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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

B5

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 28 2008
EAC 04 196 50486

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.

Marc Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be rejected as untimely filed.

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 an alien of exceptional ability or 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 an alien employment certification, is in the national interest of the United States. The director found that the petitioner does not qualify for the classification sought or a waiver of the alien employment certification. The AAO upheld the director's ultimate decision. On motion, counsel's sole assertion is that the precedent decision on which the director and the AAO relied pursuant to 8 C.F.R. § 103.3(c) was issued in violation of the Administrative Procedure Act (APA).

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 CIS policy. Counsel asserts that the AAO's decision was based on an incorrect application of law. Counsel does not support his brief with any precedent or federal court decisions striking down any part of *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Commr. 1998), the precedent decision he claims violates the APA,[1] but does cite federal cases relating to the APA in general. Thus, the motion, as characterized by counsel, is a motion to reconsider.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides, in pertinent part, that any motion to reconsider an action by Citizenship and Immigration Services (CIS) filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. The AAO dismissed the appeal on August 3, 2007. That decision advised the petitioner that the record was being returned to the office that originally decided the petitioner's case, the Vermont Service Center. Regardless of the information counsel claims to have received from the CIS customer service telephone line, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(E) provides that motions must be submitted "to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction." The regulation at 8 C.F.R. § 103.2(a)(7) provides that an application or petition is properly filed when received with the required filing fee. The Vermont Service Center received the motion with proper fee on September 21, 2007, 49 days after the AAO's decision. Thus, it was untimely filed.

ORDER: The motion is rejected as untimely filed.

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[1] *See Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001)(rejecting a claim that *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215 violates the APA).