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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 27 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 Director, Texas Service Center, denied the immigrant visa petition. An untimely appeal to this decision was filed, and the director treated the appeal as a motion without first forwarding it to the Administrative Appeals Office (AAO). On February 6, 2008, the director affirmed his previous decision. The petitioner subsequently filed a second appeal, which the director forwarded to the AAO. On May 14, 2010, the AAO withdrew the director's decision on the untimely appeal, which was treated as a motion, and rejected the appeal pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1). The AAO also decided not to remand the untimely appeal to the Texas Service Center to be treated as a motion to reopen or reconsider pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2). On June 11, 2010, the petitioner moved to reopen the matter. The motion to reopen is granted. The AAO will withdraw its previous decision, reject the untimely appeal, and remand the matter to the Texas Service Center as a motion to reopen for further consideration of the new evidence submitted on appeal.

The petitioner claims to be a company that designs leather products and manufactures buttons. It seeks to employ the beneficiary permanently in the United States as a metal/plastic worker. As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor. 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 priority date of the petition. The director 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 his decision on July 11, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The record shows that the appeal was received by the director on September 11, 2007, 62 days after the decision was issued. It is noted that the appeal was initially received with an incorrect filing fee on August 15, 2007. However, as August 15, 2007, was 35 days after the decision, it would have also been rejected as untimely even if it had been accompanied by the correct filing fee. Accordingly, the director erroneously treated the appeal as a motion to reopen/reconsider under Title 8 CFR § 103.3(a). The director's treatment of the late appeal as a motion is withdrawn, and the appeal will be rejected as untimely.¹

¹ It is noted that counsel argues on motion that the appeal was timely because it was sent by U.S. Postal Service express mail on July 31, 2007. However, the date of the mailing of the appeal is irrelevant. The regulations are clear that the receipt date is the day it is received by U.S. Citizenship and Immigration Services (USCIS), not the day it is mailed. *See* 8 C.F.R. § 103.2(a)(7).

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. 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).

In the instant matter, the petitioner submitted, *inter alia*, copies of its purportedly amended 2003 and 2004 tax returns, Forms 1120, along with an explanatory letter from its accountant dated July 26, 2007. These handwritten amendments, which consist solely of the schedules L, attempt to recharacterize certain investments as “current assets” for purposes of establishing their availability to pay the beneficiary’s proffered wage in those years. Although the record is devoid of evidence establishing that these amendments were filed with the IRS, or of a credible explanation addressing why, exactly, these funds are being recharacterized, this evidence was not previously available to the Texas Service Center during its initial adjudication of the petition. Accordingly, the matter shall be remanded to the Texas Service Center to be treated as a motion to reopen pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2). Nevertheless, it is emphasized that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements, after the fact. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

ORDER: The motion to reopen is granted. The decision of the director is withdrawn and the AAO’s prior decision, dated May 14, 2010, is withdrawn. The appeal is rejected. However, the matter is remanded to the Texas Service Center to be considered as a motion to reopen.