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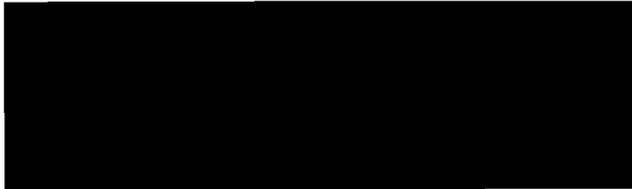
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090

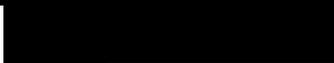


U.S. Citizenship  
and Immigration  
Services

B6



FILE:



Office: TEXAS SERVICE CENTER Date:

SRC 07 246 50466

**APR 23 2010**

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**DISCUSSION:** The approval of the employment-based immigrant visa petition was revoked by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed; however, the matter will be remanded as a motion to reopen and reconsider.

The petitioner claims to be a landscaping services business. It seeks to permanently employ the beneficiary in the United States as a landscape gardener. The petitioner requests classification of the beneficiary as a 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).<sup>1</sup> The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 30, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

After initially approving the petition on February 21, 2008, the director issued a notice of intent to revoke (NOIR) the petition on July 1, 2009. The NOIR instructed the petitioner to submit evidence to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and to establish that the beneficiary met the minimum requirements of the offered position as of the priority date.

On August 17, 2009, the director revoked the approval of the petition.<sup>2</sup> The notice of revocation (NOR) states that the petitioner did not respond to the NOIR, and the petition was revoked accordingly. The record contains the petitioner's response to the NOIR, which was received by U.S. Citizenship and Immigration Services (USCIS) on August 17, 2009, the same day the NOR was issued.

Counsel's appeal was received by USCIS on October 5, 2009, 49 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 by USCIS. *See* 8 C.F.R. § 103.2(a)(7)(i).

It is noted that the NOR incorrectly states that the petitioner had 33 days to file an appeal. 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

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<sup>1</sup>Section 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.

<sup>2</sup>Section 205 of the Act permits the director to revoke the approval of a petition "at any time, for what he deems to be good and sufficient cause."

8 C.F.R. § 205.2(d) is sufficient notice to the petitioner of the allotted time to appeal a revocation. Even so, counsel did not file the appeal until 49 days after the decision.

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 USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The evidence and arguments in the record meet the requirements of a motion to reopen and reconsider. The case will therefore be remanded for further consideration.

**ORDER:** The appeal is rejected. The petition is remanded to the director as a motion to reopen and reconsider for further action in accordance with the foregoing and entry of a new decision.