identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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]

D2

Date: MAY 04 2012 Office: VERMONT SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. Please note that all documents have been returned to the office that originally decided your case. Please also note that any further inquiry must be made to that office.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director revoked the approval of the visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reopen and reconsider.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(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).

The record indicates that the service center director issued the decision on May 18, 2010.[1] Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

Although the petitioner dated the Notice of Appeal or Motion (Form I-1290B) June 20, 2010, it was not received by the service center until Monday, June 28, 2010, which is 41 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, in this case the Director of the California Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii).

The AAO notes that even if the appeal had been properly filed, it would have been summarily dismissed, as discussed below.

The petition was initially granted. Thereafter, on October 14, 2009, an administrative site visit was conducted to verify the veracity of the information within the petition. The director reviewed the results of site visit report, and on November 23, 2009 the director issued a notice of intent to revoke (NOIR) the approval of the petition. The director notified the petitioner that USCIS had obtained new information indicating that the work-site location provided on the Form I-129 was a residential address, that it did not appear that the petitioner's business activities were located at the address or that the beneficiary was employed at the site. The director requested the petitioner identify its business address and provide documentation regarding its business activities. Additionally, the NOIR requested the petitioner provide evidence that the beneficiary was serving in a specialty

[1] More specifically, USCIS records reveal that the director's decision was mailed to the petitioner on February 23, 2010, but returned by the post office as undeliverable. USCIS resent the notice to the petitioner on April 27, 2010, and it was again returned to USCIS by the post office as undeliverable. Thereafter, USCIS resent the notice to the petitioner on May 18, 2010. Thus, the record indicates that the service center director mailed the revocation decision to the petitioner on February 23, 2010, April 27, 2010, and May 18, 2010. Assuming *arguendo*, that the final mailing date of May 18, 2010 is relevant in this case (rather than the earlier dates), to be timely, the petitioner's appeal must have been received by USCIS by Monday, June 21, 2010.

occupation, at the work site listed on the petition and supporting documents, in accordance with the applicable statutory and regulatory provisions. The NOIR advised the petitioner of the derogatory information considered by USCIS and offered an opportunity for the petitioner to submit evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval of the petition.

On December 18, 2009, the petitioner responded to the NOIR and claimed that "[w]e have already changed to a new address located at [redacted]." The petitioner also submitted several documents, including a commercial lease agreement (commencing December 1, 2009), pay statements issued to the beneficiary, bank statements and cancelled checks (indicating another address for the petitioner's business).[2]

On February 23, 2010, the director revoked the approval of the petition. The director found that the petitioner had not provided evidence establishing that the beneficiary actually worked at the address listed on the petition or performed the duties for which he was hired. Additionally, the director noted that, based upon the evidence, it was questionable whether a legitimate employer/employee relationship exists.[3] Further, the director noted that the lease agreement provided by the petitioner commenced on December 1, 2009 (approximately 1 ½ months after the site visit). The director found that the grounds for revocation of the approval of the petition had not been overcome.

On June 28, 2010, the petitioner submitted a Form I-1290B. The petitioner checked Box A in Part 2 of the form to indicate that it was filing an appeal and that a brief and/or additional evidence were attached. The body of the petitioner's letter reads, in its entirety:

> In reply to your denial notice dated on 02/23/2010 (Actually we received it on May 26, 2010) our explanations and evidence are given as follows:
>
> 1. When this company was newly set up and we temporarily used the address that you mentioned shown on the I-129 form, which was for the very beginning operation. We have already changed to a new address located at [redacted], [telephone number]. We are sorry that this situation is so complicated and we are extremely sorry to bring you these inconveniences.

---

[2] The AAO notes that the petitioner does not claim that the administrative site visit was conducted at a location other than the address provided on the petition. The petitioner does not assert that it advised USCIS of a change of address subsequent to the filing of the petition and before the site visit occurred, and that the officer did not go to the new address. A review of the USCIS computer system indicates the petitioner did not submit a change of address to USCIS between the date it filed the Form I-129 petition and the date the site visit was conducted. Moreover, based upon the evidence provided, the petitioner did not change the work location from the address provided on the petition until 1 ½ months after the site visit occurred.

[3] Based upon the 2009 Federal tax return, the beneficiary is the sole owner of the petitioning company. The beneficiary's "current residential address" was listed on the Form I-129 petition and on the pay statement provided to USCIS as the same address as the petitioner's business location.

2. Please refer to the copies of our company's 2009 tax return and 941 Form of 3rd, 4th quarter 2009 and 1st quarter 2010, phone bills with new location and the beneficiary's pay stubs, business lease.
3. Please see all copies of the used checks, bank transactions, bank statements, for the new address of the company for your references.
4. A new warehouse with 12000 square feet is under contract with location at [redacted]
5. Attached please see the copy picture of the truck with company's name and phone number.
6. The beneficiary, [redacted] in this case is actually the shareholder of this company, whose family has invested to [redacted] (evidence upon request).

Upon review of the Form I-290B, the AAO notes that the petitioner's statement contains no specific assignment of error. The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

Nevertheless, as previously mentioned, the issue of whether the petitioner identified an erroneous conclusion of law or a statement of fact as a basis for the appeal is moot as the appeal was untimely filed. The matter will therefore 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.

As the appeal was untimely filed, the appeal must be rejected.

**ORDER**: The appeal is rejected.