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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAR 16 2010
SRC 09 099 53649

IN RE: Petitioner: [REDACTED]
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: SELF-REPRESENTED

INSTRUCTIONS:

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

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 of the petition which shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. *See* 8 C.F.R. § 103.2(a)(7)(i). 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 director issued the decision denying the petition on April 2, 2009. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although the petitioner initially attempted to file the appeal on May 5, 2009, the petitioner failed to include the proper filing fee. Accordingly, U.S. Citizenship and Immigration Services (USCIS) returned the appeal along with a notice dated May 6, 2009, informing the petitioner of the correct filing fee.¹ The petitioner made a second attempt to file the appeal on May 26, 2009. However, that appeal was also returned based on the petitioner's use of an outdated Form I-290B. In a USCIS notice dated May 28, 2009, the petitioner was informed of the most updated revised Form I-290B that should be used to file an appeal or motion.² USCIS received the appeal, filed with the correct form and accompanied by the correct filing fee, on June 4, 2009, or 63 days after the denial was issued. Accordingly, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. However, 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.

A motion to reopen must state the new facts to be proved in the reopened proceeding and 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 applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

¹ It is noted that 8 C.F.R. § 103.2(a)(7)(i) requires that USCIS reject any petition or application filed with the incorrect filing fee.

² The AAO notes that even if the petitioner's second attempt to file the appeal had been successful, the appeal would nevertheless have been rejected as untimely filed, as it was received by USCIS 54 days after the director issued the decision denying the petition.

Here, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider.³ 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.

³ With regard to the petitioner's claim on appeal, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).