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U.S. Citizenship  
and Immigration  
Services

[Redacted]

File [Redacted] Office: TEXAS SERVICE CENTER Date: 07/21/10

IN RE: Petitioner: [Redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

IN 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.

*Mai Johnson*

for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter will be reopened on our motion, the appeal will be rejected, and the case will be remanded to the Texas Service Center for consideration as a possible motion.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that he had established a new commercial enterprise into which he had invested, or was in the process of investing, the requisite amount of lawfully obtained capital as of the date of filing. The director further determined that the petitioner had failed to meet the employment-creation requirement.

On appeal, counsel asserted that he would submit a brief and/or evidence to the AAO within 30 days. On July 6, 2001, the AAO concluded that no additional information had been submitted and summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v).

On July 20, 2001, counsel submitted a letter to this office asserting that a subsequent brief had been filed. The letter was submitted without accompanying fee and, thus, does not constitute a proper motion to reopen or reconsider. 8 C.F.R. § 103.5(a)(1)(iii).

Nevertheless, we will reopen our previous decision of July 6, 2001 as it was issued in error. The regulation at 8 C.F.R. § 103.3(a)(2)(i) states the following regarding time restrictions for appeals filed with the AAO:

The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

If the director's decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

In the instant case, the director issued the decision denying the petition on June 20, 2000. The appeal, while dated July 21, 2000, was filed on August 25, 2000, 66 days after the denial notice was issued. The appeal was filed and received after the expiration of the 30-day period allowed for filing an appeal. Consequently, the AAO had, and has, no authority to consider the appeal either to summarily dismiss the appeal or to issue a decision on the merits of the appeal. Rather, the AAO must reject the petitioner's appeal as untimely filed.

However, regulations at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) state that Citizenship and Immigration Services (CIS) must treat certain untimely appeals as motions pursuant to the following guidelines:

If an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) of this part or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

(Emphasis added.) The case will be remanded to the Texas Service Center for consideration as to whether the appeal constitutes a proper motion to reopen or reconsider. This decision is without prejudice to any rights the petitioner *may* have under the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

**ORDER:** The AAO's decision of July 6, 2001 is withdrawn. The appeal is hereby rejected. The case is remanded to the director for further consideration.