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U.S. Citizenship
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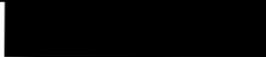
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APR 30 2007

FILE:



Office: VERMONT SERVICE CENTER

Date:

EAC 01 259 50829

IN RE:

Petitioner:

Beneficiary:



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, Chief
Administrative Appeals Office

DISCUSSION: The director, Vermont Service Center, initially approved the employment-based preference visa petition. The petitioner's Immigrant Petition for Alien Worker (Form I-140) was filed with CIS on August 21, 2001, and was approved on January 28, 2002.¹ In a Notice of Revocation (NOR), the director ultimately revoked the Form I-140. An application for lawful permanent residence (Form I-485) in connection with the approved Form I-140 was also denied at the time the director issued the revocation.² The matter is now before the Administrative Appeals Office (AAO) on appeal. In his decision to the petitioner, the director erroneously provided instructions to the petitioner that the petitioner could appeal the decision within 30 days (33 days if mailed) from the date of his decision. However, the regulations at 8 C.F.R. § 205.2 (d) state that the petitioner may appeal the decision to revoke the approval within 15 days after the service of notice of the revocation. Therefore, while the petitioner, in following the written guidance of the director, filed a timely appeal; based on 8 C.F.R. § 205.2(d), the instant appeal is untimely.

Nevertheless, 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states:

Untimely appeal treated as motion. If an untimely appeal meets the requirements of a motion to reopen as described in § 103.5(a)(2) of this part or a motion to reconsider as described in § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision made on the merits of the case.

The appeal submitted by the petitioner qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director made an erroneous decision through misapplication of law or policy. 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 AAO will remand the petition to the director for consideration of the untimely appeal as a motion.

ORDER: The appeal is remanded to the director for consideration of the appeal as a motion.

¹ The director issued a request for evidence but ultimately approved the petition.

² Based on the I-485 visa petition, the director interviewed the beneficiary and subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR).