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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: JUN 07 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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, Nebraska Service Center, denied the immigrant visa petition. The petitioner filed a motion to reopen and reconsider the director's decision. The director rejected the motion as untimely. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a drywall and insulation construction firm. It sought to employ the beneficiary permanently in the United States as a field supervisor, taping foreman.[1] As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The petitioner requested a skilled worker visa classification on the Immigrant Petition for Alien Worker, (Form I-140). As the duplicate Form ETA 750 obtained by the director required only one year of experience, the director denied the petition on February 13, 2008. Citing 8 C.F.R. § 204.5(l)(5), he determined that the petitioner had failed to submit a labor certification that supported the visa classification of a skilled worker, which requires a minimum of two years of training or experience.[2] The director additionally found that the petitioner had failed to establish that the beneficiary's employment experience satisfied the terms of Item 14 of the Form ETA 750, and also stated that the evidence failed to establish the petitioner's continuing ability to pay the proffered wage.

The petitioner, through counsel, filed a motion to reopen and reconsider the director's decision. It was rejected on March 17, 2008, by the U.S. Citizenship and Immigration Services (USCIS) for failing to include the proper filing fee of $585 at the time of filing and later accepted for filing on April 11, 2008. On May 23, 2008, the director rejected the motion as untimely. On appeal from this denial, counsel claims that the a check had been written by his law office for $585 and sent with the Form I-290B with the initial submission, but the director had lost the check. Counsel asserts that the motion should be treated as timely. In support of this scenario, he states that when his bank could not confirm that the check had been cashed, he requested a stop payment on it and issued another check. A copy of the front side of a check for $585, dated March 13, 2008, written to USCIS and copies of correspondence to the Bank of the Orient were included with the appeal.

USCIS regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* In this matter, the motion was due on March 17,

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[1] The petitioner filed the employment-based preference petition pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), which provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

[2] The director indicated that the original labor certification submitted with the petition appeared to have been altered, and, therefore a duplicate was obtained to confirm the terms of the labor certification.

2008, but was not received until April 11, 2008. The record indicates that the director's decision was mailed to the petitioner at its address of record. That a check for $585 was included with the motion and was lost by USCIS as advanced by counsel is speculative as the director clearly rejected the motion because he received no fee with the filing. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As the record does not establish that the failure to file the motion within 30 days of the decision was reasonable and beyond the affected party's control, the motion is untimely and must be dismissed for that reason.[3]

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

[3] Even if considered on the merits, nothing would establish that the labor certification supports the visa category requested, without even considering the petitioner's ability to pay the proffered wage and whether the petitioner can establish the beneficiary has the experience for the position offered. *See Matter of Izummi,* 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).