



U.S. Citizenship
and Immigration
Services

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AUG 21 2008

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date:
SRC 06 156 51222

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:

[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, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO). The appeal will be rejected as untimely filed.

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 regulation at 8 C.F.R. § 1.1(h) states:

The term *day* when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

The record indicates that the director issued the decision on November 8, 2006. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although counsel dated the appeal December 12, 2006, it was received by Citizenship and Immigration Services (CIS) on December 13, 2006, or 35 days after the decision was issued. On the I-290B form, at item No. 1, counsel asserts that the decision was dated November 8, 2006 and received November 13, 2006. On a cover letter dated December 12, 2006 submitted with the Form I-290B, counsel reiterates the assertion that the director's decision was received on November 13, 2006. The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, the regulation at 8 C.F.R. § 103.3(a)(2)(i) requires that the petition be file 30 days "after service" of the decision. The regulation at 8 C.F.R. § 103.5a(a)(1) defines routine service as mailing, not receipt. As stated above, the regulation at 8 C.F.R. § 103a(b) provides that where, as in this case, service is by mail, three days are added to the prescribed period. As the appeal was not filed within 33 days of service, complete upon mailing, the appeal was untimely filed.

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 rejected.

ORDER: The appeal is rejected.