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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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JUL 16 2009

FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

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 Director, Nebraska 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 appeal will also be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A).

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 issued the decision on June 25, 2007. The director properly gave notice to the petitioner that it had 33 days to file the appeal. Although counsel attempted to file Form I-290B, Notice of Appeal or Motion, on July 25, 2007, it was rejected by the Nebraska Service Center because counsel used an outdated version of the form. As the Form I-290B was rejected, it did not retain the July 25, 2007 filing date. 8 C.F.R. §103.2(a)(7). Counsel resubmitted the appeal using the appropriate version of Form I-290B on August 14, 2007, 50 days after the decision was issued. Accordingly, the appeal was untimely filed.¹

¹ Even if the appeal were not being rejected as untimely filed, it would be dismissed. The director denied the petition, in part, because the petitioner had not established that the proffered position requires at least two years of training or experience and, therefore, that the beneficiary could be found qualified for classification as a skilled worker. The regulation at 8 C.F.R. 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the Form ETA 750, Application for Alien Employment Certification, indicates that the minimum experience requirement for the proffered position is three months experience in a related occupation. **The petitioner requested the skilled worker classification on the Form I-140.** That classification is reserved for qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i). U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). Nor can USCIS readjudicate the petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Therefore, even if this appeal were not being rejected, it would be dismissed on this basis.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. 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. In the instant case, as discussed below, this appeal was not properly filed. Because the appeal was not properly filed, it will not be treated as a motion to reopen or a motion to reconsider under 8 C.F.R. § 103.3(a)(2)(v)(B)(2). As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

On the Form I-290B, the beneficiary is listed as the individual filing the appeal. USCIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). An appeal filed by a person not entitled to file it must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(A).

As the appeal is untimely and was not properly filed, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(B) and 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

ORDER: The appeal is rejected.