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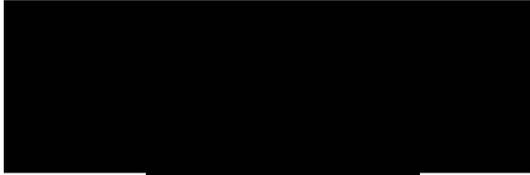
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



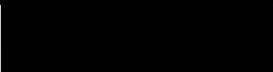
U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAR 29 2007

WAC-02-150-51924

IN RE:

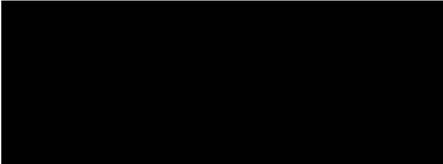
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: On December 9, 2002, the Director, California Service Center, denied the immigrant visa petition for the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage. The petitioner appealed the matter to the Administrative Appeals Office (AAO). On February 24, 2004, the AAO dismissed the petition and affirmed the director's decision. The petitioner filed a Motion to Reopen or Reconsider on April 23, 2004. The AAO rejected the petitioner's Motion as untimely filed on August 29, 2005. On October 24, 2005, the petitioner filed a Motion to Reconsider the AAO's determination that its April 23, 2004 Motion was filed late. The petitioner's Motion to Reconsider will be rejected as untimely filed.

In order to properly file a Motion to Reopen or Reconsider, the regulation at 8 C.F.R. § 103.5(a)(2)(i) provides that the affected party must file the Motion within 30 days after service of the decision that the motion seeks to reopen. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the AAO issued the decision on August 29, 2005 with instructions that all documents had been returned to the California Service Center, and any further inquiry should be made to that office. The petitioner attempted to file the Motion to Reconsider with the California Service Center on October 3, 2005, but the Motion was rejected as the petitioner did not submit the proper filing fee. Counsel then resubmitted the Motion to the Service Center, which was accepted for filing on October 24, 2005, or 56 days after the decision was issued. As the Motion was initially submitted improperly without the requisite filing fee, and subsequently properly filed on October 24, 2005, the appeal was untimely filed. *See* 8 C.F.R. § 103.2(a)(7) (receipt date is assigned when filing is properly completed).

Further, even if the Motion were timely filed, the petitioner's filing would fail to meet the criteria of a Motion to Reopen. 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. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

Counsel contends in the instant Motion to Reopen that the late filing of the April 23, 2004 Motion to Reopen resulted from the February 24, 2004 decision being delivered to the "house next door to the petitioner." Counsel contends that the neighbor only returned the misdirected mail at a "much later date."¹ Counsel has not provided any documentation, affidavits, or other evidence regarding the misdirected mail. Further, we note that the decision was mailed to both the petitioner and counsel. Even if we were to accept that the petitioner's copy was delivered to the petitioner's neighbor, counsel has not alleged that he did not timely receive his copy of the decision. As such, counsel has failed to state new facts, provide any reason for consideration based on precedent, or to show that the decision was incorrect based on evidence in the record at the time of the initial decision. Accordingly, the filing does not meet the criteria for a Motion to Reopen or Motion for Reconsideration, and the petition will not be reopened.²

¹ Counsel acknowledged in the April 2004 Motion to Reopen that the filing was late, and contended at that time that the late filing resulted from the AAO decision being delivered to the neighbor's address, so that counsel has not stated any new facts.

² Further, we note that the petitioner has not provided any new evidence to overcome the director's initial determination. In the petitioner's late filed appeal to the February 24, 2004 AAO decision, counsel provided only a statement from the petitioner's owner. The statement provided that although the director found that the

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As the Motion to Reopen was untimely filed, it must be rejected.

ORDER: The Motion to Reconsider is rejected.

petitioner did not have the ability to pay the beneficiary the proffered wage, the petitioner would be able to pay the beneficiary the proffered wage based on revenue generated from new clients once the petitioner was able to hire the beneficiary, which would allow the petitioner to take on more work. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).
