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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

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 23 2011

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: On December 23, 2008, the Administrative Appeals Office (AAO) dismissed an appeal to the denial of an employment-based preference visa petition by the Director, California Service Center (CSC). The matter is now before the AAO again on appeal. The appeal will be rejected, or in the alternative, will be summarily dismissed.

The petitioner is a restaurant seeking to permanently employ the beneficiary in the United States as a Chinese food chef pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition on January 5, 2007, based upon the determination that the petitioner had failed to demonstrate that the beneficiary possessed the required two years of experience as a Chinese food chef as of the priority date.

The petitioner subsequently filed a timely appeal on February 7, 2007.

On December 23, 2008, AAO dismissed the petitioner's appeal upholding the director's decision to deny the petition. The reasons for the dismissal of the appeal are set forth in the AAO's decision.

The petitioner subsequently attempted to file another appeal on January 27, 2009 and indicated only that it would be sending additional documentation reflecting both the beneficiary's work experience as a Chinese food chef and the petitioner's continuing ability to pay the beneficiary the proffered wage since the priority date to the AAO within 30 days. However, rather than filing the appeal with the office that originally denied the petition, the CSC, the petitioner submitted the appeal to the AAO. The AAO returned the appeal to the petitioner on January 27, 2009, specifically informing the petitioner that any motion to the AAO's prior dismissal of the appeal and corresponding fee of $585.00 must be filed with the CSC. The petitioner subsequently attempted to file an appeal with the CSC on February 3, 2009, but failed to include the full and proper fee of $585.00. The director rejected the appeal on February 3, 2009, returning it to the petitioner with specific instructions that the appeal must be accompanied by the full and proper fee of $585.00. The petitioner subsequently filed the appeal with the full and proper fee on February 17, 2009.

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). In the instant case, the petitioner filed the appeal with the correct office including the full and proper fee on February 17, 2009, 56 days after the AAO issued its decision on December 23, 2008. Consequently, the appeal must be rejected as untimely filed.

The AAO, however, does not exercise appellate jurisdiction over its own decisions. The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R.

§ 103.1(f)(3)(iii) (as in effect on February 28, 2003).[1] For instance, in the event that a petitioner disagrees with an AAO decision to dismiss an appeal, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, the AAO would have had jurisdiction over a timely motion if the petitioner had checked box D ("I am filing a motion to reopen a decision"), box E ("I am filing a motion to reconsider a decision"), or box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B, Notice of Appeal or Motion. In this case, the petitioner checked box B ("I am filing an appeal"), instead. Therefore, the appeal is improperly filed and must be rejected on this basis as well, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*).

In addition, even if the AAO were to have jurisdiction over an appeal from its own decision, the appeal in this matter would have been summarily dismissed, since the petitioner's appeal does not identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v). Although the petitioner indicates that it would submit a brief and/or additional evidence within 30 days, no such evidence or brief has been submitted. Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with filing an appeal, the petitioner in this case has not made any request to extend the 30-day deadline. Accordingly, even if the AAO had jurisdiction over the appeal, the appeal would have been summarily dismissed.

Finally, even if the appeal were treated as a motion, it would be dismissed for failing to meet applicable requirements. 8 C.F.R. § 103.5(a)(4). Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Pursuant to 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 USCIS policy. As noted above, the petitioner stated that a brief and/or additional evidence would be submitted in 30 days. Over thirty days have passed, and no brief and/or evidence has been submitted or received. Even if a brief and/or evidence had been submitted, it could not have been considered in the context of a motion. Evidence and briefs must be submitted with the motion. Unlike appeals, the regulation pertaining to motions to reopen or reconsider does not permit briefs and/or evidence to be filed subsequently. Accordingly, as the filing does not meet

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[1] In the process of reorganizing the immigration regulations, the Department of Homeland Security (DHS) deleted the list of the AAO's appellate jurisdiction that was previously found at former 8 C.F.R. § 103.1(f)(3)(iii) (2002). 68 FR 10922 (March 6, 2003). DHS replaced the appellate jurisdiction provision with a general delegation of authority, granting U.S. Citizenship and Immigration Services (USCIS) the authority to adjudicate the appeals that had been previously listed in the regulations as of February 28, 2003. *See* DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003); 8 C.F.R. § 103.3(a)(iv). As a result, there is no generally accessible list of the AAO's jurisdiction that may be cited in immigration proceedings or in federal court.

the requirements of 8 C.F.R. §§ 103.5(a)(2) or (3), it would have been dismissed pursuant to 8 C.F.R. § 103.5(a)(4), if it were treated as a motion.

Therefore, as the appeal was both untimely and not properly filed, it will be rejected, or in the alternative, summarily dismissed, or, if a motion, dismissed for failing to meet applicable requirements.

ORDER: The appeal is rejected. The AAO's previous decision dated December 23, 2008 shall not be disturbed.