U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC-02-064-55655 Office: CALIFORNIA SERVICE CENTER Date: JUN 18 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and a Form I-290B was rejected by the director as an untimely appeal. The petition is now before the Administrative Appeals Office (AAO) on appeal of the director's rejection notice, pursuant to a second Form I-290B. The appeal of the rejection notice will be rejected. The petition will be remanded to the director for consideration of the first I-290B as a motion to reopen or reconsider.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a head housekeeper. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

In a notice of decision dated September 27, 2002 the director found that the evidence failed to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On November 8, 2002 the petitioner filed a Form I-290B with an accompanying document captioned as a motion to reopen or to reconsider. The director rejected that submission as an untimely appeal in a Notice of Rejected Appeal dated March 18, 2003. The petitioner filed a second Form 290B on April 18, 2003, appealing the Notice of Rejected Appeal.

Counsel states on appeal that the petitioner and counsel were not given timely notice of the director's September 27, 2002 decision denying the petition and that the petitioner was thereby denied its right to file a timely appeal of that decision.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003).

Although the foregoing regulation grants jurisdiction to the AAO over appeals of decisions on employment-based visa petitions, no provision grants jurisdiction to the AAO over an appeal of a director's Notice of Rejection of Appeal. *See* 8 C.F.R. § 103.1(f)(3)(E)(iii)(B) (2003 ed.).

In the instant case, the director's decision of September 27, 2002 denying the petition was a decision which was appealable to the AAO. However the decision of the director of March 18, 2003 rejecting the petitioner's first Form I-290B as an untimely appeal was not a decision which was appealable to the AAO. For this reason the Form I-290B Notice of Appeal received by the director April 18, 2003 is rejected.

The record also contains the earlier Form I-290B, received by the California Service Center on November 8, 2002. Although the form is titled Notice of Appeal, the attached letter from counsel is captioned "Motion to Reopen and Re-Consideration [sic]" and section 3 of the Form I-290B refers to the motion. The motion requests the director to reopen the denial decision, in order to allow a timely appeal to be made of that decision. For these reasons, the Form I-290B submitted on November 8, 2002 is found to be in substance a motion to reopen or to reconsider, rather than a notice of appeal, notwithstanding the caption on the printed Form I-290B as a notice of appeal.

Citizenship and Immigration Services (CIS) is required by regulation to serve a copy of any decision in a case on the petitioner, except where an authorized representative has submitted a proper G-28 Notice of Entry of Appearance as Attorney or Representative, in which case the copy of the decision is to be served on the representative. See 8 C.F.R. §§ 103.5a, 292.5. Counsel's address of record as of the date of the director's

decision of September 27, 2002 was an address on N. Beeline Highway, in Payson, Arizona. That address is shown on two Form G-28 notices of entry of appearance of counsel dated November 28, 2001, one on behalf of the petitioner and the other on behalf of the beneficiary.

Under 8 C.F.R. § 103.3(a)(2)(i), the time for an appeal is 30 days from the service of the Notice of Decision. With regard to motions to reconsider and to reopen, the regulation at 8 C.F.R. § 103.5(a)(1) states in part as follows:

> Any motion to reconsider an action by [CIS] filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before [CIS] filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of [CIS] where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

Three days are added to the permissible periods when the notice of the decision is by mail. 8 C.F.R. § 103.5a(b).

With the first I-290B counsel submitted two original envelopes as evidence, each with the return address of the California Service Center. These postmarked envelopes suggest that the notice of decision was first mailed to counsel at his address of record on October 15, 2002 and was returned to CIS by the Postal Service, and that the notice of decision was then put in another envelope and mailed by CIS to counsel at his new address on October 29, 2002. Counsel's motion states that he first received a copy of the decision on November 1, 2002, presumably when the second envelope arrived.

The foregoing evidence suggests that the director's decision dated September 27, 2002 was not mailed for the first time until October 15, 2002.

In his rejection notice of March 18, 2003 the director calculated the thirty-three day period for filing the appeal as beginning on September 27, 2002, the date stamped on the first page of the decision denying the petition. The director found that the I-290B was untimely, and rejected it as an untimely appeal. In that notice the director stated that after rejecting the petitioner's first I-290B, he considered it as a motion to reopen or to reconsider and found that the document did not meet the requirements of a motion to reopen or to reconsider pursuant to 8 C.F.R. §§ 103.5(a)(2) and (3). The director gave no further explanation for that conclusion. For this reason it is not possible to determine whether the director considered the merits of that document, along with the attached supporting evidence, or whether the director's conclusion was based on some other grounds.

For the foregoing reasons, the petition is remanded to the director for consideration of the petitioner's first I-290B as a motion to reopen or to reconsider, including whether it was timely as a motion, and if, so, whether the merits of the motion require the petition to be reopened or reconsidered. Any further decision on those issues by the director should state the reasons supporting the decision. Pursuant to 8 C.F.R. 103.5(a)(6), the director's decision on the motion, other than a rejection, may be appealed to this office.

ORDER: The appeal of the director's rejection notice dated March 18, 2003 is rejected. The petition is remanded to the director for further action in accord with this decision.