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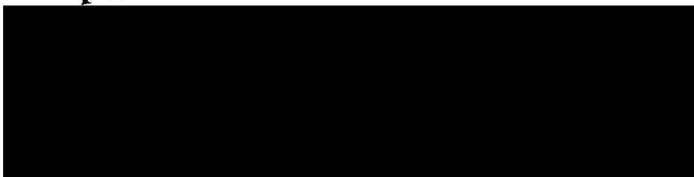
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

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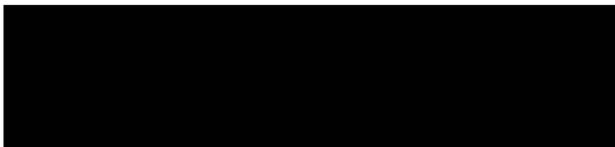
FILE: [Redacted] SRC 05 030 52000

Office: TEXAS SERVICE CENTER Date: **MAY 20 2008**

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

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 denied by the Director, Texas Service Center and 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 AAO will return the matter to the director for consideration as a motion to reconsider.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a cafe. It seeks to employ the beneficiary permanently in the United States as a retail store manager. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date. The director denied the petitioner accordingly.

On the appeal form counsel indicated that a brief or additional evidence would be submitted within 30 days. The record does not contain the brief or any additional evidence. Subsequently, this office sent a fax to counsel on February 2, 2007, inquiring after the promised brief or evidence. Counsel did not respond to that fax. The appeal will be adjudicated based on the evidence of record.

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 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 record indicates that the director issued the decision on May 19, 2005. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although the appeal was originally submitted on June 20, 2005, the director returned the appeal to the petitioner on June 21, 2005 because the Form I-290B, Notice of Appeal to the Administrative Appeals Office, was not properly signed. The appeal was not properly received by the director until July 1, 2005, or 43 days after the decision was issued. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.2 states in pertinent part:

(a) Filing-(1) General. Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions, (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission. . . .¹

(a)(2) Signature. An applicant or petitioner must sign his or her application or petition. . . .By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct.

(a)(7) Receipt date-(i) General. An application or petition received in a USCIS office shall be stamped to show the time and date of actual receipt and, unless otherwise specified in part

¹ The instructions for the I-290B clearly state:

Acceptance. An appeal that is not signed or is not accompanied by the proper fee will be rejected with a notice that the appeal is deficient. You may correct the deficiency and resubmit the appeal. However, an appeal is not considered properly filed until it is accepted by USCIS.

204 or part 245 or part 245a of this chapter, shall be regarded as properly filed when so stamped, it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted. An application or petition which is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed. Rejected applications and petitions, and ones in which the check or other financial instrument used to pay the filing fee is subsequently returned as non-payable will not retain a filing a date.

In the instant case, the Form I-290B was returned for a proper signature and was not resubmitted until July 1, 2005, or 43 days after the decision was issued. The appeal was, therefore, untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. 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.

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 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, the untimely appeal meets the requirements of a motion to reconsider. 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 director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reconsider.