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:
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IN RE: Petitioner: RIGO'S TACO #6, INC.
Beneficiary: LUIS MENDOZA

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:

[redacted]

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 on March 6, 2009. On April 10, 2009, the petitioner submitted a motion to reconsider that the director rejected as untimely. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Mexican food business. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2001 priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is timely and makes a specific allegation of error in law or fact with regard to the timeliness of the petitioner's motion to reconsider.

On appeal, counsel states that the initial legal issue is whether the previous motion to reconsider is timely. He asserts that although the director's decision is dated March 6, 2009, the director mailed the decision on March 9, 2009, and thus the 33 day prescribed period to file a motion or an appeal ended on Saturday, April 11, 2009. Counsel further states that because the United States Citizenship and Immigration Services (USCIS) was closed on Saturday, the actual deadline for the submission was the next business day, or Monday, April 13, 2009. Counsel maintains that this is the correct interpretation of 8 C.F.R § 103.5a(b) and states that the director should have granted the motion to reconsider and reviewed its contents.

The AAO notes that 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 instructions for the submission of a motion are the same as those for an appeal.

The record indicates that the director issued the decision on March 6, 2009. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The petitioner's motion was received by the director on April 10, 2009, 35 days after the decision was issued. Accordingly, the motion to reconsider was untimely filed. The AAO concurs with the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.