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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[Redacted] c.

B5

FILE: [Redacted]

Office: NEBRASKA SERVICE CENTER

FEB 17 2011
Date:

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:

[Redacted]

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 employment-based immigrant visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected. The AAO will return the matter to the director for consideration as a motion to reopen and reconsider.

The regulation at 8 C.F.R. § 205.2(d) provides that a petitioner “may appeal the decision to revoke the approval within 15 days after the service of notice of the revocation.” Three additional days are provided if the notification of revocation was mailed. If the last day of the designated period falls on a Saturday, Sunday or a legal holiday, the period will run until the end of the next day, which is not a Saturday, Sunday, or legal holiday. *See* 8 C.F.R. § 1.1(h). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the Immigrant Petition for Alien Worker (I-140) was initially approved on March 21, 2005. The director subsequently concluded that the I-140 was approved in error and notified the petitioner of his intent to revoke the petition on March 18, 2010. The director determined that the petitioner’s response did not overcome the grounds for revocation and the petition’s approval was revoked on July 9, 2010, pursuant to section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155.

It is noted that the director’s decision to revoke the petition erroneously advised the petitioner that it had 30 days (33 days if mailed) to file the appeal. However, it remains the petitioner’s burden to file a timely appeal. An untimely appeal shall be rejected as improperly filed. *See* 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 18-day time limit for filing an appeal based on a revocation. The 18-day deadline for filing an appeal from the director’s decision of July 9, 2010 to revoke the petition’s approval fell on Tuesday, July 27, 2010. Here, the director received the appeal on September 16, 2010. Accordingly, the petitioner’s appeal is 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.

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 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).

As the untimely appeal meets the requirements of a motion to reopen and reconsider because of the new evidence and argument submitted, the director should treat the untimely appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2). 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). The case will be returned to the director to treat it as a motion to reopen and reconsider.

ORDER: The petitioner's appeal is rejected. The matter is returned to the director for consideration as a motion to reopen and reconsider.