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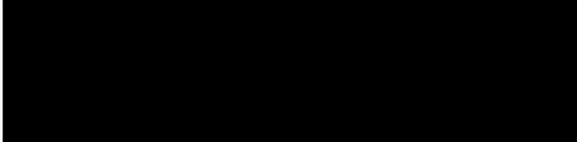
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



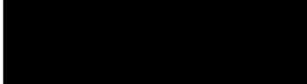
U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

SEP 22 2010

IN RE:

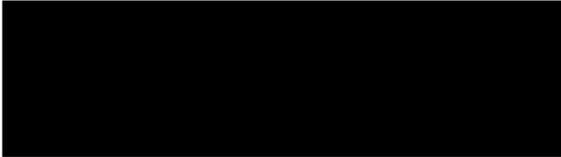
Petitioner:

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.

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 preference visa petition was denied by the Director, Texas Service Center. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The petitioner is a physical therapy/rehabilitation firm. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition.

The record indicates that the I-140, Immigrant Petition for Alien Worker was filed on July 27, 2007. The director denied the petition on December 31, 2008. The denial was based solely on the petitioner's failure to provide a prevailing wage determination from the State Workforce Agency (SWA).

The petitioner filed a notice of appeal, which was received on Tuesday, February 3, 2009. The regulation at 8 C.F.R. § 103.3(a)(2) requires an affected party to file the complete appeal within 30 days after service of the decision, or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. In this case, the notice of appeal was filed 34 days after the decision was served by mail.

USCIS, which includes both the Texas Service Center and the AAO, has no authority to accept an untimely appeal. Title 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed." Here, the appeal was untimely and must be rejected as improperly filed. *See* 8 C.F.R. § 103.3(a)(2)(v)(B)(1). 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 as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), 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 Service 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 untimely appeal does not meet the requirements of a motion to reopen because it is not supported by affidavits or other documentary evidence. It additionally does not meet the requirements of a motion to reconsider the director's decision because it does not establish that the director's decision was incorrect based on the evidence of record at the time of the initial decision. Former counsel erroneously asserted in Part 3 of the Form I-290B that the petitioner was not

required to provide a prevailing wage determination from the State Workforce Agency.<sup>1</sup> Counsel maintained that the regulation 20 C.F.R. § 656.40 referred to several alternate ways of establishing the prevailing wage and asserts that the petitioner had properly referenced DOL's online wage library in setting the prevailing wage.

Former counsel's assertions are not correct. As stated by the director, the regulations in effect at the time of the filing of the I-140 and accompanying ETA Form 9089 provided that a Schedule A application for a labor certification must include a "prevailing wage determination in accordance with §656.40 and §656.41." 20 C.F.R. § 656.15 (2005). The SWA<sup>2</sup> makes the prevailing wage determination on the form it uses and returns the endorsed form to the employer. 20 C.F.R. § 656.40(a). Although this regulation discusses various sources from which an employer may provide wage information to the SWA, such as where a collective bargaining agreement exists or circumstances surrounding the existence of a professional sports team, the SWA still makes the determination. 20 C.F.R. § 656.40. Further, the SWA prevailing wage determination must specify its validity period which, in no event may be less than 90 days or more than 1 year from the determination date. 20 C.F.R. § 656.40(c).

Based on the foregoing, counsel's untimely appeal does not qualify as a motion to reopen or motion for reconsideration and shall be dismissed. 8 C.F.R. § 103.5(a)(4).

**ORDER:** The appeal is rejected.

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<sup>1</sup>Former counsel indicated on Part 2 of the notice of appeal that a brief and/or additional evidence would be provided to the AAO within 30 days. Nothing further was received by this office.

<sup>2</sup> Effective December 19, 2008, the regulation at 20 C.F.R. § 656.40 was amended to provide that the National Processing Center would make the prevailing wage determination and would receive and process prevailing wage requests on or after January 1, 2010. Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment would continue to receive and process prevailing wage determination requests in accordance with pertinent guidelines. 20 C.F.R. § 656.40(a)(2010).