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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

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FILE:

[REDACTED]
LIN 07 155 52953

Office: NEBRASKA SERVICE CENTER

Date:

JAN 14 2010

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

 Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) rejected the petitioner's appeal of that decision on June 22, 2009, but remanded the matter to the director for consideration as a motion to reconsider. The matter is now before the AAO on a motion to reopen. The motion will be dismissed, the previous decision of the AAO rejecting the appeal and remanding the matter to the director will be affirmed, and the petition will remain denied.

On motion, counsel argues that the AAO erred in rejecting the petitioner's appeal as untimely. In support of her claim, counsel submits the FED EX Airbill and tracking and delivery confirmation which indicates that counsel erroneously submitted the appeal to the California Service Center on June 16, 2008.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides in part 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).

Further, 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)."

Moreover, the record indicates that the Director, Nebraska Service Center, issued the decision on May 13, 2008. It is noted that the director clearly and properly gave notice to the petitioner that the appeal "must be filed with the Nebraska Service Center, P.O. Box 82521, Lincoln, NE 68501-2521." As documented by counsel, however, the appeal was incorrectly submitted to the California Service Center on June 16, 2008. The California Service Center then forwarded the Form I-290B to the Nebraska Service Center, which received the appeal on June 25, 2008, 43 days after the decision was issued.

As indicated in our June 22, 2009 decision, the regulations require that an appeal which is not timely filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(I). As the appeal was not filed with the Nebraska Service Center within the time allowed, it was properly rejected as untimely.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110. With the current motion, as the petitioner has failed to establish any error on the part of USCIS, that burden has not been met. Additionally, as counsel failed to submit the instant motion with the required fee, it is not considered as properly filed in accordance with 8 C.F.R. 103.5(a)(1)(iii)(B). Accordingly, the motion to reopen will be dismissed.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motion to reopen is dismissed, the decision of the AAO dated June 22, 2009 rejecting the appeal and remanding the matter to the director is affirmed, and the petition remains denied.