



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 07 146 52068

Office: TEXAS SERVICE CENTER Date:

DEC 04 2009

IN RE:

Petitioner:

Beneficiary:

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The approval of the employment-based immigrant visa petition was revoked by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed; however, the matter will be remanded as a motion to reopen and reconsider.

The petitioner is a computer software business. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

After initially approving the petition on April 17, 2007, the director subsequently revoked the approval of the petition on May 8, 2008.² The notice of revocation (NOR) states that the beneficiary did not meet the minimum requirements of the offered position as of the April 23, 2001 priority date.³

Counsel's appeal was received by U.S. Citizenship and Immigration Services (USCIS) on June 10, 2008, 33 days after the decision was issued. An appeal of a revocation must be filed within 15 days after service of the decision. *See* 8 C.F.R. § 205.2(d). If the decision was mailed, the appeal must be filed within 18 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 by USCIS. *See* 8 C.F.R. § 103.2(a)(7)(i).

It is noted that the NOR incorrectly states that the petitioner had 33 days to file an appeal. Neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit for filing an appeal. As the appeal was untimely filed, it must be rejected. The fact that the NOR stated an incorrect period to file the appeal of the revocation does not forgive the late filing. The regulation at 8 C.F.R. § 205.2(d) is sufficient notice to the petitioner of the allotted time to appeal a revocation.

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

¹Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

²Section 205 of the Act permits the director to revoke the approval of a petition "at any time, for what he deems to be good and sufficient cause."

³The priority date is the date the labor certification was accepted for processing by the DOL. 8 C.F.R. § 204.5(d).

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 USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The supporting evidence and arguments submitted by counsel with the untimely appeal meet the requirements of a motion to reopen and reconsider. The case will therefore be remanded for further consideration.

ORDER: The appeal is rejected. The petition is remanded to the director as a motion to reopen and reconsider for further action in accordance with the foregoing and entry of a new decision.