U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 3 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. 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 of 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 January 25, 2008. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The appeal is dated April 19, 2008 and received by the director on April 21, 2008, 86 days after the decision was issued. Accordingly, the appeal was untimely filed.

In her submission on appeal, counsel urges "the Service [to] use its discretion in excusing the delayed filing" because the petitioner's former attorney failed to notify her of the Director's decision or that she had a right to appeal the Director's decision. According to the decision in *Matter of Campion*, 24 I. & N. Dec. 710, 732-33 (A.G. 2009), in order for an alien to prevail on a deficient performance of counsel claim, the alien must:

(a) "show that his lawyer's failings were 'egregious,' a requirement the Board recognized in *Matter of Lozada*. *See* 19 I. & N. Dec. 637, 639 (BIA 1988). In light of the strong public interest in finality and the rule that 'litigants are generally bound by the conduct of their attorneys,' *id.*, it is not enough merely to demonstrate that one's lawyer made an ordinary mistake or could have presented a more compelling case."
(b) "affirmatively show that he exercised due diligence in discovering and seeking to cure his lawyer's alleged deficient performance. . . . In deficient performance cases, this will typically require that the alien prove he made timely inquiries about his immigration status and the progress of his case. It will also typically require that the alien promptly file a motion to reopen within a reasonable period after discovering his lawyer's deficient performance."
(c) show prejudice from her previous counsel's errors.

The three pronged test above must be met through the submission of six categories of documents in support of any claim for deficient performance of counsel or otherwise explain why those documents are missing. Those categories are (1) "a detailed affidavit setting forth the facts that form the basis of the deficient performance of counsel claim. The affidavit must explain with specificity what his lawyer did or did not do, and why he, the alien, was harmed as a result;" (2) the agreement between counsel and the alien so that we may ascertain what duties fell within the scope of the relationship; (3) a letter sent to the former attorney stating how the alien feels that the counsel was deficient in his performance and any response received from the former attorney; (4) a completed and signed complaint to the bar association with which former counsel is registered; (5) any documents that the alien claims that former counsel failed to file; and (6) a "signed statement of the new attorney: 'Having reviewed the record, I express a belief, based on a reasoned and studied professional judgment, that the performance of my client's former counsel fell below minimal standards of professional competence.'" *Matter of Campion,* 24 I. & N. Dec. at 735-38.

In this case, the petitioner submitted her affidavit which states that her former attorney did not inform her that a decision had been rendered in her case nor did he inform her of her right to appeal that decision. Specifically,

the petitioner stated that she met with her former attorney on February 27, 2008, but that he did not inform her of the decision reached on January 25, 2008 until a second meeting on March 27, 2008. The affidavit states that the petitioner confronted her former attorney about his failure to notify her that a decision had been reached or that she had the opportunity to appeal the decision and states that the attorney told her that her "case was not strong enough to win an appeal and . . . it was too late to file one." The affidavit reflects that the petitioner hired current counsel on April 2, 2008 and that current counsel filed an appeal two weeks later. The petitioner submitted nothing concerning the other five categories of documents required by *Matter of Campion* and provides no explanation as to why those documents were not included.[1]

Because the petitioner failed to submit an appeal within 33 days of the Director's decision and did not comply with the requirements of *Matter of Campion* to establish deficient performance of her former counsel, we must reject her appeal. 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).

Upon review, the petitioner submitted sufficient new facts to meet the requirements for a motion to reopen as well as arguments sufficient to support a motion to reconsider. Accordingly, the petitioner's untimely-filed appeal meets the requirements for a motion.

The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The case will be remanded to the Nebraska Service Center to be considered as a motion to reopen and reconsider. The director shall review all the evidence of record, including the evidence submitted on appeal in which the petitioner addressed the issues singled out by the director in the denial notice.

ORDER: The appeal is rejected. The case is remanded to the director for further consideration and entry of a new decision.

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[1] We note that *Matter of Campion* was decided after the date that the petitioner filed her appeal in this case. Although *Matter of Campion* states that its provisions shall apply to all ineffective assistance of counsel claims alleged before or after the date of the decision, we note that under *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), our conclusion would not have differed. The petitioner did not meet those requirements set out by *Matter of Lozada* in that the petitioner did not submit proof that she informed her former counsel of her allegations in writing, as well as any response received or evidence of a complaint being filed with the appropriate disciplinary authorities.