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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **MAR 31 2008**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

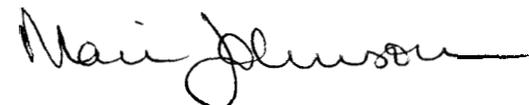
PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reconsider. This decision, however, in no way evaluates the merit of the appeal.

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 of 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 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 regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party shall file the complete appeal “with the office where the unfavorable decision was made.”

The record indicates that the director issued the decision on September 18, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The director further advised the petitioner that the notice of appeal “must be filed with the Nebraska Service Center.” Although counsel dated the appeal October 16, 2007, it was received *by the Service Center* on October 29, 2007, 41 days after the decision was issued. Accordingly, the appeal 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. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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.¹

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 untimely appeal met the requirements of a motion to reconsider at the time it was filed because counsel asserted that the decision was incorrect based on the evidence of record at the time of the initial decision. 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). Therefore, the director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly. We emphasize that our conclusion that the appeal meets the requirements of a motion to reconsider is *not* an evaluation of the appeal on its merits. More specifically, our determination that the appeal meets the requirements of a motion to reconsider does not imply or suggest that that the petitioner has overcome the director’s grounds for denial.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reconsider.

¹ The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) is separate and distinct from the regulation at 8 C.F.R. § 103.3(a)(2)(iii), which allows the reviewing official to treat *any* appeal (including timely appeals) as a motion for purposes of issuing a favorable decision.