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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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MAY 05 2009

FILE:

WAC 04 219 52012

Office: CALIFORNIA SERVICE CENTER

Date:

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The petition was denied by the Director, California Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion to reconsider will be dismissed.

The petitioner is in the business of healthcare. The petitioner seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

The director denied the petition on the basis that the petitioner failed to demonstrate that the beneficiary met the requirements as set forth in the ETA 750, specifically, the ETA 750 required a Bachelor's degree for the position, and the petitioner could only document that the beneficiary possessed the equivalent of an Associate's degree. The AAO concurred on appeal.

On motion to reconsider, counsel claims that the AAO's statement, "Any applicants who viewed or responded to the posting notice would have been required to show a Bachelor's degree to qualify for the position" is incorrect and therefore, the dismissal by the AAO of the appeal filed by the petitioner was unjustified. Counsel also states:

The undersigned attorney on behalf of the above petitioner and beneficiary request that the attached Motion for Reconsideration be admitted and given due course.

The thirty (30) day required period to file the motion for reconsideration was inadvertently overlooked for the reason that the petitioner and the alien beneficiary consulted another law firm upon receipt of the Notice of Decision through the mail.

The law firm they have consulted requested copies of the parties' complete file for review. After receiving the complete file from the undersigned, the law firm did not contact the above parties and did not return any of their calls until the 30-day period for filing the motion to reconsider has elapsed.

In the interest of justice, the undersigned pray that the instant motion be granted and the attached motion for reconsideration be admitted.

A motion to reopen or reconsider must be filed within thirty days of the underlying decision, except that failure to file during this period may be excused at the Service's discretion when the applicant has demonstrated that the delay was reasonable and beyond the control of the applicant. 8 C.F.R. § 103.5(a)(1)(i).

Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. Service by mail is complete upon mailing. 8 C.F.R. § 103.5a(b).

The previous decision from the AAO was dated December 26, 2006. Coupled with three days for mailing, the motion, in this case, should have been filed on or before January 29, 2007. The motion to reconsider, however, was not received until February 22, 2007.

Therefore, the motion to reconsider was not filed within the allotted time period. Accordingly, the motion to reconsider will be dismissed and the previous decision of the AAO will be affirmed.¹

In addition, it is noted that the motion does not meet the requirements of a motion to reconsider. A motion to reconsider must: (1) 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 U.S. Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). In the instant case, counsel has not submitted any precedent decisions to establish that the decision was incorrect based on an incorrect application of law or USCIS policy or that the decision was incorrect based on the evidence of record at the time of the initial decision.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reopen is dismissed. The previous decision of the AAO, dated December 26, 2006, is affirmed.

¹ It is noted that counsel filed both the petition and the appeal on behalf of the petitioner.