



U.S. Citizenship
and Immigration
Services

B2

[Redacted]

DATE: **DEC 18 2012** Office: TEXAS SERVICE CENTER FILE: [Redacted]

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:

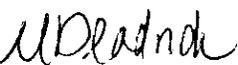
[Redacted]

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The director treated a subsequent appeal as a motion and concluded that the petitioner had not overcome the grounds of denial. The director reaffirmed that decision on his own motion. On April 28, 2010, the director withdrew his previous decisions and “restored” the appeal to a pending status. The Administrative Appeals Office (AAO) rejected the appeal as untimely filed. The matter is now before the AAO on motion to reopen. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), and 103.5(a)(4).

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 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.

On motion, counsel requests that the AAO’s January 17, 2012 decision rejecting the petitioner’s appeal as untimely be reversed and that the I-140 filed by the petitioner be approved. The petitioner’s motion, however, is unsupported by any new facts or evidence demonstrating that his appeal was properly and timely filed at the correct office.

The regulation at 8 C.F.R. § 103.2(a)(1) provides, in pertinent part:

Preparation and submission. Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

As it pertains to the proper filing of an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides:

Filing Appeal. The affected party must submit an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by § 103.7 of this part. The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions within 30 days after service of the decision.

Page 3 of the instructions for the Form I-290B, Notice of Appeal, filed by the petitioner in May 2009 states: “You must file your appeal or motion with the USCIS [U.S. Citizenship and Immigration Services] office that made the unfavorable decision within 30 calendar days after service of the decision (33 days if your decision was mailed). . . . Do **not** send your appeal directly to the Administrative Appeals Office.” (Bold emphasis in original.)

The record indicates that the director issued the decision on April 23, 2009. It is noted that the director properly gave notice to the petitioner that he had 33 days to file the appeal. The notice further advised: “Your notice of appeal must be filed with this office at the address at the top of

this page” In addition, the director’s notice concluded: **“The appeal may not be filed directly with the Administrative Appeals Office. The appeal must be filed at the address at the top of this page.”** (Bold emphasis in original.)

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. § 1.2 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)(I) provides that an appeal which is not filed within the time allowed must be rejected as improperly filed.

The petitioner dated the appeal May 14, 2009. However, despite the clear instructions in the director’s notice and on the Form I-290B, the petitioner sent the appeal directly to the AAO. The AAO received the incorrectly submitted appeal on May 20, 2009. On May 22, 2009, the AAO returned the appeal and filing fee to the petitioner as improperly submitted to the wrong office. The appeal was received by the director at the correct address on May 29, 2009, 36 days after the decision was issued. Accordingly, the appeal was untimely filed.

In a February 13, 2012 letter accompanying the petitioner’s motion, counsel acknowledges that the petitioner’s appeal was “unfortunately sent to the wrong address,” but argues that the AAO’s “temporar[y] accept[ance]” of the petitioner’s Form I-290B rendered it impossible for the petitioner to resubmit the appeal within the regulatory timeframe. This argument is not persuasive and fails to provide any new facts or evidence demonstrating that the appeal was properly and timely filed at the correct office.¹

The regulation at 8 C.F.R. § 103.5(a)(4) states that “[a] motion that does not meet applicable requirements shall be dismissed.” Accordingly, the motion will be dismissed, the proceedings will not be reopened and reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen is dismissed, the decision of the AAO dated January 17, 2012 is affirmed, and the petition remains denied.

¹ The AAO notes that the instant motion does not contain the statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding as required by the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C).