007. The regulation at 8 C.F.R. § 103.5a(a)(1) provides that routine service consists of mailing a copy by ordinary mail. Thus, the period in which to file an appeal begins on the day the denial is mailed, not received.

The record indicates that the director issued the decision on March 29, 2007.<sup>1</sup> On appeal, the petitioner does not submit the postmarked envelope or other evidence that the decision was actually *mailed* after March 29, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The petitioner dated the cover letter submitted with the appeal May 1, 2007 and the envelope in which the appeal was mailed was postmarked the same day. The appeal was received by the director on May 2, 2007, 34 days after the decision was issued. Accordingly, the appeal was untimely filed. The director forwarded the matter to the AAO.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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<sup>1</sup> On appeal, the petitioner submitted copies of the director's decision denying the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, due to the denial of the underlying Form I-140 petition. The denial of the beneficiary's adjustment application is dated March 29, 2007.

Here, the untimely appeal meets the requirements of a motion to reconsider. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

**ORDER:** The appeal is rejected. The matter is returned to the director for consideration as a motion to reconsider.