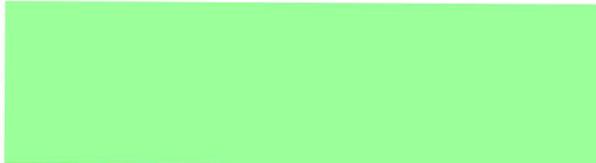


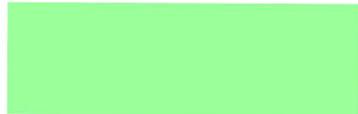


U.S. Citizenship  
and Immigration  
Services

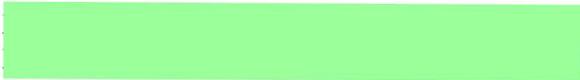
(b)(6)



DATE: **FEB 11 2014** OFFICE: TEXAS SERVICE CENTER

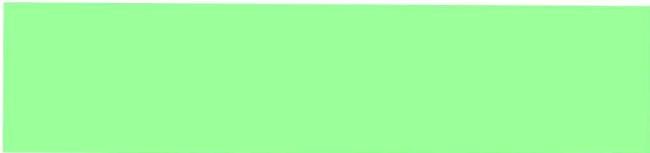


IN RE: Petitioner:  
Beneficiary:



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)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:



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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The Acting Director, Texas Service Center (acting director), denied the immigrant visa petition. The Administrative Appeals Office (AAO) rejected the petitioner's appeal as untimely. The matter is now before the AAO on the petitioner's motion to reopen. The motion will be granted, the AAO's decision will be withdrawn, and the appeal will be summarily dismissed as abandoned under the regulation at 8 C.F.R. § 103.2(b)(13)(i).

The petitioner recruits and provides temporary healthcare workers to U.S. organizations. It seeks to permanently employ the beneficiary in the United States as a physical therapist. The petition requests classification of the beneficiary as a member of the professions holding an advanced degree under section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). The petition also requests labor certification of an occupation on Schedule A. *See* 20 C.F.R. § 656.5.

The acting director found that the petitioner failed to establish the beneficiary's educational qualifications for the requested classification of advanced degree professional. Accordingly, on May 9, 2011, the acting director denied the petition.

On January 30, 2013, the AAO rejected the petitioner's appeal as untimely. The AAO found that the petitioner failed to file its appeal within 30 days of the date the acting director sent a facsimile transmission (fax) of her decision to counsel.

The record shows that the petitioner's motion is properly filed and states new facts supported by an affidavit from counsel. *See* 8 C.F.R. § 103.5(a)(2). The AAO therefore grants the motion.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The record documents the procedural history of this case, which is incorporated into the decision. The AAO will elaborate on the procedural history only as necessary.

### **The Appeal's Timeliness**

A petitioner must appeal an unfavorable decision within 30 days of its service. 8 C.F.R. § 103.3(a)(2)(i). If an unfavorable decision was mailed, a petitioner must file an appeal within 33 days of service. 8 C.F.R. § 103.5a(b) (2010).<sup>2</sup> The AAO must reject an untimely appeal as improperly

---

<sup>1</sup> The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion or appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

<sup>2</sup> The former regulation at 8 C.F.R. § 103.5a governs the instant appeal, which was filed on June 10, 2011. Effective November 28, 2011, USCIS redesignated the former regulation as 8 C.F.R. § 103.8

filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(I). Neither the Act nor the regulations grant the AAO authority to extend the appellate time limit.

An appeal's filing date is its actual date of receipt at the designated filing location. 8 C.F.R. § 103.2(a)(7)(i). A petitioner must sign an appeal and submit it with the correct fee. *Id.*

In the instant case, the record shows that the acting director faxed a copy of her decision to counsel on May 9, 2011, the date of the decision. She then sent the decision by ordinary mail to the petitioner, with a copy to counsel. In a February 6, 2013 affidavit, counsel states: "To my knowledge, a Notice of Decision ... was not received by fax, but was received by mail in my office." Counsel also states: "Throughout the summer of 2011 my law office experienced errors and delays with our fax service." U.S. Citizenship and Immigration Services (USCIS) received the petitioner's appeal on June 10, 2011, 32 days after the acting director issued the decision and faxed a copy to counsel.

USCIS regulations measure an appellate deadline from the date of a decision's "service." *See* 8 C.F.R. § 103.3(a)(2) (an affected party must submit the complete appeal "within 30 days after service of the decision.") (emphasis added); 8 C.F.R. § 103.5a(b) (2010) (granting an additional 3 days "[w]henver a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail." (emphasis added). As counsel's affidavit states that he did not receive the faxed decision because of errors with his fax service and because the acting director also served the decision by ordinary mail, USCIS regulations entitled the petitioner to 33 days in which to file an appeal. The petitioner's appeal, which was filed 32 days after the date of the decision's service, was therefore timely. Thus, the AAO withdraws its decision of January 30, 2013, which rejected the appeal.

The AAO now considers the petitioner's timely appeal.

### **The Appeal's Abandonment**

On December 19, 2013, the AAO sent the petitioner a notice of intent to dismiss the appeal and notice of derogatory information, with a copy to counsel of record. The notice informed the petitioner that the AAO intended to dismiss the appeal based on the petitioner's failure to establish the beneficiary's educational qualifications for the offered position and the requested classification. The AAO also found that the record failed to establish the petitioner's compliance with Schedule A labor regulations and its continuing ability to pay the proffered wage from the petition's priority date onward.

The notice afforded the petitioner 30 days in which to submit a response. The AAO informed the petitioner that failure to respond to the notice would result in dismissal of the appeal.

---

and revised it to provide for the electronic delivery of notices. *See* 76 Fed. Reg. 53764, 53771, 2011 WL 3793637 (Aug. 29, 2011).

As of the date of this decision, the petitioner has not responded to the AAO's notice. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Because the petitioner failed to respond to the notice, the appeal will be summarily dismissed as abandoned under 8 C.F.R. § 103.2(b)(13)(i).

In visa petition proceedings, the petitioner must establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The motion is granted. The previous decision of the AAO is withdrawn. The appeal is summarily dismissed. The petition remains denied.