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



U.S. Citizenship
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FILE: LIN 06 196 51458 Office: NEBRASKA SERVICE CENTER Date: JUN 23 2009

IN RE: Petitioner:
Beneficiary:

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

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the 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 pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1). The AAO will return the matter to the director for consideration as a motion to reconsider.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Therefore, the director denied the petition.

The record indicates that the director mailed the decision to the petitioner on July 4, 2007. A Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO), was received by the Texas Service Center on October 11, 2007, 99 days after the decision was mailed. The Form I-290B included the incorrect filing fee. A new filing fee of \$585.00 became effective on July 30, 2007. See 8 C.F.R. § 103.7. On October 18, 2007, the Texas Service Center returned the Form I-290B to the petitioner and indicated that it included the incorrect filing fee. The Texas Service Center received the resubmitted Form I-290B with the proper \$585.00 filing fee on November 13, 2007.

The regulation at 8 C.F.R. § 103.3(a)(2) requires an affected party to file the complete appeal within 30 days after service of the decision, or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. The regulation at 8 C.F.R. § 103.2(a)(7)(i) requires United States Citizenship and Immigration Services (USCIS) to reject any petition or application filed with the incorrect filing fee. Likewise, filings which were rejected because they were submitted with incorrect filing fees do not retain filing dates. Therefore, in this matter, USCIS is required to reject the appeal as untimely filed. The petitioner failed to initially submit the I-290B within 33 days of service of the decision, and the initial submission included the incorrect filing fee. As this filing did not retain a filing date, the actual filing date for the Form I-290B is November 13, 2007, 132 days after the decision was served by mail. The appeal was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

Neither the Immigration and Nationality 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 USCIS 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.