

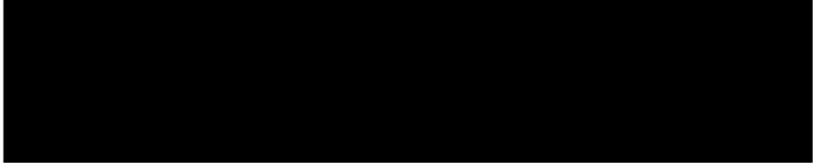
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B2



DATE: **JUL 05 2012** Office: TEXAS SERVICE CENTER FILE:

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. Please note that all documents
have been returned to the office that originally decided your case. Please also note that any further
inquiry must be made to that office.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely filed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4).

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. § 1.2 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 receipt date shall be recorded upon receipt by USCIS. *Id.* 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 issued the decision denying the petition on November 13, 2009. It is noted that the service center director properly gave notice to the petitioner that she had 33 days to file the appeal. Neither 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.* Although counsel dated the Form I-290B December 10, 2009, it was not received by the service center until December 17, 2009, or 34 days after the decision was issued. Accordingly, the appeal was untimely filed and was rejected by the AAO.

On motion, counsel states:

1. In its Denial decision dated November 13, 2009, the USCIS specifically instructed Petitioner to file her I-290B Appeal with the U.S. Department of Homeland Security, P.O. Box 852841, Mesquite, Texas 75185-3841 [See attached I-140 Decision dated November 13, 2009: "...the appeal must be filed at the address at the top of this page."]
2. [The petitioner] duly posted her I-290[B] appeal visa USPS express mail on November 15, 2009; one day prior to the statutory deadline for filing [Receipt No: EV934148671US].
3. U.S. Postal Service Records indicate that [the petitioner's] I-290[B] appeal was delivered to the subject Post Office on December 16, 2009 at 9:46AM. Notice of delivery was likewise physically placed in the subject USCIS P.O. Box at 11:04 AM that same day. December 16, 2009 was the 33rd day stipulated by the USCIS as within the acceptable time limits for receipt by USCIS.
4. Further inquiry with the U.S. Postal Service revealed that the USCIS employee or agent responsible for picking up USCIS mail from its designated post office box on December 16, 2009 did not recover said mail until the next morning [5:30 am] of

December 17, 2009. Consequently, much of the mail timely received at the subject USCIS mailbox on December 16, 2009 during normal business hours was not entered into the USCIS's filing system on the following day: December 17, 2009.

5. The unfortunate and unfair result of USCIS's next-day pickup and processing of its mail from the previous day caused the AAO to erroneously presume that the Petitioner's I-290B filing was filed late under Section 103.5 of the Code of Federal Regulations.

On motion, the petitioner submits U.S. Postal Service (USPS) "Track & Confirm Search Results" stating: "Your item was *delivered* at 5:20 am on *December 17, 2009* in MESQUITE, TX 75185 to INS. The item was signed for by M SALCEDO." [Emphasis added.] The preceding USPS information further states: "Expected Delivery Date: *December 17, 2009.*" [Emphasis in original.] Moreover, the AAO notes that the USPS Express Mail mailing label attached to the envelope in which the petitioner's appeal was mailed includes an information block listing the "Scheduled Date of Delivery" as December 17, 2009. Further, the USPS Track & Confirm Search Results submitted by petitioner include a "Detailed Results" section stating: "*Delivered, December 17, 2009, 5:20am, MESQUITE, TX 75185.*" [Emphasis added.] Finally, the AAO notes that the USPS Express Mail envelope in which the petitioner's appeal was mailed and the petitioner's Form I-290B, Notice of Appeal or Motion, are both date stamped as received by the service center on December 17, 2009.

Counsel asserts that the "appeal was delivered to the subject Post Office on December 16, 2009 at 9:46AM," but the documentation submitted on motion does not support his claim. The USPS Track & Confirm "Detailed Results" section states: "Arrival at Unit, December 16, 2009 9:46 am, MESQUITE, TX *75149*" (emphasis added), not the service center's zip code of 75185. With regard to counsel's claims as listed in items 3 – 5 above, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The regulation at 8 C.F.R. § 103.2(a)(7)(i) (2009), in effect at the time the petitioner's appeal was filed, stated, in pertinent part: "An application or petition received in a USCIS office shall be stamped to show the time and date of actual receipt and . . . shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted."

A motion to reconsider a decision on a petition must, when filed, 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). The AAO's March 21, 2011 appellate decision was correct based on the evidence of record at the time of the decision because the petitioner's appeal was not properly filed until December 17, 2009. As the appeal was untimely filed, the AAO was correct in rejecting the petitioner's appeal. Moreover, the instant motion does not contain a 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). For this additional reason, the motion must be dismissed.

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 and reconsider is dismissed, the decision of the AAO dated March 21, 2011 is affirmed, and the petition remains denied.