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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **SEP 23 2008**
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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:
[Redacted]

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 Acting Director (director), Nebraska Service Center, revoked the approval of 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 reconsider.

In order to properly file an appeal, the regulation at 8 C.F.R. § 205.2(d) provides that the affected party must file the complete appeal within 15 days after service of the decision to revoke the approval. If the decision was mailed, the appeal must be filed within 18 days. *See* 8 C.F.R. § 103.5a(b).¹

The record indicates that the director issued the decision on December 15, 2006.² Although counsel dated the appeal January 17, 2007, it was received by the director on January 18, 2007, 34 days after the decision was issued. Accordingly, the appeal was untimely filed. The director erroneously annotated the appeal as timely and forwarded the matter to the AAO.

Neither the Immigration and Nationality Act (the Act) nor the pertinent regulations grant the AAO authority to extend the 18-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.³

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). 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 reconsider.⁴ The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center

¹ While the AAO notes that the instructions in the director's decision identified improper deadlines for filing the appeal, under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1), the AAO lacks the authority to consider the untimely appeal.

² Counsel notes on appeal that the director's decision mailed to his office was undated. He includes a copy of the undated decision, together with an envelope postmarked December 19, 2006 from the Nebraska Service Center which contained the decision. Even if this office utilizes December 19, 2006 as the date of the decision, the appeal is untimely, as it was received 30 days after December 19, 2006.

³ Although counsel stated on the Form I-290B that he would send a brief and/or additional evidence to the AAO within 30 days, this office has received nothing further from counsel or the petitioner.

⁴ Counsel asserts on appeal that the director failed to consider evidence presented by the petitioner in response to the director's Notice of Intent to Revoke (NOIR) dated August 23, 2006.

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.⁵

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

⁵ The Form I-290B and the Form G-28, Entry of Appearance as Attorney or Representative, submitted in conjunction with the Form I-290B, indicate that Fairview Health Services as successor to the petitioner retained counsel to file the appeal. Counsel submitted no evidence to establish that Fairview Health Services is a successor-in-interest to the petitioner. This issue must be addressed in further proceedings. Since the record of proceeding contains a properly executed Form G-28 signed by the petitioner's representative and counsel filing the instant appeal, the appeal is deemed to be filed by the petitioner.