



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 05 104 50859

Office: TEXAS SERVICE CENTER

Date:

JUN 03 2008

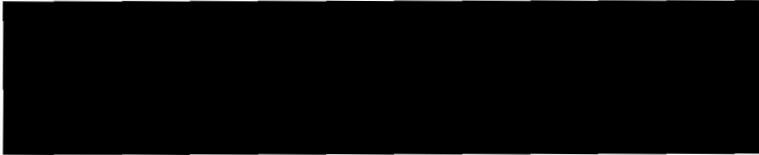
IN RE:

Petitioner:
Beneficiary:



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

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Acting Director, Texas Service Center. On further review of the record, the Acting Director determined that the beneficiary was not eligible for the benefit sought. The Acting Director served the petitioner with notice of intent to revoke the approval of the preference visa petition, together with her reasons therefore. The Acting Director subsequently revoked approval of the petition due to marriage fraud under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), as a skilled worker.

The record indicates that the director issued the Notice of Revocation (NOR) on June 17, 2005. In order to properly file an appeal, the regulation at 8 C.F.R. § 205.2(d) provides that the affected party must file the complete appeal within 15 days after service of the NOR. If the NOR was mailed, the appeal must be filed within 18 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). Although the appeal was originally submitted on July 15, 2005,^{1 2} the director returned the appeal to the petitioner on July 18, 2005 because the Form I-290B, Notice of Appeal to the Administrative Appeals Office, was not the correct version of the form. The appeal was not properly received by the director until July 28, 2005, or 41 days after the decision was issued.³ Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee CIS has accepted will not be refunded.

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).

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). 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

¹ It is noted that counsel filed a motion to reopen/reconsider with the director on July 13, 2005. On motion, counsel submitted a brief identical to the brief submitted on appeal. Counsel submitted no additional evidence on motion or on appeal. The director dismissed the petitioner's motion to reopen/reconsider on July 25, 2005.

² It is also noted that even though the appeal was originally submitted on July 15, 2005, it was untimely as it was submitted 28 days after the NOR instead of the required 18 days.

³ This office notes that counsel indicates on Form I-290B and in her brief submitted on appeal that she represents the beneficiary. Citizenship and Immigration Services' (CIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). However, the record of proceeding contains a properly executed Form G-28 signed by the petitioner's representative and counsel. Therefore, the appeal will be treated as being filed by the petitioner through counsel.

evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, counsel submitted identical arguments on appeal and on motion. Since the petitioner has received a decision on its motion to reopen/reconsider, this office declines to return the matter to the director for consideration as a motion. The appeal must be rejected.

ORDER: The appeal is rejected as being untimely filed.