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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: AUG 0 2 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]
SRC 09 191 50692

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:

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 $630. 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) states 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 denying the petition on June 15, 2010. The director properly gave notice to the petitioner that it had 33 days to file the appeal. Although counsel dated the appeal June 26, 2010, it was postmarked July 22, 2010, and was received by the director on July 26, 2010, 41 days after the decision was issued. Accordingly, the appeal was untimely filed.

Neither the Immigration and Nationality Act (the 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 United States 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).

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*).

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

In addition, if the appeal had not been rejected as untimely filed, it would have been rejected because the AAO lacks jurisdiction to consider an appeal from the director's decision when the denial is based on the lack of a valid labor certification.

In the instant case, the petitioner seeks to employ the beneficiary permanently in the United States as a nanny, pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). The petition was filed with U.S. Citizenship and Immigration Services (USCIS) on June 10, 2009, with a labor certification

approved by the Department of Labor (DOL) on December 3, 2007 that was valid until May 31, 2008. The director denied the petition because the labor certification had expired before the petition was filed and because the petitioner had not demonstrated its ability to pay the beneficiary the proffered wage.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(b)(1) states:

> An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of the date the Department of Labor granted the certification.

The petitioner filed the instant petition with USCIS on June 10, 2009. The petition was accompanied by a labor certification approved by the DOL on December 3, 2007 and valid until May 31, 2008. The petition was filed 375 days after the expiration of the underlying labor certification. The petition was therefore filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;
>
> . . .

> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

The petition was not filed with a valid labor certification and the director denied the petition accordingly. Therefore, the AAO lacks jurisdiction to consider the appeal of the director's decision.

On appeal, counsel claims that the petitioner never received the original labor certification and that after contacting DOL in November 2008, the petitioner was informed that the labor certification had been approved on December 3, 2007, more than 180 days after the approval of the labor certification. Therefore, counsel claims that the filing of the I-140 petition in a timely manner was beyond his firm's or his client's control. Even if this claim is true, the AAO still does not have jurisdiction over the appeal. In addition, although counsel claims that the petitioner was not informed that the labor certification was approved until November 5, 2008, the instant petition was not filed until June 10, 2009, more than 180 days after the petitioner claims it was apprised of the approval of the labor certification by the DOL.[1]

ORDER: The appeal is rejected.

[1] Pursuant to section 204(b) of the Act, the AAO has consulted with DOL regarding the instant petition.