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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 and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 14 2010

SRC 07 172 51530

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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, Texas Service Center, denied the immigrant visa petition. An untimely appeal to this decision was filed, and the director treated the appeal as a motion without first forwarding it to the Administrative Appeals Office (AAO). On February 6, 2008, the director affirmed his previous decision. The petitioner subsequently filed a second appeal, which the director forwarded to the AAO. The matter is now before the AAO on appeal. However, the AAO will withdraw the director's decision on the untimely appeal, which was treated as a motion, and reject the appeal pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*).

The petitioner claims to be a company that designs leather products and manufactures buttons. It seeks to employ the beneficiary permanently in the United States as a metal/plastic worker. As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL). 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 petition. The director denied the petition accordingly.

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 his decision on July 11, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The record shows that the appeal was received by the director on September 11, 2007, 62 days after the decision was issued. Accordingly, the director erroneously treated the appeal as a motion to reopen/reconsider under Title 8 CFR § 103.3(a). The director's treatment of the late appeal as a motion is withdrawn and the appeal will be rejected as untimely.

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. 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 U.S. Citizenship and Immigration Services 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).

In the instant matter, the petitioner has failed to state new facts to be proved in the reopened proceeding that are supported by affidavits or other documentary evidence. Furthermore, the petitioner fails to establish that the director's denial of July 11, 2007 was incorrect based on the evidence of record at the time of the initial decision. Although the petitioner attempts to submit copies of amended tax returns, the petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements, after the fact. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The evidence submitted on appeal, which attempts to establish that the petitioner erred in failing to characterize certain assets as current assets on its tax returns, is not "new" evidence and is not sufficient to support a motion to reopen. Furthermore, although the petitioner's 2006 tax return was submitted, this document does not pertain to the petitioner's failure to establish its ability to pay in 2003 and 2004. Here, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*).

It is noted that the appeal would have been deemed untimely filed even if the incorrect fee had been accepted by the Service Center on August 15, 2007, because it was received 35 days after the decision.

A review of the director's decision reveals that the director accurately set forth a legitimate basis for denial of the I-140 application. Counsel's statements on appeal fail to overcome the basis for the denial. Accordingly, the appeal will be rejected.

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.[1]

ORDER: The decision of the director is withdrawn, and the appeal is rejected.

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[1] It is noted that, had the AAO considered the merits of the instant appeal, it would have dismissed the appeal. As correctly noted by the director, the petitioner failed to establish that it could pay the proffered wage ($29,556.80 per year) in 2003 and 2004 through an examination of net current assets and net income. The record does not establish that the petitioner could have paid the proffered wage through an examination of the totality of the circumstances. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The record is devoid of evidence paralleling the facts of that case, e.g., the presence of uncharacteristic expenses or losses in those years. Furthermore, as noted above, the petitioner's assertion on appeal that it had mischaracterized its assets in its tax returns as investments instead of current assets is not persuasive. As noted above, the petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements, after the fact. *See Matter of Izummi*, 22 I&N Dec. at 176.