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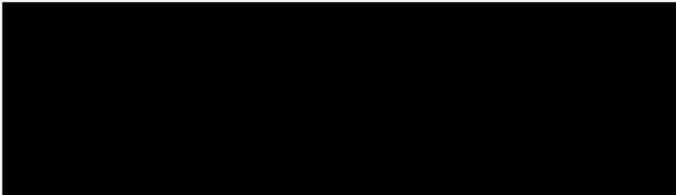
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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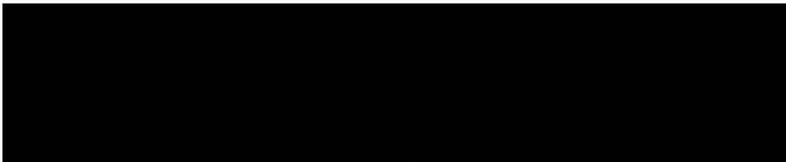


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **JAN 27 2010**
LIN 05 264 51692

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

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

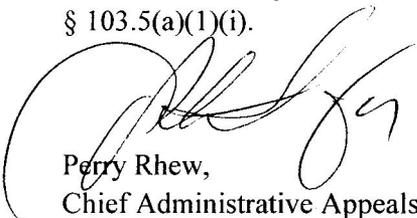
ON BEHALF OF PETITIONER:



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 employment based immigrant visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely.

The record indicates that the Immigrant Petition for Alien Worker (Form I-140) was filed on September 15, 2005. It was initially approved on March 31, 2006.¹ The director subsequently concluded that the I-140 was approved in error. On August 8, 2008, the director issued a notice of intent to revoke the approval of the petition's approval based on the petitioner's failure to establish its continuing ability to pay the proffered wage as of the priority date pursuant to 8 C.F.R. § 204.5(g)(2).² The petitioner was afforded thirty days to offer additional evidence or argument in opposition to the proposed revocation. Upon review of the petitioner's response to this request and other evidence contained in the record, the director revoked the petition's approval on October 29, 2008, based upon the petitioner's failure to establish its continuing ability to pay the proffered wage.

¹ The Form I-140 was not approvable at the outset. The petitioner sought visa classification (Part 2, paragraph g of the I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. However, as shown on item 14 of the ETA 750, the position's minimum requirements are two years of experience in the job offered. As the ETA 750 indicates, it does not support the visa classification sought on the Form I-140 because the position as certified by DOL does not require less than two years of training or experience. Nevertheless the director initially approved the petition. However, the revocation is based solely on the petitioner's failure to establish its continuing ability to pay the proffered wage. It is noted that the petitioner subsequently filed another Form I-140 (LIN 07xxx52765) on March 9, 2007 seeking to classify the beneficiary as a skilled worker. This petition was denied on June 5, 2008. No appeal was taken.

² The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The regulation at 8 C.F.R. § 205.2(d) provides that a petitioner “may appeal the decision to revoke the approval within 15 days after the service of notice of the revocation.” Three additional days are provided if the notification of revocation was mailed. If the last day of the designated period falls on a Saturday, Sunday or a legal holiday, the period will run until the end of the next day, which is not a Saturday, Sunday, or legal holiday. *See* 8 C.F.R. § 1.1(h). 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).

Although the director’s decision to revoke the petition’s approval failed to adhere to the procedure for revocation upon notice set forth at 8 C. F. R. § 205.2 and thus failed to advise the petitioner that it had 18 days to file the appeal, it remains the petitioner’s burden to file a timely appeal. An untimely appeal shall be rejected as improperly filed. *See* 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 18-day time limit for filing an appeal. The 18-day deadline for filing an appeal from the director’s decision of October 29, 2008 to revoke the petition’s approval fell on Monday, November 17, 2008. Here, the director received the appeal on Monday, December 1, 2008. As the appeal was untimely filed, it must be rejected. 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 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).

Counsel’s submission on appeal does not state new facts to be proved in the reopened proceeding and is accompanied by documentation already contained in the record. The reasons for reconsideration as stated in counsel’s brief on appeal simply reiterate arguments made in his response to the director’s notice of intent to revoke. We do not conclude that the untimely appeal meets the requirements of either a motion to reopen under 8 C.F.R. § 103.5(a)(2) or a motion to reconsider under 8 C.F.R. § 103.5(a)(3). Therefore it shall be dismissed.

Accordingly, the petitioner’s appeal is rejected as untimely filed.

ORDER: The untimely appeal is rejected. Further, it is dismissed as a motion to reopen or a motion to reconsider.