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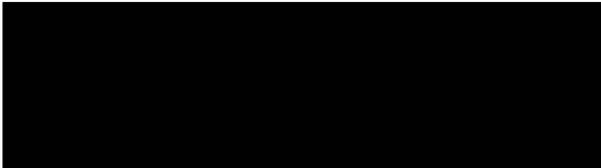
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 06 110 52535

Office: TEXAS SERVICE CENTER Date: **NOV 12 2008**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition¹ was denied by the Director, Texas Service Center for abandonment. The director reopened the matter on motion and denied the petition on its merits. The director then rejected a subsequent appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a financial manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The original petition was also supported by a Form G-28, Notice of Entry of Appearance as Attorney or Representative for counsel signed by the petitioner.

On March 29, 2006, the director requested additional evidence relating to the petitioner's ability to pay the proffered wage. On July 11, 2006, the director denied the petition for abandonment. On July 27, 2006, the petitioner filed a motion to reopen, asserting that a response had been timely submitted. On August 7, 2006, the director reopened the matter, considered the petitioner's response to the request for additional evidence and denied the petition based upon a determination that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On August 28, 2006, counsel filed an appeal. While counsel had previously represented the petitioner, on the Form I-290B, Notice of Appeal to the Administrative Appeals Office, counsel indicated that she represented the beneficiary and submitted a newly signed Form G-28 signed by the beneficiary.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

The regulation at 8 C.F.R. § 103.3(a)(2)(v) states:

Improperly filed appeal -- (A) Appeal filed by person or entity not entitled to file it -- (1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

¹ In her August 7, 2006 and October 24, 2006 notices, the director referred to the petition in different places as a nonimmigrant petition and an immigrant petition. The petition associated with the receipt number on these notices is an immigrant petition.

The director concluded that the appeal had not been filed by the petitioner, nor by any entity with legal standing in the proceeding, but rather by the beneficiary. Therefore, the director rejected the appeal as improperly filed and did not advise the petitioner of any appeal rights.

On November 2, 2006, counsel filed the instant appeal. Counsel now indicates that she represents the petitioner and submits a copy of the Form G-28 submitted with the initial petition. While counsel indicates that the petitioner is appealing the director's October 24, 2006 decision, accompanying the Form I-290B is an attachment advising that the petitioner "appeals the decision dated August 7, 2006" and another letter entitled Motion to Reopen and Reconsider based on a "clerical error" listing the beneficiary as the appellant. This explanation does not address why a new G-28 signed by the beneficiary was submitted with the prior appeal. Counsel then goes on to address the merits of the director's August 7, 2006 decision.

The director's notice of November 2, 2006 was a rejection of an improperly filed appeal. Counsel cites no legal authority that would allow the petitioner to appeal a rejection. Moreover, we decline to withdraw the director's decision as counsel has not sufficiently explained why the rejection was in error.

Thus, the only decision on which an appeal may be filed is the director's August 7, 2006 decision. The director properly gave notice to the petitioner that it had 33 days to file the appeal. The instant appeal was received by the director on November 2, 2006, nearly three months after the decision was issued. Accordingly, the appeal was untimely filed. The director erroneously annotated the appeal as timely and forwarded the matter to the AAO.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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).

Here, the untimely appeal meets the requirements of a motion to reconsider. 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). Therefore, the director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reconsider.