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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

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FILE:



Office: TEXAS SERVICE CENTER

Date:

JUL 02 2009

SRC 07 162 50950

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:

SELF-REPRESENTED

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 preference visa petition was denied by the Director, Texas Service Center. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The petitioner is a software development firm. It seeks to employ the beneficiary permanently in the United States as a system analyst.

The record indicates that the director denied the I-140, Immigrant Petition for Alien Worker on January 22, 2008. The petitioner submitted a Notice of Appeal or Motion (Form I-290B) on March 10, 2008. Additionally, the I-290B indicates that it was originally submitted to the Vermont Service Center rather than the Texas Service Center which had issued the denial and where the instructions on the cover page of the denial advised the petitioner to file any appeal with that office. On February 6, 2008, the Vermont Service Center had advised the petitioner of this requirement and had returned the I-290B to the petitioner.

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. Although the petitioner initially submitted the notice of appeal within 33 days of service of the decision, this submission was not filed with the appropriate office and did not retain a filing date. The properly filed appeal was not submitted until March 10, 2008, or fourteen days after the deadline for appealing the director's decision, which was February 25, 2008. Therefore, the United States Citizenship and Immigration Services (USCIS) is required to reject the appeal as untimely filed.

USCIS, which includes both the Texas Service Center and the AAO, has no authority to accept an untimely appeal that fails to hold a timely filing date due to the submission to the wrong jurisdiction. **USCIS is compelled to reject such an appeal.** Title 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed." Therefore, under the regulations, USCIS lacks the authority to consider the untimely appeal. An untimely appeal shall be rejected as improperly filed. *See* 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

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 as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case. 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).

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).

The petition was denied for failure to establish that the beneficiary met the requirements of the labor certification, which was a master's degree in computer science and 12 months of training on system or tools. On appeal, the petitioner submits an evaluation, which shows the beneficiary has a master's degree, but not in the field required on ETA Form 9089. Accordingly, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider as it does not state new facts to be proved, or evidence that the decision was incorrect at the time of the initial decision.¹ Therefore, the appeal must be rejected.

ORDER: The appeal is rejected as untimely filed.

¹ Additionally, the director notes that the petitioner filed under the wrong category. Based on the requirements of the labor certification, a master's degree and twelve months of training, it appears that the petitioner should have filed for the beneficiary as a member of the professions holding an advanced degree, rather than as a professional or skilled worker. This basis cannot be overcome on appeal or on a motion to reopen or reconsider.