

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



B5

DATE: DEC 03 2012

OFFICE: TEXAS SERVICE CENTER



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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) rejected the petitioner's appeal as untimely. The director treated the untimely appeal as a motion to reopen, and again denied the petition. The matter is again before the AAO on appeal. The AAO will again reject the appeal as untimely.

In order to properly file an appeal, the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must submit the complete appeal within 30 days of service of the unfavorable decision. If the director issued the decision by mail, the petitioner must file the appeal within 33 days. *See* 8 C.F.R. § 103.8(b). For a decision served by mail, the date of service is the date of mailing, not the date the affected party receives the notice. *Id.* The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the service center director attempted to issue the decision on May 21, 2012, but sent it to an outdated address. Following an inquiry by the petitioner, the director mailed the decision to the correct address on August 1, 2012. On appeal, the petitioner states: "September 4, 2012 represents 33 days after I received the duplicate notice by mail." The postmark on the appeal submission is dated September 4, 2012. The director received the submission on September 7, 2012.

Under the regulations cited above, the 33-day appeal period does not span from the date the petitioner received the denial to the date the petitioner mailed the appeal. Rather, the appeal period spans from the date the director mailed the denial to the correct address to the date USCIS receives the appeal. The denial date, therefore, was Wednesday, August 1, 2012. Day 33 was Monday, September 3, 2012. Because that date was Labor Day, a federal holiday, the appeal was due to be received – not mailed – the next day, Tuesday, September 4, 2012. The petitioner prepared the Form I-290B Notice of Appeal on August 31, 2012 but waited another four days to mail it. For the second time in this proceeding, the petitioner filed an untimely appeal.

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, USCIS must treat the appeal as a motion, and make a decision on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director of the Texas Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director acknowledged the untimely filing of the appeal, and forwarded the matter to the AAO.

As the appeal was untimely filed, USCIS must reject the appeal.

ORDER: The appeal is rejected.