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JUN 14 2005



File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC-93-170-50980

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)

IN 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, initially approved the immigrant visa petition. On the basis of an investigation for fraud and information received, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke (NOIR) the approval of the preference visa petition, and his reasons therefor, and ultimately revoked the approval of the petition. The Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely. The matter is again before the AAO on a motion to reopen. The motion will be denied. The prior decision of the AAO will be sustained. The petition will remain denied.

The director revoked the approved immigrant visa petition on the basis that the petitioner failed to timely respond to the NOIR. The director's NOIR was dated February 21, 2002 and gave the petitioner 30 days to respond. The petitioner's counsel sought a 30-day extension of the deadline to respond to the NOIR on March 4, 2003 and ultimately responded on April 22, 2002. There is no indication in the record of proceeding that the requested extension was granted and the regulations at 8 C.F.R. § 205.2 do not provide for the granting of such a request. The director ultimately revoked the petition on June 6, 2002, which was mailed on June 11, 2002 and noted the petitioner's failure to timely respond to the NOIR. The director's notice of revocation clearly indicated that the petitioner had fifteen (15) days to appeal his decision to the AAO in accordance with the requirement set forth at 8 C.F.R. § 205.2(d). The petitioner filed an incomplete appeal on Form I-290B on June 21, 2002, which was properly rejected by the director and returned to the petitioner¹. The petitioner re-filed the appeal on July 8, 2002, which was accepted at that date as properly filed and received by Citizenship and Immigration Services (CIS). Although the AAO's October 14, 2003 decision references incorrect dates, the prior adjudicator properly rejected the appeal as untimely filed as the ultimate complete and properly filed appeal was received past the 15-day deadline required by 8 C.F.R. § 205.2(d).

On motion to reopen, counsel submits additional evidence. 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). Counsel states that the appeal was timely filed and submits copies of mail receipts to prove that fact. Counsel fails to address the defective appellate filing that ultimately resulted in the untimely receipt of the appeal by CIS. The factual crux in this matter is whether or not CIS received the appeal within the 15-day deadline and the evidence submitted by counsel on appeal does not support that factual assertion. Thus, the motion to reopen will be denied.

The portion of the AAO's decision that contains erroneous date information is withdrawn and replaced by the factual summary in this decision, but otherwise the AAO's October 14, 2003 decision to reject the appeal as untimely is affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The motion to reopen is denied. The prior decision of the AAO, dated October 14, 2003, is affirmed in part and withdrawn in part. The petition remains denied.

¹ The petitioner or counsel failed to complete Item 2 reflecting whether or not additional evidence or a brief would be submitted into the record of proceeding. See 8 C.F.R. §§ 103.2(a)(1) and (7)(i), which provide guidance that every filing with CIS, including an appeal, must conform to the instructions on the appropriate form and the receipt date will be stamped upon actual receipt of a proper filing.