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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



B3

Date: JUN 18 2012 Office: TEXAS SERVICE CENTER

FILE:



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to
Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

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 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 Director, Texas Service Center, denied the employment-based immigrant visa petition. The director dismissed a subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The beneficiary has a bachelor's degree in electronics engineering. He has filed this petition, seeking to classify himself as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The director denied the petition on August 16, 2011, on the basis that the regulations make no provision for an individual to self-petition for the requested classification. *See* 8 C.F.R. §§ 204.5(c), 204.5(i)(1). The director dismissed a subsequent motion to reopen. Counsel filed the instant 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 must file the complete appeal within 30 days after 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 with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the director issued the decision on October 5, 2011. It is noted that the director properly gave notice to the petitioner that he had 33 days to file the appeal, and listed the proper fee for filing an appeal. The appeal was received with the proper fee by the director on December 5, 2011, 61 days after the decision was issued. Accordingly, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO the authority to extend the 33-day time limit for filing an appeal. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirement 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.

A motion to reopen must state the new facts to be proven in the reopened proceeding and, when filed, be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also 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). A motion that does not meet the applicable requirements when filed shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Counsel asserts as the basis for the appeal "ministerial error" on the part of his law firm in failing to list [REDACTED] as the petitioner in this petition. Counsel has submitted the affidavit of the president of [REDACTED] stating that the company believed it was "sponsoring the I-140 application filed on behalf of [REDACTED]" as an outstanding researcher. However, USCIS is not responsible for the action, or inaction, of counsel. Further, the beneficiary does not assert or

set forth any ineffective assistance of counsel claim.¹ Therefore, the evidence does not establish that the requirements for filing a motion to reopen have been met.²

Here, the untimely appeal did not meet the requirements of a motion to reopen or a motion to reconsider when it was filed. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

ORDER: The appeal is rejected.

¹ To the extent that the beneficiary seeks to make a claim of ineffective assistance of counsel, he has failed to meet the standard enumerated. To make a claim under *Matter of Lozada*, 19 I&N 637 (BIA 1988) the filing must be accompanied by an affidavit from the aggrieved party attesting to the relevant facts, that counsel must be informed of the allegations presented and allowed an opportunity to respond, and that if the case involved a violation of legal or ethical responsibilities that the motion should "reflect whether a complaint has been filed with appropriate disciplinary authorities." *Matter of Lozada*, 19 I&N at 637.

² On appeal, counsel also asserts that the director erred in denying the petition without first issuing a request for additional evidence. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) provides that if the initial evidence does not demonstrate eligibility, USCIS in its discretion may deny the petition for lack of eligibility *or* request any missing evidence. As the director determined that the initial evidence did not demonstrate eligibility, the director did not err in denying the petition without first issuing a request for additional evidence. Moreover, the most efficient remedy for any alleged error in failing to request additional evidence would be to consider any evidence that might have been submitted in response to such a request on appeal. In the matter before us, however, the petitioner submits no additional evidence relating to the director's concerns.