



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN 07 183 51658

Office: NEBRASKA SERVICE CENTER

Date: AUG 29 2008

IN RE:

Petitioner:
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:

[REDACTED]

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, initially approved the immigrant visa petition. Upon 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 visa petition, and his reasons therefore, and ultimately revoked the approval of the petition on May 5, 2008. The matter is now before the Administrative Appeals Office on appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reconsider.

The petitioner performs software consultancy and development services. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a bachelor's degree.

On appeal, the petitioner cites conventions that do not address what constitutes equivalent or comparable education and two federal cases that involve a lesser classification than the one sought, *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Ore. 2005) and *Hoosier Care, Inc. v. Chertoff*, 482 F. 3d 987 (7th Cir. 2007).

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the director issued the decision on May 5, 2008. According to the pertinent regulations, the appeal was not timely filed. 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. 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. Although counsel dated the appeal June 3, 2008, it was received by the director on June 4, 2008, 30 days after the decision was issued. Accordingly, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 15-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

Here, the untimely appeal meets the requirements of a motion to reconsider. 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). Therefore, the director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reconsider.