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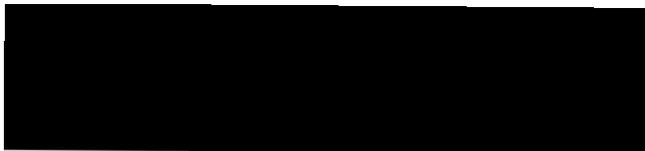
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

BG



FILE:

LIN 07 234 50844

Office: NEBRASKA SERVICE CENTER

Date: AUG 14 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 (AAO) 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the director, Nebraska Service Center. The petitioner appealed this matter to the AAO on January 29, 2009. On June 1, 2009, counsel for the petitioner requested that the appeal be withdrawn. The withdrawal may not be retracted. 8 C.F.R. § 103.2(b)(6).¹

ORDER: The appeal is dismissed based on its withdrawal by counsel. The director's February 12, 2009 decision is withdrawn.

¹It is noted that the director considered the petitioner's January 29, 2009 appeal as a motion to reopen and reconsider because it was untimely. However, the AAO concludes that the director's consideration of the appeal filed on January 29, 2009 as a motion without first forwarding the matter to AAO was contrary to the regulations and shall be withdrawn. After the entry of the decision denying the petition on December 22, 2008 and the subsequent filing of an appeal, the regulations permitted the director to treat the appeal as a motion only if "favorable action" was warranted. 8 C.F.R. § 103.3(a)(2)(iii). As the director was not inclined to take favorable action, the regulations state that the director "shall promptly forward the appeal and related record of proceeding to the [AAO]." 8 C.F.R. § 103.3(a)(2)(iv). It must be emphasized that the director is obligated to forward *all such appeals to the AAO*, including those that the director believes may have been untimely. The requirement at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) that untimely appeals meeting the requirements of motions must be treated as motions only applies after the appeal has been forwarded to the AAO and rejected as untimely pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1). This could have been of particular importance in this matter because the director chose to affirm the prior denial because no new evidence was submitted with the untimely appeal. However, the petitioner did supplement the record by submitting evidence directly to the AAO as permitted by the Form I-290B.

Therefore, the director lacked the authority to consider the untimely appeal as a motion where favorable action was not taken, and the decision dated February 12, 2009 affirming the prior denial shall be withdrawn.

That being said, it is noted that the instant appeal was untimely filed. If the appeal were not being dismissed as withdrawn by counsel as noted above, it would have been rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).