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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **NOV 29 2007**
SRC 06 274 53586

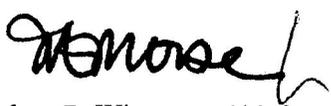
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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: SELF-REPRESENTED

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: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reopen.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). 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 director denied the petition on October 3, 2006 because the petitioner had failed to demonstrate an ability to pay the proffered wage. The director properly gave notice to the petitioner that it had 33 days to file the appeal. The petitioner's owner, [REDACTED] mailed the appeal dated October 26, 2006 to the AAO, rather than to the Texas Service Center. On November 2, 2006, the AAO returned the appeal to [REDACTED] with the explanation that the appeal and its fee must be filed with the field office which denied the petition. [REDACTED] forwarded the appeal to the Texas Service Center along with a cover letter which indicated that the attorney who filed the petition had directed her to file the appeal with the AAO.¹ [REDACTED] asked that the appeal be accepted based on the fact that she initially filed the appeal timely, but mistakenly filed it with the incorrect office. The director received the appeal on November 13, 2006, 41 days after the decision was issued. Thus, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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 Service 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).

Here, the untimely appeal meets the requirements of a motion to reopen in that the appeal includes documentary evidence to indicate that the petitioner has been paying the beneficiary the full proffered wage.

¹ Ms. Early indicated that the attorney may have misdirected her to file the appeal with the AAO intentionally because she was not willing to pay the attorney one thousand dollars in fees to file the appeal for her, which upset the attorney. The AAO notes this assertion here only to make a record that it is aware of the petitioner's assertion. The AAO does not make any determination regarding whether the attorney intentionally misled the petitioner. Although this office does find that the petitioner has not established an ineffective assistance of counsel claim in keeping with the required criteria for such a claim as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

This amounts to new facts to be proved in the reopened proceedings. 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). Therefore, the director must consider the untimely appeal as a motion to reopen and render a new decision.

This office would also note that the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003 submitted on appeal is nearly the same as the copy of this form submitted with the petition except that page 4, which includes Schedule L, is completed on the form submitted on appeal; however, page 4, including the Schedule L, attached to the 2003 Form 1120S submitted with the petition did not list the petitioner's financial information, but was instead left blank. The petitioner is to submit its tax return as provided to the U.S. Internal Revenue Service, and there is no indication that the 2003 tax return submitted on appeal was an amended tax return. Thus, it is not clear why the two copies of the tax return are not identical. This office would emphasize that the Schedule L submitted on appeal does not demonstrate an ability to pay the proffered wage based on the petitioner's net current assets, as such replacing the blank page 4 with a completed page 4 does not appear to be a matter of the petitioner falsifying information in order to gain a positive decision.² However, the petitioner must address for the director this inconsistency in the evidence because where there are discrepancies in the evidence of record it calls all of the petitioner's evidence into question. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). **The petitioner must provide independent, objective, competent evidence to resolve such discrepancies, and it is not sufficient for the petitioner to merely provide its own statements or explanations in an effort to resolve the inconsistencies.** *See Id.*

In addition, this office would note that in the denial notice, the director initially indicated that under 8 C.F.R. § 103.2(b)(8), Citizenship and Immigration Services (CIS) is not obligated to issue a request for evidence or otherwise put the petitioner on notice that the petition cannot be approved based on the initial evidence submitted where the evidence of record establishes ineligibility, regardless of whether the petitioner failed to submit some of the initial evidence required by regulation or by the instructions on the form.

The denial notice then goes on to state that current CIS policy "dictates that if the record is complete with respect to all required initial evidence ([such as where the record includes] one of the three required documents to establish the petitioner's ability to pay as outlined in 8 CFR 204.5(g)(2): annual reports, tax returns, or audited financial statements), [CIS] is not required to place the petitioner on notice [and not required] to request additional evidence [from the petitioner]. . . ." That is, the denial notice indicates that if the initial evidence includes the petitioner's tax returns and the tax returns do not establish an ability to pay the proffered wage, CIS may, in all instances, deny the petition without first issuing a request for evidence. Based on this reasoning, the director denied the instant petition based on the petitioner's failure to show an ability to pay the proffered wage without first issuing a request for evidence.

² The petitioner's financial information on the various copies of the following attachments to the Form 1120S for 2003 in the record do not match exactly: Form 4562, Depreciation and Amortization (Including Information on Listed Property), page 2; and page 3 of the petitioner's Form 1120S Subschedules for Tax Year Ending 12/31/2003. That is, the copies of these pages submitted with the petition and those submitted on appeal are not identical. However, this office finds the differences on the two copies of these pages in the record too minimal and too far removed from ability to pay issues to be relevant to the analysis of this case.

This office would point out first that the director's two assertions as listed above are not the same assertion. The AAO would then underscore that the director's first assertion is correct, but the second assertion is not correct.

More specifically, the regulation at 8 C.F.R. § 103.2(b)(8) includes the directive that "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence. . . ." In this instance, the evidence of record at the time of the issuance of the denial did not establish *ineligibility*. That is, although the petitioner's Form 1120S for 2003 submitted with the petition did not *establish* eligibility, it may not be said that it *ruled out eligibility*. The petitioner may have yet been able to establish eligibility, despite the fact that the net income and the net current assets as reflected on the Form 1120S for 2003 do not establish an ability to pay the wage. For example, by providing, a Form W-2, Wage and Tax Statement, which indicates that the petitioner had paid the beneficiary the full proffered wage in 2003, the petitioner could have established an ability to pay during the year of the priority date.³ In this matter, the evidence in the record specifically raised this "underlying question" relating to this alternate manner of demonstrating the ability to pay the wage in that the beneficiary specified under penalty of perjury on the Form ETA 750, Application for Alien Employment Certification, that he had worked full-time for the petitioner providing janitorial services from 1997 through the date that he signed that form in 2003. Thus, under 8 C.F.R. § 103.2(b)(8), the director was obligated to issue a request for evidence that specifically asked the petitioner to submit documentary evidence such as the Form W-2 regarding the wages it paid the beneficiary during the period from the April 11, 2003 priority date onwards, and any other evidence which the director deemed relevant to the approvability of the petition.

Finally, this office also notes that on appeal the petitioner's owner suggests that because the beneficiary has been a good person who has worked faithfully and honestly that CIS should reward him by granting the instant petition. This assertion is not persuasive. As the director correctly indicated in his decision dated October 3, 2006, in these proceedings, the burden is on the petitioner to establish that its request meets the requirements of the law for employment-based immigrant visa petitions. Section 291 of the Act, 8 U.S.C. § 1361. *See also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

The decision of the director is withdrawn. The matter is returned to the director: for consideration as a motion to reopen; for the issuance of a request for evidence relating to the discrepancies between the blank page 4 of the 2003 Form 1120S, including Schedule L, as initially submitted into the record, and the completed page 4 of the 2003 Form 1120S as submitted on appeal as well as evidence relating to any issue relevant to the approvability of the petition, as determined by the director; and for entry of a new decision.

ORDER: The appeal is rejected as untimely. The matter is returned to the director for consideration as a motion to reopen. The final decision shall be certified to this office for review.

³ This office notes again that on appeal the petitioner did provide this precise evidence.