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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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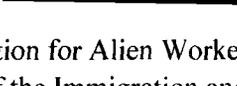


**U.S. Citizenship
and Immigration
Services**



B2

FILE: LIN 09 067 50659 Office: NEBRASKA SERVICE CENTER Date: **AUG 03 2010**

IN RE: Petitioner: 
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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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. The AAO will return the matter to the director for consideration as a motion to reconsider.

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 record indicates that the director issued the decision on August 21, 2009. It is noted that the director mailed the decision to the address given by counsel in the Notice of Entry of Appearance (Form G-28).¹ However, the decision was returned to the Service Center indicating "Return Service Requested." On September 3, 2009, counsel for the petitioner e-mailed the Nebraska Service Center indicating that he had not received the denial notice. The Nebraska Service Center faxed the denial letter to counsel for the petitioner on September 17, 2009. Counsel for the petitioner appealed the decision, filing a Form I-290B, on October 14, 2009, that he accompanied by a written brief.²

In the appeal brief, counsel for the petitioner concedes that the appeal was filed "more than 33 days" after a decision was issued. Counsel contends that the appeal, however, is "timely" because the "decision was only received on September 17, 2009 following the written request of the petitioner on September 3, 2009." Nonetheless, his appeal brief fails to provide an explanation for not filing an appeal during the 6 days following his receipt of the decision, prior to the appeal being due. As counsel for the petitioner had 6 days to file a timely appeal following his receipt of the decision via facsimile, he had the opportunity to file a timely appeal and request an additional 30 days to submit a brief.

Regardless, counsel's contention of non-receipt is of no consequence given that the director issued the final decision to counsel's address of record. *See* 8 C.F.R. § 103.5a(a)(1) (Service of notices and decisions consists of mailing copies to a person's last known address); *see also* 8 C.F.R. § 292.5(a) which states: "Whenever a person is required by any of the provisions of this chapter to give or be given notice; . . . such notice . . . shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented." The director's reliance on the unrevoked address furnished by counsel on his existing Form G-28 was proper. *See e.g., Tobeth-Tangang v. Gonzales*, 440 F.3d 537, 540 (1st Cir. 2006); *Radkov v. Ashcroft*, 375 F.3d 96, 99 (1st Cir. 2004). The fact that the mailing in this case somehow went awry without any fault on the part of the director does not excuse the failure to timely file the appeal.³

¹ Note also that the Nebraska Service Center sent the Request for Evidence (RFE) to the same address on June 18, 2009, to which counsel for the petitioner responded on July 29, 2009.

² Note that although an appeal brief was submitted, no additional evidence was provided on appeal.

³ Although the director neglected to include the reference to counsel's law office as part of the address, we find such omission negligible.

Despite the fact that the appeal was late, the director erroneously annotated the appeal as timely and forwarded the matter to the AAO. 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 meets the requirements of a motion to reconsider. 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). Therefore, the director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reconsider.
