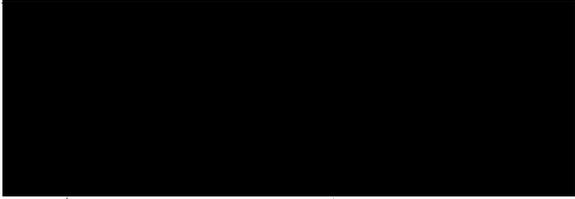




U.S. Citizenship  
and Immigration  
Services

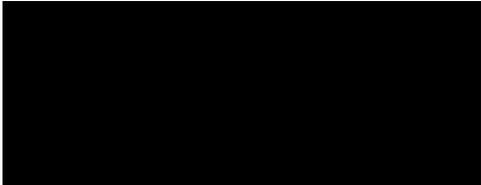


FILE: WAC 01 135 55955 Office: CALIFORNIA SERVICE CENTER Date: AUG 08 2004

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

PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

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, Director  
Administrative Appeals Office

**PUBLIC COPY**

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal as untimely filed. The matter is now before the AAO on a motion to reopen. The motion to reopen will be denied.

A motion to reopen must state the new facts to be provided 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 Citizenship and Immigration Services (CIS) policy. 8 C.F.R. § 103.5(a)(3).

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). Citizenship and Immigration Services (CIS) received the petitioner's appeal 37 days after the decision of the service center director. Therefore the AAO rejected the appeal as untimely filed. The AAO also determined that the untimely appeal did not meet the requirements of a motion pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

On motion, counsel states that the Form I-290B, Notice of Appeal to the Administrative Appeals Unit, was submitted via certified mail on March 25, 2002, four calendar days before the expiration of the filing deadline. The appeal was received in the California Service Center on April 5, 2002, ten days after it was mailed. Counsel provides copies of the certified mail receipt indicating that the appeal was mailed on March 25, 2002. Counsel asserts that, in his experience, delivery time to this location normally takes two to three days, and states that the petitioner should not be penalized for this "abnormally long time" for delivery.

Nonetheless, the regulations require that the appeal be received within 30 days after service of the unfavorable decision (33 days if service is by mail). The appeal is considered filed upon receipt in the service center and not upon deposit in the United States mail system.

The petitioner can attribute no part of the delay in receipt of the appeal to the service center. Further, the AAO cannot set an arbitrary guideline that if the petitioner can establish that the appeal was mailed within "X" number of days of the filing deadline, the appeal is considered timely filed whenever it is received by CIS.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. As no new evidence has been presented to overcome the grounds for the previous dismissal, and no reasons set forth indicating that the decision was based on an incorrect application of law, the previous decisions of the AAO and the director will be affirmed. The petition is denied.

**ORDER:** The AAO's decision of June 18, 2003 is affirmed. The petition is denied.