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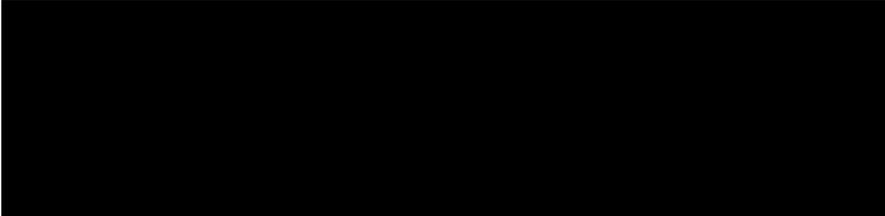
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 088 51104 Office: NEBRASKA SERVICE CENTER Date: JAN 29 2008

IN RE: Petitioner:
 Beneficiary:



PETITION: Immigrant 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: SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The record contains an undated, but otherwise properly executed, Form G-28 Notice of Entry of appearance from attorney [REDACTED] of the Blank, Rome law firm. Later in the record, apparently submitted with the appeal, is an undated Form G-28 from [REDACTED] of the same law firm. On July 19, 2007 Citizenship and Immigration Services (CIS) received a letter from [REDACTED] withdrawing her appearance and that of her firm in favor of the [REDACTED], which [REDACTED] stated is now the petitioner's attorney of record.

The record, however, does not contain a Form G-28 in which the petitioner acknowledges representation by [REDACTED] or by any attorney at that firm. Therefore, on December 14, 2007 this office sent a facsimile transmission to [REDACTED] the petitioner's Vice President of Recruitment. In that fax this office requested, *inter alia*, that petitioner should, if represented by counsel, provide a properly executed Form G-28. That fax further stated that, if the petitioner did not provide such a Form G-28, this office would consider the petitioner to be self-represented. The petitioner did not respond to that request and shall be considered to be self-represented. All submissions will be considered, but the decision on appeal will be furnished only to the petitioner.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party, in order to properly file an appeal from a denial, 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 receipts. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the acting director issued the decision on July 27, 2006. Although the petitioner's then counsel dated the appeal brief August 28, 2006, it was received by the acting director on August 30, 2006, 34 days after the decision was issued. Accordingly the appeal was untimely filed. The acting director erroneously forwarded the matter to the AAO.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO authority to extend the 33-day limit for filing and appeal. 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 provided 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 CIS 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 8 C.F.R. § 103.5(a)(3). A motion that does not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here the untimely appeal meets the requirements of a motion to reopen, as new evidence was submitted. It also meets the requirements of a motion to reconsider, as the petitioner's former counsel argued that the

decision of denial was incorrect based on the evidence then in the record. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center acting director. See 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the acting director must consider the untimely appeal as a motion to reopen and review and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the acting director for consideration as a motion to reopen and review.