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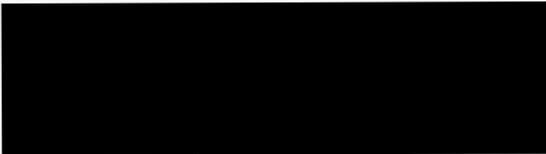
U.S. Department of Homeland Security
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: NOV 25 2008

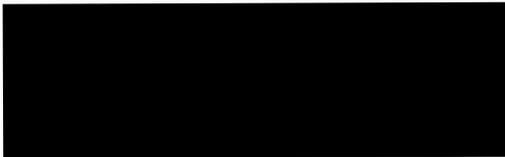
IN RE:

Petitioner:
Beneficiary:



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.

JF Grissom
John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director found the petitioner had not established that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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 decision.” If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The regulation at 8 C.F.R. § 1.1(h) explains that when the last day of a period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. 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. § 103.2(a)(1) provides:

General. Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission.

Part 1 of the instructions for the Form I-290B, Notice of Appeal to the AAO, filed by the petitioner states: “You must file your appeal with the U.S. Citizenship and Immigration Services (USCIS) office that made the unfavorable decision within 30 calendar days after service of the decision (33 days if your decision was mailed).”

The record indicates that the Director, Nebraska Service Center, issued the decision on March 30, 2007. It is noted that the director properly gave notice to the petitioner that he had 33 days to file the appeal and that his appeal “must be filed with the Nebraska Service Center, P.O. Box 82521, Lincoln, NE 68501-2521.” The petitioner, however, incorrectly submitted the Form I-290B to the Vermont Service Center on April 30, 2007. The Vermont Service Center then forwarded the Form I-290B to the Nebraska Service Center, which received the appeal on May 10, 2007, 41 days after the decision was issued. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states in pertinent part that “[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed.” Accordingly, as the appeal was not filed with the Nebraska Service Center within the time allowed, it must be rejected.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. 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.

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 does not meet the requirements of a motion to reopen or a motion to reconsider. The petitioner's submission includes no discussion of the new facts to be proved in the reopened proceeding. Nor is there a statement addressing the specific reasons for reconsideration or information indicating the director's decision was incorrect based on the evidence of record at the time of the initial decision. 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 and does not qualify as a motion, the appeal must be rejected.

It is noted that even if we were to accept the petitioner's appeal as timely filed, it would be summarily dismissed. On appeal, counsel states: "Based on the evidence submitted, it is our contention that there was sufficient evidence pursuant to 8 C.F.R. § 204.5(h)(2) qualifying [the petitioner] as an alien of extraordinary ability. We request additional time for submission additional [sic] evidence from Poland to strengthen our argument." Counsel indicated that a brief and/or evidence would be submitted to the AAO within 90 days. The appeal was filed on May 10, 2007. As of this date, more than eighteen months later, the AAO has received nothing further.

The petitioner's appellate submission was unaccompanied by arguments or evidence addressing the pertinent regulatory criteria at 8 C.F.R. § 204.5(h)(3). As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. The petitioner has not specifically addressed the reasons stated for denial and has not provided any additional evidence. Therefore, were the appeal found to be timely filed, it would be summarily dismissed.

ORDER: The appeal is rejected.