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

**PUBLIC COPY**

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

MAR 28 2003

File: [REDACTED] Office: Texas Service Center

Date:

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:

[REDACTED]

**Identifying 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 that originally decided your case. Any further inquiry must be made to that office.

*Elizabeth Hayward*  
for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be rejected.

We note that, while the petitioner's submission includes a Form I-290B Notice of Appeal, counsel repeatedly refers to the submission as a motion to reopen rather than an appeal. Whether the submission is treated as an appeal or as a motion, regulations (to be discussed below) plainly prohibit the further consideration of this petition.

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 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 intends to practice as a physician in a medically underserved area. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has 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 September 21, 1999, citing *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998). That precedent decision held that a local worker shortage is not sufficient grounds for a national interest waiver of the job offer requirement, because a fundamental purpose of labor certification is to demonstrate that qualified workers are unavailable locally. At the time of the director's decision in September 1999, neither the statute nor the regulations provided any special exceptions or provisions for physicians.

In the denial notice, the director properly advised the petitioner that, if the petitioner desired to appeal the decision, the "notice of appeal must be filed within 30 days from the date of this notice." This instruction reflects the requirement at 8 C.F.R. § 103.3(a)(2)(i) that "[t]he affected party shall file the complete appeal . . . within 30 days after service of the decision."

The petitioner did not file an appeal or motion to reopen within 30 days. The petitioner filed the appeal on January 28, 2000, citing new legislation that was passed on November 12, 1999. On that date, Congress amended the Act to incorporate a new section 203(b)(2)(B)(ii). That new section indicates that a physician intending to practice medicine in a medically underserved area, and who meets certain evidentiary requirements, qualifies for the national interest waiver. Counsel states that this new legislation nullifies the denial of the petition, and thus warrants its reopening and approval. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B) spells out the procedures relating to untimely appeals:

(I) Rejection without refund of filing fee. An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

(2) Untimely appeal treated as motion. If an untimely appeal meets the requirements of a motion to reopen as described in Sec. 103.5(a)(2) of this part or a motion to reconsider as described in Sec. 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The above regulation would ordinarily cause the petitioner's untimely appeal to be treated as a motion. There is, however, a superseding regulation at 8 C.F.R. § 204.12(d)(6). This regulation explicitly rules out the reopening of denied petitions for which no timely appeal was pending at the time section 203(b)(2)(B)(ii) was amended to the Act:

Petitions denied prior to November 12, 1999. If a prior Service decision denying a national interest waiver under section 203(b)(2)(B) of the Act became administratively final before November 12, 1999, an alien physician who believes that he or she is eligible for the waiver under the provisions of section 203(b)(2)(B)(ii) of the Act may file a new Form I-140 petition accompanied by the evidence required in paragraph (c) of this section. The Service must deny any motion to reopen or reconsider a decision denying an immigrant visa petition if the decision became final before November 12, 1999, without prejudice to the filing of a new visa petition with a national interest waiver request that comports with section 203(b)(2)(B)(ii) of the Act.

Supplementary information to Service regulations implementing the Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95, published at 65 Fed. Reg. 53889 (September 6, 2000), reinforces and explains the above regulation:

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 Matter of Atembe*, 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.

Because the petition was denied on September 21, 1999, and the petitioner did not file a timely appeal, the denial became administratively final upon the expiration of the 30-day appeal filing period. The above regulation at 8 C.F.R. § 204.12(d)(6) contemplates the exact circumstances under which the petitioner filed this untimely appeal/motion. Because the petitioner's submission was filed several months after the 30-day appeal period elapsed, as an appeal it must be rejected. Furthermore, because the denial was administratively final before November 12, 1999, the above



regulations demand the denial of any motion to reopen the petition. Therefore, it would serve no useful purpose to treat the untimely appeal as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

Pursuant to the above-cited regulations, the rejection of this appeal (or, alternatively, the denial of this motion) is without prejudice to any new petition filed subsequent to the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999.

**ORDER:** The appeal is rejected.

