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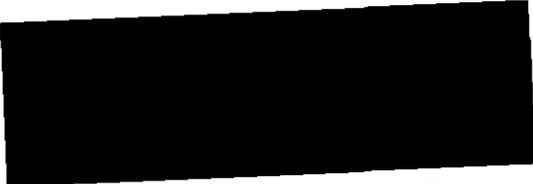
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE:

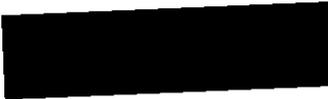


Office: TEXAS SERVICE CENTER

Date: **OCT 22 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:

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.

Thank you.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the third preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Mexican Specialty Chef. As required by statute, a labor certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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 February 27, 2008. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The appeal was received by the director on June 9, 2008, 133 days after the decision was issued. Accordingly, the appeal was untimely filed.¹ The appeal must be rejected for this reason.

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 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).

¹ According to counsel's brief dated June 5, 2008, he requests a review of a USCIS decision dated May 26, 2006, which is an incorrect date. Further, counsel asserts that the director's decision in this matter was not received by the petitioner and petitioner's counsel until May 7, 2008, "which is the actual post-date of the envelope in which the denial was delivered," but counsel submitted no evidence on appeal establishing that the February 27, 2008, decision was sent in that envelope. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The electronic records of USCIS, and the decision itself, indicate that the petition was served on February 27, 2008.

The appeal does qualify as a motion to reopen for consideration under 8 C.F.R. § 103.5(a)(2)² as the evidence the petitioner provided is not in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the evidence does not rebut the director's finding that the petition's wage offer was inadequate and not in accordance with the labor certification.

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.

ORDER: The appeal is rejected as improperly filed.

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

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.