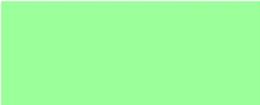


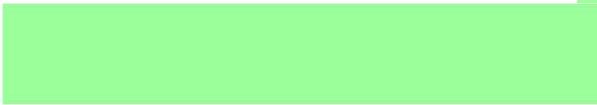
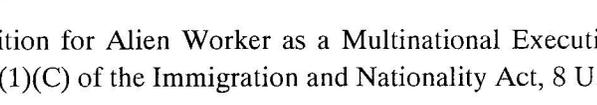
(b)(6)



U.S. Citizenship
and Immigration
Services

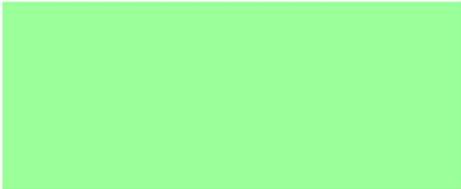


Date: **MAY 16 2014** Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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:

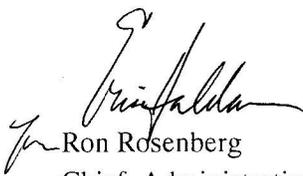


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner subsequently appealed the decision to the Administrative Appeals Office (AAO) and the AAO dismissed the appeal. The petitioner then filed a motion to reconsider which was also dismissed by this office for being untimely filed. The matter is now again before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner is a New York corporation engaged in the import and wholesale distribution of clothing. The petitioner states that it is a subsidiary of [REDACTED] Ltd. located in China. The petitioner seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, finding that the petitioner had failed to establish: (1) that the beneficiary will be employed in an executive or managerial capacity in the United States; and (2) that the beneficiary was employed abroad in a managerial or executive capacity for at least one of the three years preceding his admission into the United States as an L-1A nonimmigrant intracompany transferee. The AAO affirmed the director's adverse findings and dismissed the appeal on November 7, 2013.

The petitioner subsequently filed a motion to reconsider claiming that the petitioner's business was impacted by Hurricane Sandy while the petition was pending, thus causing a temporary decrease in staffing and a temporary need for the beneficiary to become more involved in the day-to-day activities of the company. Counsel asserted that the evidence of record nevertheless establishes that the petitioner was employed abroad and will be employed in the United States in a qualifying managerial or executive capacity. However, the petitioner's Form I-290B, Notice of Appeal or Motion, was not received by the designated filing location until December 13, 2013 or 36 days after the AAO's decision was issued. Therefore, the motion was dismissed as untimely filed.

On motion, counsel contends that the decision to dismiss the previous motion as untimely was erroneous. Counsel contends that the time for determining whether a motion is timely begins upon the date which USCIS mails the decision, rather than the date stamped on the decision. Counsel further contends that the date for determining the timeliness of a motion is based upon the petitioner's mailing of the motion rather than USCIS receipt of the motion. Counsel states that the petitioner's first motion was timely filed since it was mailed on December 10, 2013, 33 days following the AAO's decision. As such, counsel contends that the motion was timely filed and should be adjudicated on its merits.

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

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 [U.S. Citizenship and Immigration Services (USCIS)] 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, the petitioner has not established that this office's previous decision to dismiss the motion to reconsider was based upon an incorrect application of the law or policy.

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

(i) 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.

Therefore, in order to properly file a motion to reconsider, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the petitioner or the attorney or representative of record must file the motion within 30 days of the date the decision that the motion seeks to reconsider. If the decision was mailed, the motion must be filed within 33 days. 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the actual date of receipt at the designated filing location. 8 C.F.R. § 103.2(a)(7)(i).

The regulations are not ambiguous as to determining the timeliness of a motion. As stated above, a motion must be filed "within 30 days of the date of the decision that motion seeks to reconsider," or within 33 days if the decision was mailed. As such, the petitioner has not demonstrated with citations to pertinent law that the date to begin tolling timeliness is the date on which the decision was mailed. Indeed, the regulations state expressly otherwise.

Further, counsel contends that the petitioner's date of mailing the motion is also determinative of timeliness. However, as reflected in the regulations above, the date of filing is not the date of mailing, but the date of actual receipt of the motion at the designated filing location. The record indicates that the AAO dismissed the appeal of the director's decision on November 7, 2013. The petition was given notice that it had 33 days to file a motion to reconsider or reopen. As such, any motion to reopen or reconsider was due by Tuesday, December 10, 2013. Although the Form I-290B, Notice of Appeal or Motion, is dated December 6, 2013, it was not received by the designated filing location until December 13, 2013 or 36 days after the adverse decision was issued. In fact, the record reflects that the Form I-290B was mailed on December 10, 2013. Therefore, it would not have been possible for the motion to have been received in a timely fashion. Accordingly, the motion was untimely filed. Pursuant to 8 C.F.R. § 103.5(a)(4), a motion that does not meet applicable requirements shall be dismissed.

Regardless, this office does retain discretion to excuse a late motion if it is found that this was due to events beyond the reasonable control of the petitioner. *See* 8 C.F.R. § 103.5(a)(1)(i). Counsel asserts that a reasonable delay could theoretically be due to a late mailing on the part of USCIS following the issuance of a decision thereby unreasonably shortening a petitioner's ability to respond with an appeal or motion. However, the petitioner presents no evidence to demonstrate that this office mailed its decision late or that it unreasonably shortened the petitioner's ability to respond in a timely fashion. In fact, counsel merely states that these circumstances could take place, but provides no evidence to demonstrate that the decision at issue was mailed after November 7, 2013. The AAO's decisions are stamped upon the date of their mailing, as reflected on the face of the decision included in the record. Therefore, the petitioner has neither claimed nor provided evidence that events beyond its reasonable control prevented the filing of the motion in a timely matter.

In conclusion, the motion to reconsider is dismissed as the petitioner has not established that this office's previous decision was based on an incorrect application of law or USCIS policy.

As a final note, 8 C.F.R. § 103.5(a)(1)(iv) provides that the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date.

In visa petition proceedings, the burden of proving eligibility for the immigration benefit sought 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 is dismissed.