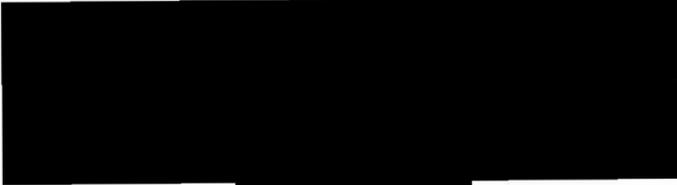




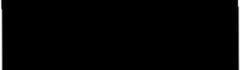
U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: NOV 05 2009

EAC 04 131 55082

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Filed Office Director, St. Albans Field Office (Field Office Director) revoked the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2). However, as the untimely appeal meets the requirements of a motion, this matter will be directed to the Vermont Service Center for consideration as a motion to reopen and reconsider. The St. Albans Field Office is not the proper entity to consider the revocation of this petition.

The petitioner is a private yacht club. On March 29, 2004, it filed a petition to permanently employ the beneficiary in the United States as a dining room manager. The petitioner requested classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ As required by 8 C.F.R. 204.5(l)(3), the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. The Director, Vermont Service Center, approved the petition on September 3, 2004.

On November 7, 2008, the Field Office Director issued a Notice of Intent to Revoke (NOIR) the petition. The NOIR states that the beneficiary had apparently entered into a "sham marriage" for the "sole purpose of obtaining lawful permanent resident status." Accordingly, the Field Office Director intended to revoke the petition for marriage fraud pursuant to section 204(c) of the Act, 8 U.S.C. § 1154(c). On May 1, 2009, after reviewing the petitioner's response to the NOIR, the Field Office Director issued a Notice of Revocation (NOR).

Counsel's appeal was received on May 29, 2009, 28 days after the decision was issued. An appeal of a revocation must be filed within 15 days after service of the decision. *See* 8 C.F.R. § 205.2(d). If the decision was mailed, the appeal must be filed within 18 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).

It is noted that the NOR incorrectly states that the petitioner had 30 days to appeal the revocation. Neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit for filing an appeal. As the appeal was untimely filed, it must be rejected. The fact that the NOR stated an incorrect period to file the appeal of the revocation does not forgive the late filing. The regulation at 8 C.F.R. § 205.2(d) is sufficient notice to the petitioner of the allotted time to appeal a revocation.

¹Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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). Here, it is determined that the untimely appeal meets the requirements of a motion to reopen and reconsider.

Further, the AAO has determined that the revocation of the approval of the petition should be considered by the Vermont Service Center, not the St. Albans Field Office.² Therefore, the AAO will direct this case to the Director, Vermont Service Center, for further action.

In view of the foregoing, the decision of the Field Office Director would be withdrawn if the appeal were not rejected as untimely filed. This matter is directed to the Director, Vermont Service Center. The Director, Vermont Service Center, may request any additional evidence considered pertinent. Upon receipt of all the evidence, if applicable, the Director, Vermont Service Center, will review the entire record and enter a new decision.

ORDER: The appeal is rejected. The matter is directed to the Director, Vermont Service Center, as a motion to reopen and reconsider for further action in accordance with the foregoing and entry of a new decision.

²See Memo. from Paul W. Virtue, Executive Associate Commissioner (Acting), Office of Programs, U.S. Immigration & Naturalization Service, to Regional Directors, *et al.*, *Revocation of Employment-Based Petitions (I-140s)* (February 27, 1997), indicating that a petition which is believed by a field office to have been incorrectly approved is to be returned to the service center that approved the petition along with a memorandum of explanation. The service center will then either initiate revocation proceedings or reaffirm the petition and return it to the field office along with a memorandum of explanation for the reaffirmation.