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



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

**B6**



FILE [REDACTED]  
SRC-07-259-52479

Office: TEXAS SERVICE CENTER

Date: **MAR 17 2009**

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:



**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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 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 November 5, 2008. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although counsel dated the appeal December 5, 2008, it was initially received by the director on Tuesday, December 9, 2008, 34 days after the decision was issued, and the 33<sup>rd</sup> day is not a weekend or holiday.<sup>1</sup> Accordingly, the appeal was untimely filed. 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 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 and reopen because counsel contends that the petitioner has submitted sufficient evidence to establish its ability to pay the proffered wage and submits additional evidence on appeal. 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

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<sup>1</sup> The record shows that the director received the initial filing of a Form I-290B, Notice of Appeal or Motion on December 9, 2008. However, the director returned the appeal to the petitioner on December 11, 2008, December 22, 2008 and January 5, 2009 respectively because the denial of the relevant Form I-140 immigrant petition could not be found in the U.S. Citizenship and Immigration Services (USCIS) system. The director accepted and assigned a receipt number for the appeal on January 16, 2009. While the AAO acknowledges that the director was in error in returning the appeal on December 11, 2008, December 22, 2008 and January 5, 2009, it does not alter the fact that the petitioner's initial appeal filing was late.

consider the untimely appeal as a motion to reconsider and reopen, 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 and reopen.