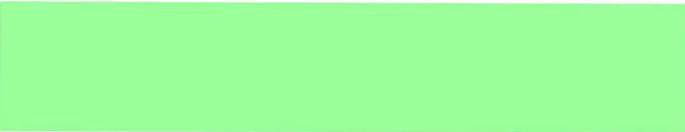


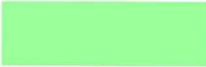
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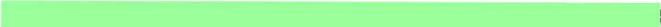
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **MAR 27 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
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:


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.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal was summarily dismissed. The petitioner filed the instant motion to reopen and reconsider the AAO's decision.¹ The motion will be granted, and the petition will be reopened.

The petitioner describes itself as a gas and grocery retail business. It seeks to permanently employ the beneficiary in the United States as a general and operational manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).²

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is February 6, 2004. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

At the outset, we note that an application or petition that fails to comply with the technical requirements of the law may be denied or rejected by the AAO even if earlier decisions did not

¹ The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

The regulations at 8 C.F.R. § 103.5(a)(3) state that 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 Service 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."

The September 4, 2009, AAO decision summarily dismissing the appeal stated that the petitioner failed to provide a brief or other evidence with the appeal. However, the petitioner's brief was received on July 1, 2008. Thus, the motion qualifies under 8 C.F.R. § 103.5(a)(3) as a motion to reconsider.

² Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

identify all of the grounds for denial or rejection. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal and motion.³

The petition was filed on October 3, 2006, and has a priority date of February 6, 2004. The director denied the petition on February 5, 2008, and informed the petitioner that it had thirty days, thirty-three if the decision was sent to the petitioner by mail, to appeal the decision. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i). The petitioner appealed the director's decision, with its Form I-290B Notice of Appeal or Motion arriving on March 11, 2008: 35 days after the decision. Furthermore, the petitioner failed to include the required fee for the appeal, which did not arrive until March 23, 2008: 47 days after the decision. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.⁴ However, the AAO, without statutory or regulatory authority accepted the appeal which it summarily dismissed on September 4, 2009. The instant motion to reopen or to reconsider follows.

The AAO withdraws the summary dismissal entered on September 4, 2009. In its place, we reject the appeal (LIN 08 118 51431).

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. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director, Nebraska Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii).

As the brief in this matter was submitted directly to the AAO in accordance with 8 C.F.R. § 103.3(a)(2)(viii), the director did not have an opportunity to review the late appeal to determine whether it meets the requirements of a motion to reopen or a motion to reconsider. Therefore, the matter will be returned to the director. If the director determines that the late appeal meets the requirements of a motion, the motion shall be granted and a new decision will be issued.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ The petitioner included a letter detailing how severe weather made its submission of the Form I-290B one day late, and asked that the appeal be deemed timely filed. We note that the regulations gave the petitioner thirty-three days to file the appeal. The petitioner must assume the risk of waiting until the end of that time period to file an appeal. Furthermore, the petitioner's letter fails to explain why the required fee was not submitted until nearly two weeks after the deadline.

ORDER: The September 4, 2009, decision of the AAO is withdrawn. The appeal is rejected, and the petition returned to the director for consideration as a motion to reopen or reconsider.