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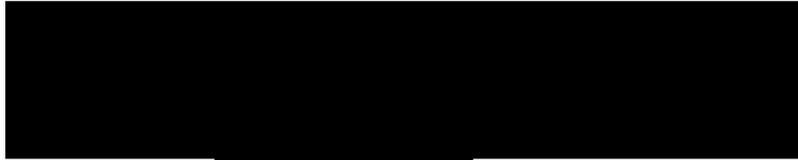
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE: [REDACTED]
LIN 07 149 50989

Office: NEBRASKA SERVICE CENTER

Date: FEB 16 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.

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 Director, Nebraska Service Center, denied the immigrant visa petition.¹ 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 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 October 30, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Counsel failed to complete the box on the Form I-290B, Notice of Appeal or Motion, where he was required to list the date that he signed and completed that form. The Federal Express (FedEx) Airbill in the record indicates that counsel sent the appeal on Monday, December 3, 2007 and it was received by the director on December 4, 2007, 35 days after the decision was issued.² Accordingly, the appeal was untimely filed. The director incorrectly 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. 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.

¹ The Form ETA 750, Application for Alien Employment Certification, in the record identifies the petitioner as [REDACTED]. The Forms G-28, Notice of Entry of Appearance or Representative, in the record identify the petitioner as [REDACTED]. The petitioner submitted the tax returns filed by an entity which uses the name: [REDACTED]. The Form I-140, Immigrant Petition for Alien Worker, identifies the petitioner as [REDACTED]. The AAO conducted several searches at the New York State Department of State Division of Corporations online database located at http://appsex8.dos.state.ny.us/corppublic/corppsearch.entity_search_entry (accessed February 1, 2010) and found that, in this database, [REDACTED] is listed as an active business at the petitioner's address. This office also found that this database lists no information for [REDACTED], or [REDACTED] that relates to the instant petitioner. This office conducted a search using the search engine Google, located at www.google.com (accessed February 1, 2010), and found the restaurant: [REDACTED], listed at the petitioner's address. For purposes of this analysis, the AAO will list the petitioner's name as [REDACTED], [REDACTED] as listed on the Form I-140 filed with this agency.

² The AAO notes that Monday, December 3, 2007 was not a federal holiday.

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, the director denied the petition based on the petitioner's failure to establish its ability to pay the proffered wage. The untimely appeal does not meet the requirements of a motion to reopen as the petitioner failed to submit documentary evidence to support its assertions made on appeal. Also, the filing does not meet the standard for a motion to reconsider as the petitioner did not cite to any pertinent precedents to establish that the director based his decision on an incorrect application of law or USCIS policy. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

ORDER: The appeal is rejected.