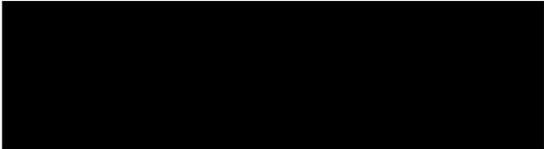




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy



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FILE: WAC 07 191 53998 Office: CALIFORNIA SERVICE CENTER Date: DEC 13 2007

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF APPLICANT:



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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. 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 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 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).

The record indicates that the director issued the decision on July 12, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although dated August 9, 2007, Citizenship and Immigration Services did not receive the petitioner's appeal in filing condition until September 4, 2007, 54 days after the decision was issued.¹ Accordingly, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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 does not meet the requirements of a motion to reopen or a motion to reconsider. Therefore, the director appropriately declined to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.

¹ The director stated the following on the cover page of her July 12, 2007 denial:

The petitioner must submit such an appeal **TO THIS OFFICE** with a filing fee of \$385.00. Do NOT send the I-290B directly to the AAO [bolding and capitalization in original].

Despite the director's instructions not to send the Form I-290B directly to the AAO, the petitioner sent the Form I-290B to the AAO. In its August 13, 2007 letter returning the Form I-290B to the petitioner, the AAO notified the petitioner both that it needed to file the application at the California Service Center (as instructed on the Form I-290B) and that the filing fee had increased to \$585 on July 30, 2007. Despite the AAO's notice that the filing fee had increased, the petitioner proceeded to send the Form I-290B to the California Service Center with the old filing fee. Accordingly, the California Service Center rejected the Form I-290B on August 22, 2007. The petitioner filed the Form I-290B with the correct filing fee at the California Service Center on September 4, 2007.