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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:

[REDACTED]
SRC 08 004 59261

Office: TEXAS SERVICE CENTER

Date:

OCT 06 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

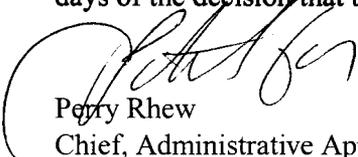
ON BEHALF OF PETITIONER:

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).


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 petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as specialty cook (trainee).

The record indicates that the director denied the I-140, Immigrant Petition for Alien Worker on November 20, 2008. The denial was based solely on the petitioner's failure to demonstrate that its request to substitute the instant beneficiary for the original beneficiary named on the Application for Alien Employment Certification (Form ETA 750) was timely pursuant to 20 C.F.R. 656.11, which provides in pertinent part:

Substitutions and modifications to applications.

- (a) Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.¹

¹ At the page found at the USCIS web site of <http://www.uscis.gov/memoranda>, under the general topic of Immigration Policy and Procedural Memoranda, there is a headquarters memorandum identified as "Interim Guidance Regarding the Impact of the Department of Labor's (DOL) final rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests," HQ 70/6.2 (June 1, 2007). It provides that USCIS will reject all Form I-140 petitions requesting labor certification substitution that are filed on or after July 16, 2007 pursuant to 20 CFR 656.11. An additional USCIS UPDATE, dated July 13, 2007, and superseding the announcement, dated May 24, 2007, advised that the new DOL regulations prohibit substitution of an alien beneficiary on any application for permanent labor certification *after* July 16, 2007. It further stated that the new procedures outlined in the previous [May 24, 2007] announcement would take effect on July 17, 2007 instead of July 16, 2007.

Additionally, we note that the applicant listed on the I-140 as ' [REDACTED] ' is not the employer, [REDACTED] listed on the ETA 750. The record contains no evidence that the I-140 petitioner qualifies as a successor-in-interest to the employer named on the ETA 750. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Therefore, even if the I-140 had been timely filed with a timely designated substitution for the beneficiary, there was no evidence that the I-140 petitioner could validly use the labor certification issued to [REDACTED]

The petitioner filed a notice of appeal (Form I-290B) on February 2, 2009.² 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 due on Tuesday, December 23, 2007, however the I-290B was filed 74 days (February 2, 2009) after the decision was served by mail.³ On Part 2 of the I-290B, the petitioner further requested an additional 30 days in which to submit additional evidence and/or a brief.

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 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 does not meet the requirements of a motion to reopen or a motion to reconsider. Counsel's stated reason for reconsideration is that although prepared prior to the regulatory deadline of July 16, 2007, the I-140 was not mailed until July 26, 2007.⁴ A subsequent statement from counsel merely adds that the delay was caused by the employer's difficulty in locating old tax returns. Neither assertion was supported by evidence and additionally failed to establish that the director's decision was based on an incorrect application of the law, Service policy

² No Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner has been submitted. The only G-28 contained in the record was signed by the beneficiary and the beneficiary's son. Pursuant to 8 C.F.R. § 103.3(a)(1)((iii)(B), the beneficiary is not an affected party and has no legal standing in this proceeding. For this reason, the petitioner will be treated as representing itself.

³ Counsel stated that the appeal was late because of the death of his mother on December 14, 2008, and included a copy of her death certificate.

⁴U.S. Citizenship and Immigration Services (USCIS) electronic records indicate that the I-140 was filed on October 3, 2007.

or was erroneous based on the evidence of record at the time of the initial decision. Therefore, the appeal will be rejected as untimely filed and will not be treated as a motion to reopen under 8 C.F.R. § 103.5(a)(2) or a motion to reconsider pursuant to 8 C.F.R. § 103.5(a)(3).

ORDER: The appeal is rejected.