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U.S. Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

[Redacted]

File: [Redacted] Office: Vermont Service Center Date: JUN 13 2001

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

Public Copy

IN BEHALF OF PETITIONER:  
[Redacted]

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The petitioner has subsequently filed a motion to reopen.<sup>1</sup> The director has forwarded the record of proceeding to the Associate Commissioner for Examinations for review. The petition will be remanded.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States because the petitioner will practice medicine in a designated health care professional shortage area. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

The director denied the petition on August 12, 1999. The petitioner did not appeal this decision. Subsequently, on November 12, 1999, the Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95, became law. Among other provisions, this statute amended the Act to make the national interest waiver available to certain physicians intending to practice in underserved areas. This provision of law did not exist at the time that the director denied the petition.

On March 27, 2000, the petitioner filed a motion to reopen.<sup>2</sup> On motion, counsel specifically cites the above statute as grounds for reopening the petition. According to 8 C.F.R. 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding. Because, in this case, the disputed decision was rendered by the director, the AAU has no jurisdiction over this motion and the case must be remanded to the director for a decision pursuant to the regulations governing motions to reopen.

Because new regulations are in place which are relevant to the matter at hand, we will review those new rules here. Any further

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<sup>1</sup>The petitioner inadvertently filed the motion with the Texas Service Center, which subsequently transferred the motion to the Vermont Service Center.

<sup>2</sup>Counsel utilized a Form I-290B Notice of Appeal when preparing the motion. It appears that the director may have seen this form, mistaken the motion for a true appeal, and forwarded the motion to the Administrative Appeals Office for that reason.

action taken by the director must be consistent with these regulations.

8 C.F.R. 103.5(a)(1)(i) requires that a motion to reopen must be filed within thirty days of the underlying decision, except that failure to file during this period may be excused at the Service's discretion when the petitioner has demonstrated that the delay was reasonable and beyond the control of the petitioner.

Even if the new statute allowed for the reopening of denied, unappealed petitions, the petitioner did not file a motion until more than four months after the enactment of the new law. The statute, however, contains no such provision. With regard to the regulations arising from the statute, 8 C.F.R. 204.12(d)(2) states in pertinent part:

Section 203(b)(2)(B)(ii) of the Act applies to all petitions that were pending adjudication as of November 12, 1999 before a Service Center, before the Associate Commissioner for Examinations, or before a Federal court.

In supplemental information accompanying the above interim rule, published in 65 Fed. Reg. 53889 (September 6, 2000), the Service stated:

If a Service decision that denied an immigrant visa petition became administratively final before November 12, 1999, the alien physician may obtain the benefit contained in the interim rule only through the filing of a new immigrant visa petition with the required evidence. The Service will not entertain motions to reopen or reconsider denied cases because the provisions of section 203(b)(2)(B)(ii) of the Act were not in effect when those particular cases were denied. Under established precedent, in order for an alien to receive a priority date, his or her petition must be fully approvable under the law that is in effect at the time of filing. See [redacted] 19 I&N Dec. 427 (BIA 1986). The denial of a motion to reopen or reconsider, however, will be without prejudice to the filing of a new immigrant visa petition.

This restriction applies only if the denial became final before November 12, 1999. That is, if the petitioner had filed a timely appeal of the Administrative Appeals Office (AAO) which was still pending as of that date, or, if the AAO affirmed the denial but the petitioner had already sought judicial review by November 12, 1999, it will not be necessary to file a new petition. In making provision for cases filed before November 1, 1998,

however, section 203(b)(2)(B)(ii)(IV) of the Act makes it clear that Congress intended to apply this new provision to all petitions that were actually pending on November 12, 1999.

The petition in this matter was not pending before the Service Center, the AAO, or any court as of November 12, 1999; the authorized 30-day period for filing an appeal or a motion expired well before that date, and the petitioner had filed neither a timely appeal nor a timely motion. In this proceeding, the petitioner has filed a motion to reopen over seven months after the petition was denied, based on a provision of law which simply did not exist when the petition was filed.

For the above reasons, we do not believe that the delay in filing the motion was reasonable. The director did not err by failing to take future legislation into account when rendering the decision, and the regulations concerning the very section of law cited by counsel specifically preclude reopening petitions with initially uncontested denials. Nevertheless, the initial, binding determination in this respect lies with the director rather than the AAO.

Accordingly, this matter is remanded to the director for consideration under the above statutory provision and regulations at 8 C.F.R. 204.12. The director must allow the petitioner the opportunity to submit any further evidence required by the new regulations at 8 C.F.R. 204.12(c).

**ORDER:** The petition is remanded to the director for further action in accordance with the foregoing, and in compliance with all regulations in effect at the time the decision is rendered.