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FILE: WAC 07 043 50574 Office: CALIFORNIA SERVICE CENTER Date: APR 30 2008

IN RE: Petitioner:  
Beneficiary:



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

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed and returned to the director for treatment as a motion.

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 of 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 June 26, 2007. It is noted that the instructions on the Form I-290B (Notice of Appeal) gave notice to the petitioner that it had 33 days to file the appeal. Counsel dated the appeal July 30, 2007, and it was received by CIS on July 31, 2007, or 35 days after the decision was issued. Accordingly, the appeal was untimely filed.

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.

An untimely filed appeal must meet specific requirements to be treated as a motion. The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Furthermore, 8 C.F.R. § 103.5(a)(3) requires that 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 CIS policy.

The director denied the petition on the basis that the petitioner had not established that it qualifies as a U.S. employer or agent or that its labor condition application is valid.

On appeal, counsel for the petitioner stated that the petitioner qualifies as a U.S. employer and is eligible for the classification sought. Counsel also stated that, although the director's decision is dated June 26, 2007, the decision was not mailed to the petitioner until July 3, 2007, as reflected by the postmark on an envelope submitted with the appeal. The AAO does not find any information on the envelope linking the envelope to the director's decision. The postmarked envelope is insufficient to establish that the director's decision in this matter was not mailed until a date later than the date-stamped decision.

The AAO finds that the matters presented in the late appeal are sufficient to merit consideration as a motion to reopen and reconsider, in accordance with the above-cited regulations on late appeals and motions.

As the appeal was untimely filed, the appeal must be rejected. Because the matters raised in the late appeal meet the requirements of a motion, the director must adjudicate them as a motion and render a new decision on the merits based upon reconsideration of the entire record of proceedings as expanded by the matters that were submitted as an appeal.

**ORDER:** The appeal is rejected as untimely filed. The director will treat the late appeal as a motion and will issue a new decision based on the merits of the entire record of proceedings.