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U.S. Department of Justice
Immigration and Naturalization Service

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

File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: SEP 23 2002

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. On the basis of new information received and on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and his reasons therefore, and ultimately revoked the approval of the petition on May 20, 1999. The matter is now before the Associate Commissioner for Examinations on appeal. The matter will be remanded for further consideration.

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 revoked the approval of the petition because the petitioner had left the underserved area specified in the initial petition documents.

The regulation at 8 C.F.R. 205.2(d) indicates that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The notice of revocation erroneously stated that the petitioner could file an appeal within 33 days. Nevertheless, the director's error cannot and does not supersede the pertinent regulations. The appeal was filed on June 15, 1999, and was thus untimely filed.

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 as described in 8 C.F.R. 103.5(a)(2), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

8 C.F.R. 103.5(a)(2) requires that a motion to reopen state the new facts to be proved at the reopened proceeding; and be supported by affidavits or other documentary evidence. Review of the record indicates that the appeal meets this requirement.

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.

Furthermore, new regulations pertain to physicians seeking the national interest waiver based on service to a medically underserved area. The petition in this case was filed on November 18, 1997. The petitioner's appeal was still pending as of November 12, 1999. Pursuant to the interim regulation at 8 C.F.R. 204.12(d)(2), this petition shall be remanded to the director for consideration under the newly-enacted section 203(b)(2)(B)(ii) of the Act.

As noted above, the director revoked the approval of this petition because the petitioning physician had left the underserved area (in Ohio) designated on the initial documents, and had begun practicing in Florida. The interim rule at 8 C.F.R. 204.12(f) requires the submission of a

new petition if the alien physician relocates to a new medically underserved area. A new petition has, in fact, already been filed by an employer in Florida. The petition, filed on July 20, 2001, was approved on February 28, 2002. The petition has a priority date of July 31, 2000. The fact that the priority date differs from the filing date indicates that the new petition includes an approved labor certification, in which case it is far from clear why the Service should waive a requirement that has already been met. Pursuant to the above approved petition, the alien petitioner in this matter has filed a Form I-485 adjustment application, with receipt number SRC 01 183 50754. If the petitioner seeks further action regarding the present petition, with a request for a national interest waiver, it would appear to be appropriate for the director to inquire as to why the petitioner's approved petition, with a labor certification, is inadequate. We further note that an approval of a national interest waiver would not expedite the approval of his adjustment application. Indeed, under current regulations, an adjustment application arising from the approval of a petition with a labor certification is not subject to the five-year requirement that attaches to physician waivers, and therefore approval of a physician waiver, if it had any effect at all, would presumably delay the approval of the adjustment application by several years.

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 director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.