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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

[Redacted]

B2

DATE **APR 19 2012** OFFICE: NEBRASKA SERVICE CENTER

[Redacted]

IN RE:

[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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject 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 or the attorney or representative of record must submit the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(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 submission, but the date of actual receipt with the proper signature and the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i). The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) provides that an appeal which is not filed with the time allowed must be rejected as improperly filed.

The record indicates that the service center director issued the decision on December 30, 2010. It is noted that the service center director properly gave notice to the petitioner that he had 33 days to file the appeal. Neither the Immigration and Nationality Act (the Act) nor the pertinent regulations grant the AAO authority to extend this time limit. *See Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006). Even if the appeal was delayed by the overnight delivery service, the error would not warrant special consideration of the appeal. *Id.* In the case here, Form I-290B, Notice of Appeal or Motion, was received by the service center on March 16, 2011, 76 days after the director's decision. Accordingly, the appeal was untimely filed.

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. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director of the Nebraska Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). It is noted that counsel acknowledged the untimely filing of the appeal and requested the appeal be treated as a motion. However, the director determined that the late appeal did not meet the requirements of a motion and forwarded the matter to the AAO.

In addition, counsel indicated that he was also appealing the petitioner's Form I-485, Application to Register Permanent Residence or Adjust Status, which he filed pursuant to section 245 of the Act. Notwithstanding that counsel failed to file a separate Form I-290B, the regulation at 8 C.F.R. § 245.2(a)(5)(ii) provides that "[n]o appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240." As such, the regulations do not permit AAO jurisdiction over the petitioner's appeal of his adjustment of status application.

Finally, counsel requested that the petitioner be re-classified "as an alien of exceptional ability with a National Interest Waiver pursuant to INA §203(b)(2)" and submitted an amended petition and supporting documentation. However, the petitioner is precluded from requesting a change of

classification on appeal. A request for a change of classification will not be entertained for a petition that has already been adjudicated. A post-adjudication alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In addition, the Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee, including multiple appeals on a single Form I-290B with a single fee. The initial filing fee for Form I-140 covered the cost of the director's adjudication of the petition, as well as the initial filing fee for Form I-290B covering the cost of the adjudication of the appeal. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.¹ If the petitioner now seeks classification as an alien of exceptional ability pursuant to section 203(b)(2) of the Act, then he must file a separate Form I-140 requesting the new classification. On appeal, counsel has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

For the reasons discussed above, the appeal must be rejected.

ORDER: The appeal is rejected.

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>, accessed on April 11, 2009, and incorporated into the record of proceeding.