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FILE: [Redacted]
SRC-06-168-51401

Office: TEXAS SERVICE CENTER

Date: OCT 21 2008

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: The preference visa petition was denied by the Director, Texas Service Center, and 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 reconsider.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a food preparation worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it could pay the beneficiary the proffered wage. Therefore, the director denied the petition.

The record indicates that the director mailed the decision to the petitioner on March 8, 2007. A Form I-290B, Notice of Appeal to Administrative Appeals Office, was received by the Nebraska Service Center on April 27, 2007. However, the Form I-290B was filed at the wrong place, and therefore, was forwarded to the Texas Service Center. The Texas Service Center received the Form I-290B on May 8, 2007.

The regulation at 8 C.F.R. § 103.3(a)(2) requires an affected party to file the complete appeal within 30 days after service of the decision, or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. In the instant case, the Form I-290B was received and the receipt number was assigned by the Texas Service Center on May 8, 2007, 61 days after the decision was served by mail.

The AAO notes that the director of the Texas Service Center properly instructed the petitioner to file an appeal within 30 days from the date of her notice (33 days if the notice was received by mail) and to file an appeal with her office at the Texas Service Center. The petitioner was put on notice of the timeframe and correct office to file an appeal. Receipt dates are not assigned until a filing is perfected according to the regulatory requirements of 8 C.F.R. § 103.2(a). The actual filing date for the Form I-290B is May 8, 2007, the date the Texas Service Center received the appeal and assigned the receipt date and number to the appeal, instead of the date the Nebraska Service Center received it. However, the record shows that the petitioner filed the instant appeal with the wrong office 50 days after the decision was served by mail. Therefore, the appeal was not timely filed even if we accepted the filing date at the Nebraska Service Center.

Neither the Immigration and Nationality 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 Citizenship and Immigration Services (CIS) 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).

Here, the untimely appeal meets the requirements of a motion to reconsider since it is filed based on assertions of incorrect application of law and evidence of record at the time of the initial decision. 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 reconsider and render a new decision accordingly.

ORDER: The appeal is rejected as untimely filed. The matter is returned to the director for consideration as a motion to reconsider.