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**U.S. Citizenship
and Immigration
Services**

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FILE: EAC 02 225 51739 Office: VERMONT SERVICE CENTER Date: **NOV 15 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents 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 director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) rejected an untimely appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. However, the decisions of the director and the AAO will be affirmed. The petition will be denied.

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 record indicates that the director issued her decision on October 15, 2003. The AAO notes that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The Form I-290B was not received by Citizenship and Immigration Services in proper condition for filing until November 18, 2003, or 34 days after the decision was issued. Accordingly, the appeal was untimely filed.

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; at the time of the AAO's decision this official was the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO. The AAO had no jurisdiction over this motion, and it was properly rejected.

On motion, counsel contends that the AAO erred in rejecting the motion. Counsel asserts that the director stated that the appeal had to be received at the service center on or before November 19, 2003. Since the appeal was received on November 18, 2003, counsel asserts, the appeal was timely filed.

However, counsel's assertions are not persuasive. The appeal was received at the service center 34 days after the director's decision was issued. While the AAO acknowledges the director stated that the petitioner had until November 19, 2003 to file the appeal, the director's error cannot change the regulations that give the petitioner 33 days to file the appeal. The director declined to treat the late-filed appeal as a motion, and forwarded the matter to the AAO. The AAO properly rejected the motion, as it had no jurisdiction over the matter.

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 AAO's July 22, 2004 decision is affirmed. The petition is denied.