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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



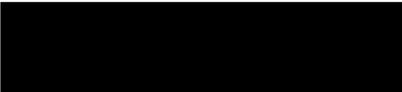
U.S. Citizenship
and Immigration
Services

B6



FILE:  Office: NEBRASKA SERVICE CENTER

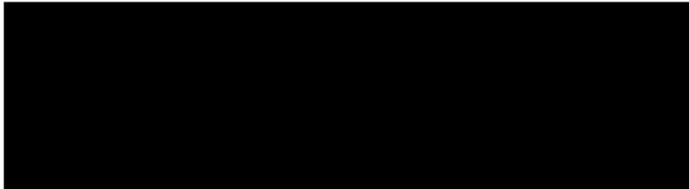
Date:

IN RE: Petitioner: 
Beneficiary: 

JUN 28 2010

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:

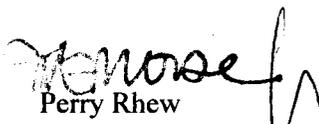


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reopen.

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 April 23, 2009. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Counsel dated the appeal May 27, 2009. It was received by the director on Thursday, May 28, 2009, 35 days after the decision was issued. Accordingly, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal 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 U.S. 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).

This untimely appeal meets the requirements of a motion to reopen. That is, here, the petition's priority date year is 2001. The director found that the petitioner had shown the ability to pay the wage in 2001 through 2006. However, the director noted that in response to the request for evidence the petitioner's owner submitted a statement indicating that in May 2007, the petitioning business was sold to [REDACTED]. The director indicated in the notice of decision that because the petitioner sold its business in May 2007 and filed the Form I-140 in August 2007, the petitioner was not able to make a valid job offer to the beneficiary at the time of filing the petition. On appeal, counsel submitted a brief, the affidavit of [REDACTED] and the 2008 Form 1120 for [REDACTED] Corporation. These documents indicate: that the petitioner was sold to [REDACTED] in May 2007; that the petitioning bakery continues to operate as [REDACTED] and that the beneficiary has at all times during the petitioner's transition in ownership and during the period that followed been employed by the petitioning company.¹ That is, counsel

¹ The record indicates that the beneficiary has been employed in the proffered position of Head Baker since 1977.

asserted on appeal that [REDACTED] was able to make a valid job offer at the time the Form I-140 was filed. Counsel indicated that [REDACTED] had not become defunct by the time the petition was filed, as indicated in the notice of decision. Rather, counsel asserted that the petitioning bakery changed owners in May 2007 and continued doing business as [REDACTED] at the same address, under its new ownership. These new facts presented on appeal suggest that a successor-in-interest relationship exists between [REDACTED] and are accompanied by [REDACTED] affidavit and the 2008 [REDACTED] University, Peoria, IL, tax return, which were also submitted on appeal. Thus, the instant late appeal qualifies as a motion to reopen.

The official having jurisdiction over a motion is the official who made the last decision in the proceedings, 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.

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