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FILE: WAC 04 132 52011 Office: CALIFORNIA SERVICE CENTER Date: **DEC 02 2005**

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner filed an appeal, which was rejected by the director on the ground that it was not timely filed. The director also determined that the late filed appeal did not meet the requirements of a motion to reopen. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed. The petition will be denied.

The petitioner is an assisted living and residential care facility. It seeks to employ the beneficiary as a program coordinator and to extend his classification as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The service center director denied the petition on the ground that the record failed to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner appealed. As provided in 8 C.F.R. § 103.3(a)(2)(i), an appeal together with the fee specified in 8 C.F.R. § 103.7 must be filed at the service center within 30 days of the date the decision was served. Three additional days are allowed for an appeal if the notice of decision was served by mail. *See* 8 C.F.R. § 103.5a(b). Since the notice of decision was mailed to the petitioner in this case, a 33-day appeal period applies. Furthermore, if the last day of the appeal period falls on a weekend or a holiday, the deadline is extended until the next working day. *See* 8 C.F.R. § 1.1(h).

The service center decision was issued on November 3, 2004. The deadline for filing an appeal was 33 days later – Monday, December 6, 2004. The petitioner’s appeal (Form I-290B) bears a receipt stamp of the service center dated December 15, 2004. Noting that this date was after the filing deadline, the director rejected the appeal as untimely filed. The director also noted the regulation at 8 C.F.R. § 103.3 (a)(2)(v)(B)(2), which 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 service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). After reviewing the petitioner’s burden of proof on a motion to reopen, and the additional evidence submitted on appeal, the director determined that the petitioner failed to meet its burden of proof because no new fact(s) were stated, as required under 8 C.F.R. § 103.5(a)(2), and the additional documentation could have been discovered and presented earlier in the proceeding. The director dismissed the motion in accordance with 8 C.F.R. § 103.5(a)(4), which provides that “[a] motion that does not meet applicable requirements shall be dismissed.”

Counsel has filed a timely motion to reconsider, asserting that the petitioner’s appeal was timely filed and should be considered on the merits. The requirements of a motion to reconsider are specified in 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 Service [U.S. Citizenship and Immigration Services] policy. A motion to reconsider . . . must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel submits evidence that the notice of appeal was sent to the service center by certified mail from its office in Houston, Texas on December 2, 2004, but that it was not received in Laguna Niguel, California

until December 16, 2004. (The receipt stamp on the appeal form shows that it was actually received by the service center on December 15, 2004.) Counsel asserts that the appeal was timely filed because it was mailed within the 33-day appeal period, that it complies with the “postmark rule” under which a petition is deemed filed by Citizenship and Immigration Services (CIS) on the date it is received by the U.S. Postal Service, and that the petitioner is not at fault for the two-week lag between the mailing of the appeal and its receipt by the service center. Counsel’s arguments have no merit.

The regulation at 8 C.F.R. § 103.2(a)(7) expressly provides that filing is accomplished on the date the subject document is received by CIS, not the date of its mailing by the petitioner or counsel:

An application or petition received in a [CIS] office shall be stamped to show the *time and date of actual receipt* and . . . *shall be regarded as properly filed when so stamped*, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted.” [Emphasis added.]

The date stamped by the service center on the petitioner’s appeal is December 15, 2004, which was nine days after the expiration of the 33-day appeal period on December 6, 2004. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) provides that “[a]n appeal which is not filed within the time allowed must be rejected as improperly filed.”

Counsel’s assertion that CIS has a “postmark rule” recognizing a petition’s filing date as the date of its receipt by the post office is incorrect. The regulation cited above clearly states that the date a document is filed is the date of its receipt by CIS, not by the post office. The petitioner may not be at fault for the delayed delivery of its appeal, but that does not make the appeal timely under the regulations.

For the reasons discussed above, the petitioner has not established that the director’s rejection of the appeal was based on an incorrect application of law or CIS policy, as required under 8 C.F.R. § 103.5 (a)(3) for the AAO to grant a motion to reconsider.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The motion is dismissed. The petition is denied.