



U.S. Citizenship  
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Services

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BC

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 21 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the immigrant visa petition. The Director rejected the appeal as untimely. The petitioner has filed a motion to re-open/reconsider or appeal the rejection. The appeal will be dismissed.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

*Requirements for motion to reconsider.* 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.

The motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal, and, he asserts no precedent decisions for any position. There was no brief in the matter. Petitioner's counsel, in his cover letter transmitting the abovementioned documents, does not raise any issues of law or fact.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does not qualify as a motion to reopen. There are no new facts presented here by counsel that related to his initial evidence accompanying the petition, or to the issue of whether or not on the priority date of the alien labor application the petitioner had the ability to pay the beneficiary the proffered wage.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party, in order to properly file an appeal, must file the complete appeal within 30 days 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).

In the present case, the appeal of the initial denial was untimely filed. The record indicates that the Service Center director issued the decision on February 5, 2004. The director properly gave notice to the petitioner that it had 30 days to file the appeal. Citizenship and Immigration Services (CIS) received the appeal on March 16, 2004, 41 days after the decision was issued. The appeal, therefore, was untimely filed.

No reason was given for the late filing. Counsel has provided the original U.S.P.S. Form 3811 certified mail receipt showing that the appeal was received by the Service Center on March 16, 2004. There is no factual dispute here, and, counsel is not asserting that the Service committed an error of law or policy.

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). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

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

**ORDER:** The appeal is dismissed.