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U.S. Citizenship  
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Services

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FILE:

[REDACTED]  
SRC 05 049 51242

Office: TEXAS SERVICE CENTER

Date:

JAN 30 2009

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The approval of preference visa petition was revoked by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

Pursuant to the regulation at 8 C.F.R. § 205.2(d), a petitioner must file an appeal from a decision revoking approval of a petition within 15 days after the service of the notice of the revocation. Petitioners that are served with the notice by mail will be allowed 18 days.

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a U.S. Citizenship and Immigration Services (USCIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the director issued the decision on February 20, 2007.<sup>1</sup> The appeal was received by USCIS on March 22, 2007, or 30 days after the decision was issued. Therefore, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly filed. Accordingly, the appeal in the instant case will be rejected as untimely filed.

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 service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Although the director declined to treat the late appeal as a motion and forwarded the matter to the AAO, even if the director had considered the petitioner's submissions, a motion would not have been granted.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>2</sup>

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<sup>1</sup> The AAO notes that the cover page of the revocation decision erroneously informs the petitioner that it has no right to file an appeal or motion due to the petitioner's failure to provide requested documents. However, the director's instruction was erroneous and directly inconsistent with 8 C.F.R. § 205.2(d), which expressly provides for the filing of an appeal in the event of a revocation of a prior approval. Accordingly, the AAO will disregard the director's instruction and consider the petitioner's submission pursuant to the time guidelines set out in 8 C.F.R. § 205.2(d).

<sup>2</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

In the present matter, no new evidence was submitted in support of the petitioner's motion. Therefore, the petitioner did not meet the requirements for a motion to reopen.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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 CIS 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.

In the present matter, counsel frames his arguments around references to previously submitted documentation. However, he does not cite any legal precedent or applicable law that would support the conclusion that the director committed an error in revoking the prior approval of the petitioner's Form I-140. Therefore, even if the director had considered the petitioner's motion, the motion would have been dismissed in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

Lastly, the AAO concludes that even if the petitioner had properly filed an appeal within the given regulatory time period, the director's revocation would not have been withdrawn, as the petitioner's eligibility at the time of filing had not been successfully established. More specifically, the AAO notes that the record fails to establish that at the time the Form I-140 was filed, the petitioner was able to employ the beneficiary in a qualifying capacity where the duties primarily performed would be of a managerial or executive nature.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the petitioner provided a letter dated June 21, 2005, which contained the following description of the proposed employment:

Overview: To ensure the smooth running (overall operational and financial administration) of the company whose business is to distribute, in North America, the products of an off-shore garment factory.

To attend trade and textile shows to source new suppliers and manufacturers; to attend apparel shows to attract new customers/contracts; to consult with buyers on the demand for styles, types and quality of fabrics; to source fabrics, negotiate prices/quantities, and purchase [the] same from U[.]S[.] suppliers; to verify cutting quantities based on orders and advise [the] off-shore factory accordingly; to coordinate shipments of fabric/production schedules of factory/receipt in the U[.]S[.] of finished product[s] based on orders and seasonal requirements (training of supervisors in these tasks); to verify customs documentation and liaise with brokers/authorities to facilitate customs entry of consignments into the U[.]S[.]

While the above job description does not illustrate the beneficiary's specific day-to-day job duties, it provides enough information to indicate that the beneficiary's time had been and would be primarily

devoted to performing the tasks necessary to produce a product or provide services, including selling and marketing the petitioner's services, dealing with customers who purchase the petitioner's products and services, and completing various necessary administrative steps in the customs process. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As such, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity.

Finally, the AAO notes that, while the U.S. entity may have advanced to another stage in its development which may now make the petitioner eligible to classify the beneficiary as a multinational manager or executive, the Form I-140 in the present matter must be reviewed based on facts and conditions that existed at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Regardless, the appeal must be rejected due to its untimely filing.

**ORDER:** The appeal is rejected as untimely filed.