



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JAN 03 2013 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen and reconsider that decision. The director dismissed the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject the appeal as untimely filed and return the matter to the director for consideration as a motion to reopen and reconsider.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as an elementary school science teacher for the [REDACTED]. At present, U.S. Citizenship and Immigration Services (USCIS) records indicate that the petitioner works at [REDACTED].

The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The director dismissed the petitioner's subsequent motion, stating that it did not meet the requirements of a motion set forth in the USCIS regulations at 8 C.F.R. §§ 103.5(a)(2) and (3).

The director, in dismissing the motion, stated: "There is no appeal to this decision." The director cited no regulation or other authority to support this assertion. This assertion amounts to harmless error, however, because the Texas Service Center accepted the petitioner's appeal from the dismissal.

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 mailed the decision, the petitioner must file the appeal within 33 days. *See* 8 C.F.R. § 103.8(b). 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 issued the decision on Thursday, June 7, 2012. Counsel dated the Form I-290B, Notice of Appeal or Motion Wednesday, July 11, 2012, which was 34 days after the issuance of the decision, already past the filing deadline. The Service Center did not receive the appeal until Friday, July 12, 2012, 35 days after the decision was issued. Accordingly, the appeal was 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, 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).

Here, as the petitioner submitted the brief in this matter directly to the AAO in accordance with 8 C.F.R. § 103.3(a)(2)(viii), it is apparent that the director did not have an opportunity to fully

(b)(6)

Page 3

review the late appeal to determine whether it meets the requirements of either a motion to reopen or a motion to reconsider. Therefore, the AAO will return the matter to the director. If the director determines that the late appeal meets the requirements of a motion, the director shall grant the motion and issue a new decision.

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

ORDER: The appeal is rejected.