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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 26 2010

LIN 05 264 51692

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

Perry Rhew,
Chief Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director subsequently revoked approval of the petition. The Administrative Appeals Office (AAO) rejected the appeal as untimely and found that the untimely appeal did not meet the requirements of a motion to reconsider or a motion to reopen under 8 C.F.R. 103.5(a)(2) or (3) and dismissed the appeal. The AAO reopens its decision. However, the appeal is rejected as untimely filed and returned to the director for consideration as a motion for reconsideration.

The record indicates that the Immigrant Petition for Alien Worker (Form I-140) was filed on September 15, 2005. It was initially approved on March 31, 2006. The director subsequently concluded that the I-140 was approved in error. On August 8, 2008, the director issued a notice of intent to revoke the approval of the petition's approval based on the petitioner's failure to establish its continuing ability to pay the proffered wage as of the priority date pursuant to 8 C.F.R. § 204.5(g)(2).[1] The notice was sent to the petitioner's current attorney. This notice afforded the petitioner thirty days to offer additional evidence or argument in opposition to the proposed revocation. Upon review of the petitioner's response to this request and other evidence contained in the record, the director revoked the petition's approval on October 29, 2008, based upon the petitioner's failure to establish its continuing ability to pay the proffered wage. However, the decision to revoke the petition's approval was sent to the petitioner's former attorney, which current counsel asserts caused unnecessary delay to the petitioner's ability to file a timely appeal.[2]

---

[1] The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

[2] The regulation at 8 C.F.R. § 205.2(d) provides that a petitioner "may appeal the decision to revoke the approval within 15 days after the service of notice of the revocation." Three additional days are provided if the notification of revocation was mailed. If the last day of the designated period falls on a Saturday, Sunday or a legal holiday, the period will run until the end of the next day, which is not a Saturday, Sunday, or legal holiday. *See* 8 C.F.R. § 1.1(h). 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).

Although the AAO's position as to the petitioner's burden to file a timely appeal remains as stated in its decision of January 27, 2010 rejecting the petitioner's untimely appeal as improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1), the AAO has reconsidered its decision relevant to the petitioner's untimely appeal as a motion to reconsider and hereby withdraws and reopens its decision of January 27, 2010 as to this issue, pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for the purpose of issuing this decision. The AAO hereby finds that the appeal was untimely and that it will be returned to the director as a motion for reconsideration under 8 C.F.R. 103.5(a)(3). 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 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).

Accordingly, the petitioner's appeal is rejected as untimely filed.

ORDER: The untimely appeal is rejected. It will be returned to the director as a motion for reconsideration.