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U.S. Citizenship  
and Immigration  
Services

*BS*



FILE: WAC-01-201-50365 Office: CALIFORNIA SERVICE CENTER Date: **APR 15 2004**

IN RE: Petitioner:   
Beneficiary:

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)

ON BEHALF OF PETITIONER:



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.

*Mari Johnson*

*RP* Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

According to 8 C.F.R. § 103.3(a)(2)(i), an appeal must be filed with the office where the unfavorable decision was made within 30 days after service of the decision. 8 C.F.R. § 103.5a(b) states that whenever a person is required to act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. The same provision provides that service by mail is complete upon mailing. *Id.*

The director issued his decision on March 19, 2002. Although the petitioner submitted a Form G-28 dated March 28, 2001, designating counsel as the attorney of record, it does not appear that the director initially sent a copy of the decision to counsel. According to a postmarked envelope submitted on appeal, the director sent a copy of the decision to counsel on May 24, 2002. The appeal was received on Friday, June 28, 2002, more than 33 days after the envelope was postmarked. The appeal was therefore filed untimely.

8 C.F.R. § 103.3(a)(2)(v)(B) states that an appeal that is not filed within the time allowed must be rejected as improperly filed; however, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), 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 Citizenship and Immigration Services (CIS) policy.

Upon review, counsel claims that the director's decision was based on an incorrect application of law or policy and has cited to a precedent decision in support of this claim. Accordingly, the petitioner's untimely-filed appeal meets the requirements for a motion to reconsider.

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. In this case, the disputed decision was rendered by the director; the AAO has no jurisdiction over this motion. The director must issue a decision on this motion pursuant to the regulations governing motions to reopen and/or reconsider.

**ORDER:** The appeal is rejected.