

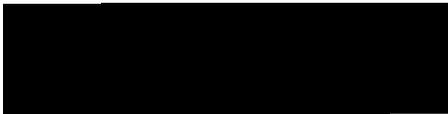


U.S. Citizenship
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Services

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FILE: [REDACTED]
LIN 06 192 50254

Office: NEBRASKA SERVICE CENTER

Date: OCT 14 2009

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.

Perry Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The director rejected a subsequent appeal as untimely and determined that the appeal did not meet the requirements of a motion. On motion, the director reopened that decision and forwarded the appeal to the Administrative Appeals Office (AAO). The matter is now before the AAO on appeal. The appeal will be rejected as untimely filed.

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 record indicates that the director issued the decision on July 24, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although counsel dated the appeal August 23, 2007, it was shipped August 24, 2007 and received by the director on Tuesday, August 28, 2007, 35 days after the decision was issued. Accordingly, the appeal was untimely filed. The director rejected the appeal as late on January 10, 2008, concluding that the appeal did not meet the requirements of a motion. This decision was in error as the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) only allows the director to consider a late appeal if it meets the requirements of a motion, which the director concluded it did not.

On motion, counsel submits a letter from Federal Express indicating that the appeal was delayed due to severe weather conditions throughout their sorting system, disrupting air and ground operations. The director concluded that “there are sufficient grounds for forgiving” the late filed appeal, reopened the appeal on March 12, 2009 and forwarded it to the AAO.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal.¹ Delivery by an overnight courier a day or two past the “guaranteed” date is not a rare or extraordinary event that would excuse late filing. *Matter of Liadov*, 23 I&N Dec. 990, 992 (BIA 2006).

As stated above, 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 as of the date it is filed shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, as concluded by the director in the January 10, 2008 decision, 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).

¹ Compare 8 C.F.R. § 103.5(a)(i) excusing late filed motions to reopen where the delay was reasonable and beyond the control of the applicant or petitioner. The regulation relating to appeals, 8 C.F.R. § 103.3, does not include any comparable language.

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

ORDER: The appeal is rejected.