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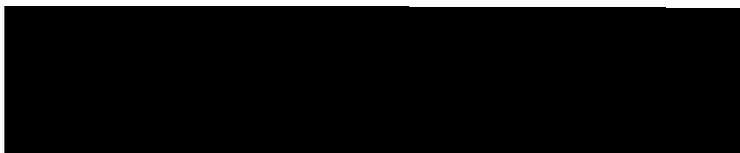
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



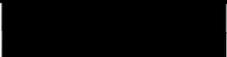
U.S. Citizenship
and Immigration
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: MAR 27 2009

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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.

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.¹ 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.

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 that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that she meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director also determined that the petitioner had not submitted clear evidence that she would continue to work in her area of expertise in the United States as required by the regulation at 8 C.F.R. § 204.5(h)(5).

The Form I-140, Immigrant Petition for Alien Worker, was filed on September 15, 2006. On June 1, 2007, the director issued a request for evidence pertaining to the regulatory requirements at 8 C.F.R. §§ 204.5(h)(3) and (5). The record reflects that the petitioner's response was received by the service center on August 6, 2007. Nevertheless, on October 10, 2007, the director denied the petition stating that a request for evidence was issued and that "the alien petitioner was given until August 15, 2007 to respond," but that "[n]o response has been received by the Service." The petitioner filed her appeal on April 2, 2008, 175 days after the director's decision was issued.

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 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 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 record indicates that the director issued the decision on October 10, 2007. The appeal was not received by the director until April 2, 2008, 175 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 The petitioner was initially represented by [REDACTED]. In this decision, the term "previous counsel" shall refer to [REDACTED].

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).

Here, the untimely appeal meets the requirements of a motion to reopen and reconsider. The petitioner successfully argues that the director's October 10, 2007 decision was flawed because it was not issued to her attorney of record and because it did not consider the evidence she submitted in response to the director's request for evidence. The petitioner states:

To date, neither I nor my current attorney of record . . . has received any written notification that a decision had been made regarding my petition.

* * *

[A]ccording to the October 10, 2007 decision letter, the petition was denied because USCIS had not received my response to a . . . "Request for Evidence" before the August 15th deadline specified in the RFE. This was an unfortunate mistake made within the Nebraska Service Center since my response to the RFE was in fact received by the NSC on August 6, 2007 well before the deadline date.

The petitioner's appellate submission includes a FedEx Express tracking receipt verifying that her response to the director's request for evidence was received by the service center on August 6, 2007.² Thus, the director's October 10, 2007 decision, based on the petitioner's failure to respond, was clearly in error. The record also reflects that the director's decision was mailed to previous counsel's address rather than to counsel's address as indicated on the July 25, 2007 Form G-28, Notice of Entry of Appearance as Attorney, submitted in response to the director's request for evidence. The regulation at 8 C.F.R. § 103.2(b)(19) states: "*Notification.* An applicant or petitioner shall be sent a written decision on his or her application, petition, motion, or appeal. Where the applicant or petitioner has authorized representation pursuant to Sec. 103.2(a), that representative shall also be notified." Further, notices and decisions, when served by mail, must be sent to a person at his or her last known address. 8 C.F.R. § 103.5a(a)(1). In this instance, counsel did not receive a decision at her last known address as identified on her July 25, 2007 Form G-28. Accordingly, the director's decision did not comply with the regulatory requirements set forth at 8 C.F.R. § 103.2(b)(19) and 8 C.F.R. § 103.5a(a)(1).

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

²The record also includes a copy of the original FedEx Express USA Airbill reflecting that counsel sent the response on August 3, 2007.

director must consider the untimely appeal as a motion to reopen and reconsider and render a new decision accordingly. The director's new decision must thoroughly address all of the evidence submitted by the petitioner in response to the director's request for evidence and shall be sent to counsel at her address of record.

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