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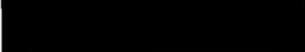
U.S. Citizenship  
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FILE:



Office: TEXAS SERVICE CENTER

Date: JAN 22 2009

SRC 06 800 15041

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.

John F. Grissom, Acting 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 complete appeal within 30 days of 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 issued the decision on January 26, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although counsel dated the appeal February 27, 2007, it was received by the director on March 1, 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.

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).

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. Here, the untimely appeal meets the requirements of a motion to reopen. The petitioner submits a letter from its accountant with further considerations of the petitioner's ability to pay the proffered wage. This evidence is sufficient to reopen the matter.

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.

The AAO further notes that the director in his denial of the instant petition provided erroneous calculations of the petitioner's net current assets for the tax years 2001 through 2005. For example in tax year 2001, the director added in line 19, Schedule L, Loans to Shareholders, in her calculations

of the petitioner's current liabilities significantly increasing the petitioner's negative net current assets. This miscalculation also occurred in the petitioner's net current assets in tax years 2002 through 2004. In tax year 2005, the director omitted line 6, Schedule L, other current assets, in considering the petitioner's current assets. Further, the director in several tax years did not correctly identify the petitioner's net income based on the petitioner's Forms 1120S.<sup>1</sup> Finally, the director identified the proffered wage as the weekly wage of \$379 as noted on the I-140 petition, and multiplied this figure by 52 weeks to arrive at the proffered wage of \$19,708. The AAO utilizes the proffered wage as identified on the certified ETA Form 750, namely, \$19,656. While such miscalculations may not change the final decision in the instant petition, in the new decision, the director should provide the petitioner with accurate calculations of the petitioner's net income, net current assets and the proffered wage.

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

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<sup>1</sup>Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income or deductions shown on its Schedule K for tax years 2001, 2002, and 2005, the petitioner's net income is found on Schedule K, line 23 for tax year 2001 and 2002, and Line 17e for tax year 2005. With regard to tax years 2003 and 2004, the petitioner did not have any additional income, deductions, credits or other adjustments, therefore, the petitioner's net income is found on line 21, of the Form 1120S.