

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY



U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services



B6

FILE: [REDACTED]
LIN-03-231-51636

Office: NEBRASKA SERVICE CENTER

Date: **APR 03 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The petitioner filed the immigrant visa petition (LIN-03-032-51901) on November 12, 2002 and the Director, Nebraska Service Center, denied the petition on May 22, 2003 because the director determined that the petitioner failed to establish its successorship and ability to pay the proffered wage. The petitioner filed the second petition (LIN-03-231-51636) on July 29, 2003 which was approved on November 12, 2004. However, upon receipt of a letter from the petitioner, the director issued a notice of automatic revocation due to withdrawal on January 22, 2005. On August 1, 2008, the petitioner filed a motion to reopen and the director rejected the motion to reopen as untimely filed.¹ 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 complete 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 rejected the motion to reopen as untimely filed on August 26, 2008. It is noted that the director gave clear instructions that any motion or appeal must be filed within 33 days. Counsel dated and submitted an appeal form on September 23, 2008; however, the director returned the form on September 29, 2008 and October 10, 2008 respectively because it was filed improperly on a Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals from a Decision of a USCIS Officer. The director received the properly filed Form I-290B on November 4, 2008, 70 days after the decision was issued. An application or petition will not be stamped a receipt date until it is properly filed. *See* 8 C.F.R. § 103.2(a)(7)(i). Accordingly, the appeal was untimely filed. The director erroneously annotated the appeal as timely and forwarded the matter to the AAO.

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 U.S. Citizenship and Immigration Services policy. A motion to reconsider a decision on an

¹ While the motion to reopen indicated that it was filed to reopen LIN-03-032-51901, the petitioner's discussion referenced LIN-03-231-51636. The director treated the motion to reopen for both immigrant petitions and the petitioner does not indicate which petition's decision the instant appeal is filed from. Because the petitioner continues to discuss the revocation decision, the AAO considers the motion to reopen and the instant appeal related to LIN-03-231-51636.

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 because counsel submits new evidence on appeal. 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 accordingly.

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