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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

[redacted]

DATE: MAY 1 4 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 with the field office or service center that originally decided your case by filing a 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,

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) dismissed a subsequent appeal. 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)(i), 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states in pertinent part that:

> Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) provides:

> *Filing Requirements* – A motion shall be submitted on Form I-290B, and may be accompanied by a brief. It must be:
>
> (A) In writing and signed by the affected party or the attorney or representative of record, if any;
>
> (B) Accompanied by a nonrefundable fee as set forth in § 103.7;
>
> (C) Accompanied 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;
>
> (D) Addressed to the official having jurisdiction; and;
>
> (E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states that a motion must be filed within 30 days of the decision that the motion seeks to reopen or reconsider. The regulation at 8 C.F.R. § 103.5a(b) states that whenever a person is required to act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. 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). Finally, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(E) requires that motions be submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

The AAO issued the decision summarily dismissing the petitioner's appeal on December 1, 2010. It is noted that the AAO properly gave notice to the petitioner that "[a]ll motions must be submitted to the office that originally decided your case by filing a Form I-290B" (Notice of Appeal or Motion) and that "any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen." Counsel, however, incorrectly submitted the petitioner's Form I-290B to the AAO on December 29, 2010. The AAO returned the Form I-290B with fee to counsel based on his incorrect submission of the motion to the AAO. Counsel submitted the Form I-290B to the Texas Service Center on January 4, 2011, 34 days after the decision was issued. Accordingly, the motion was untimely filed.

As it relates to motions to reopen, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that "failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." In this matter, the petitioner's motion was not properly filed within the required thirty days and he has not demonstrated that this delay was reasonable and beyond his control. The motion must therefore be dismissed as untimely filed.

Even if the motion was timely filed, it would be dismissed for additional reasons. The record reflects that the Director, Texas Service Center denied the petition on November 2, 2009. The petitioner submitted his appeal on December 1, 2009 and indicated on the Form I-290B that a brief and/or evidence would "be submitted to the AAO within 30 days." The regulation at 8 C.F.R. § 103.3(a)(2)(viii) provides: "*Where to submit supporting brief if additional time is granted.* If the AA[O] grants additional time, the affected party shall submit the brief directly to the AA[O]." Further, the general instructions for the Form I-290B submitted by the petitioner state: "You may submit a brief and evidence with this form. Or you may send these materials to the AAO within 30 days of the date you sign this form. You must send any materials you submit after filing the appeal to: USCIS Administrative Appeals Office." On December 31, 2009, counsel incorrectly submitted the petitioner's brief and additional evidence to the Texas Service Center. On motion, counsel asserts that the petitioner submitted supplemental documents in support of the appeal, but the AAO failed to consider the documentation in its decision summarily dismissing the appeal. 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 appellate decision, however, was correct based on the evidence of record at the time of the decision because the petitioner's appellate brief and additional evidence were not properly submitted to the AAO in accordance with the regulation and form instructions. Moreover, 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). 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 December 1, 2010 is affirmed, and the petition remains denied.