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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  
and Immigration  
Services**

Dg

File: [REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

OCT 08 2010

IN RE:

Petitioner:

Beneficiary:

Petition:

Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:

[REDACTED]

**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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The petitioner, an Indian specialty restaurant, filed the instant petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien of extraordinary ability in the arts. The petitioner seeks to employ the beneficiary in the position of executive chef for a period of three years.

The director denied the petition, concluding that the petitioner failed to submit the required written advisory opinion from an appropriate consulting entity, pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(D).

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 with the office where the unfavorable decision was made 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). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a USCIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the director issued the decision on October 14, 2009. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal and properly instructed the petitioner to submit the appeal to the California Service Center. The director explicitly advised the petitioner that the appeal may not be filed directly with the AAO.

The AAO notes that Form I-290B, Notice of Appeal or Motion, was initially submitted on November 13, 2009; however, the Form I-290B was submitted to the AAO, and not to the California Service Center, as required by the regulation at 8 C.F.R. § 103.2(a)(7)(i). On November 16, 2009, the AAO returned the appeal to counsel, advising that the appeal must be filed with the USCIS office that issued the unfavorable decision. The petitioner properly filed the appeal with the service center on November 23, 2009, 40 days after the director's decision was issued. Consequently, the appeal in this matter was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. Thus, the appeal was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

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 as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), 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).

It is noted that the appeal does not meet the applicable requirements of a motion to reopen or reconsider. 8 C.F.R. § 103.5(a). A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the petitioner offers no "new" evidence, which could not have been presented in the initial proceeding. Likewise, the petitioner fails to cite to any pertinent precedent decisions establishing that the director's decision was based on an incorrect application of law or USCIS policy.

The untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

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

**ORDER:** The appeal is rejected.