



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]
SRC 07 084 53287

Office: TEXAS SERVICE CENTER

Date: MAY 22 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 Director, Texas Service Center, denied the immigrant visa petition. Specifically, the director found that the petitioner has not submitted additional evidence, as requested, of its ability to pay the proffered wage for the years 2005 and 2006, and also the petitioner offered an inadequate wage on the Form I-140 when the accompanying labor certification required a higher proffered wage. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

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 June 4, 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, July 6, 2007, the appeal was received by the director on Wednesday, July 10, 2007, 36 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.

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 (USCIS) 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 appeal does not qualify as a motion to reopen for consideration under 8 C.F.R. § 103.5(a)(2)¹ as the evidence the petitioner provided is not in accordance with the regulation at 8 C.F.R.

¹ The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is

§ 204.5(g)(2).² Additionally, the late-filed appeal does not qualify as a motion to reconsider, as the petitioner cannot establish that the petition as filed met the regulatory requirements. Further, the evidence does not rebut the director's finding that the petition's wage offer was inadequate and not in accordance with the labor certification.

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.

ORDER: The appeal is rejected.

established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner failed to submit either copies of annual reports, federal tax returns, or audited financial statements for 2005 or 2006 to address the basis for denial.

² According to counsel's appeal's statement, the petitioner has not filed federal tax returns for 2005 and 2006. According to the website accessed on May 14, 2009, at <http://sdatcert3.resiusa.org>, the petitioner's status was forfeited, meaning that its existence has been ended by the State of Maryland on October 5, 2007. Since an employer must be in continuing existence to offer a permanent job to a beneficiary, and the record shows that the petitioner's status is forfeited, if this matter is pursued, proof of the petitioner's continuing existence is demanded.