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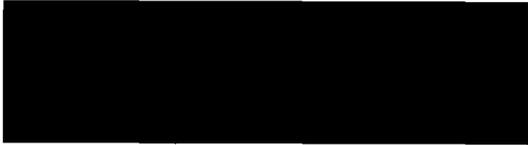
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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DATE: **MAR 12 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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 . Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition on November 4, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on September 13, 2010, as the appeal was untimely. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be dismissed. The motion to reconsider will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed. In this case, the petitioner failed to submit a statement regarding if the validity of the decision of the AAO has been or is subject of any judicial proceeding. As such, the motions must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

Notwithstanding the above fatal defect, the AAO will review counsel's claims. The motion must overcome the basis of the decision the motion seeks to reverse, in this case the AAO's decision that the petitioner untimely filed the appeal. The September 13, 2010, decision dismissing the petitioner's original appeal concluded that the petitioner failed to file the appeal timely. Counsel's brief accompanying the motions makes the following assertions: (1) assuming USCIS mailed the decision after November 4, 2009, the due date for the appeal was December 8, 2009; (2) December 7, 2009, was a legal holiday (Pearl Harbor Remembrance Day) and according to 8 C.F.R. § 1.1(h) the due date for the appeal cannot fall on a legal holiday; and (3) counsel did file its response timely, but the U.S. Postal Service did not deliver the appeal on the scheduled date of December 7, 2009.

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 file 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. § 103.5a(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 service center director issued the decision on November 4, 2009. It is noted that the service center director properly gave notice to the petitioner that it had 33 days to file the appeal. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit. Counsel failed to include a date on the Form I-290B when he signed it. The appeal was not received by the service center until December 8, 2009, or 34 days after the decision was issued. Accordingly, the appeal was filed untimely.

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 Texas Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director determined that the late appeal did not meet the requirements of a motion and forwarded the matter to the AAO. As the appeal was untimely filed, the AAO rejected the appeal.

The AAO will not presume, as counsel does, that the director failed to mail the notice on November 4, 2009. The petitioner does not support this presumption with the postmarked envelope. Thirty-three days after November 4, 2009, is December 7, 2009. This leads us to counsel's second assertion that December 7, 2009, is a legal holiday contemplated by the regulation at 8 C.F.R. § 1.1(h), which states:

The term day when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

As evidence that December 7, 2009 was a "legal holiday," counsel provides a website printout from butlerwebs.com. This printout provides a holiday calendar for 2007, 2008, and 2009, listing 54 holidays for each year. The printout states that "Federal Holidays" are in red. Pearl Harbor Remembrance Day is not in red. Following counsel's logic, USCIS would be forced to extend the due date when it falls on Summer Solstice, Winter Solstice, Mardi Gras, and Bosses Day among numerous other "holidays." The list of the ten "legal public holidays" recognized by the U.S. Federal Government are found at 5 U.S.C. § 6103. Pearl Harbor Remembrance Day is not one of the holidays undermining counsel's contention that Pearl Harbor Remembrance Day is one of the legal holidays contemplated by 8 C.F.R. § 1.1(h).

Counsel's final assertion is that the fault of the untimely appeal lies with the U.S. Postal Service, and thereby the U.S. Federal Government, rather than with his office. As evidence of this assertion counsel provides web-based tracking printouts relating to the appeal. The printouts demonstrate that the package arrived in Mesquite, Texas at 9:45 am on December 7, 2009. This printout does not reflect that the package resided with USCIS at this time. Counsel also provides a delivery confirmation indicating that the appeal was delivered to USCIS on December 8, 2009, which is 34 days after the director issued the November 4, 2009, decision. Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. *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.*

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 motion to reconsider is dismissed. The decision of the AAO dated September 13, 2010, is affirmed, and the petition remains denied.