

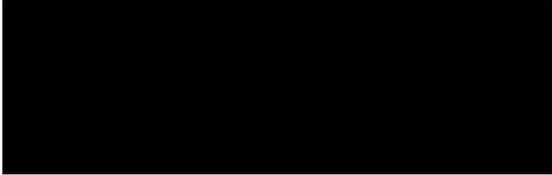
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U.S. Citizenship
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **NOV 17 2005**
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IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, revoked the approval of the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a software development and recruitment business. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. Citizenship and Immigration Services (CIS) electronic records reveal that the director approved the petition on February 22, 2005 and immediately cancelled the action. Nevertheless, an approval notice appears to have been issued. Upon review, the director determined that the petitioner did not have the required education as of the priority date and revoked the approval of the petition accordingly. The director did *not* first serve the petitioner with notice of intent to revoke the approval of the petition, pursuant to the regulation at 8 C.F.R. § 205.2(b).

The record indicates that the director issued the decision, which is titled a “revocation” and concludes with the order “the petition is revoked,” on April 6, 2005. The appeal was filed on May 3, 2005, 27 days after the decision was rendered. According to the pertinent regulations, the appeal was not timely filed. The regulation at 8 C.F.R. § 205.2(d) states that revocations of approvals must be appealed within 15 days after the service of the notice of revocation (18 days if service is by mail). We acknowledge that the notice of revocation erroneously stated that the petitioner could file an appeal within 33 days. Nevertheless, the director’s error does not supersede the pertinent regulations.

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. 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). Thus, while the appeal appears to meet the requirements of a motion, the ultimate decision as to whether to treat the late appeal as a motion rests with the director.

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.