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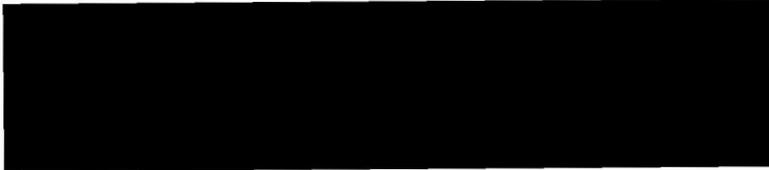
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
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FILE: [Redacted]
SRC 08 056 52602

Office: NEBRASKA SERVICE CENTER

Date: **OCT 06 2009**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b).

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 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 AAO will return the matter to the director as a motion to reopen.

The petitioner is a store front sales firm. It seeks to employ the beneficiary permanently in the United States as a stock clerk.

The record indicates that the director denied the I-140, Immigrant Petition for Alien Worker on August 11, 2008.

The petitioner filed a notice of appeal, which was received on September 16, 2008.¹ 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. In this case, the appeal was filed 34 days after the decision was served by mail.

USCIS, which includes both the Texas Service Center and the AAO, has no authority to accept an untimely 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." Here, the appeal was untimely and must 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.

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

¹ The Form G-28, Notice of Entry of Appearance as Attorney or Representative signed by the petitioner, indicates that [REDACTED] is acting as a representative at the request of the petitioner and on behalf of [REDACTED]. The regulation at 8 C.F.R. § 103.2(a)(3) provides that a petitioner may be represented by an attorney in the United States, as defined in § 1.1(f), by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4). Section 292.1(a)(4) defines an accredited representative as a person representing an organization described in § 292.2 of this chapter who has been accredited by the Board. (The Board means the Board of Immigration Appeals. It is noted that the current roster of accredited organizations available online (<http://www.usdoj.gov/eoir/statspub/recognitionaccreditationrosterwithstatecity.pdf>) does not include CMSQ in its list of accredited organizations. [REDACTED] will be treated as individually representing the petitioner based on his status as a licensed attorney in New York.

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, the untimely appeal meets the requirements of a motion to reopen. 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.

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