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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Bc

FILE:

Office: NEBRASKA SERVICE CENTER

Date: FEB 22 2011

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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. 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 \$630. 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 and subsequently denied as untimely a motion to reopen/reconsider that prior decision.¹ The petitioner appealed the denial of the motion to the Administrative Appeals Office (AAO). The appeal will be dismissed.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* In this matter, a motion was initially filed with the Nebraska Service Center without the required fee on July 14, 2009. The motion was correctly rejected by the director and returned to counsel, who subsequently submitted the motion and fee on July 29, 2009, 46 days after the director's decision. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, the director properly dismissed the motion as untimely. The record indicates that the director's decisions were mailed to both the petitioner at its business address and to its counsel of record. As the record does not establish that the failure to file the motion within 30 days of the decision was reasonable and beyond the affected party's control, the motion was untimely filed and the appeal to the denial of the motion must be dismissed. The Nebraska Service Center did not err in denying the motion.

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 sustained that burden. Accordingly, the appeal will be dismissed and the previous decision of the director will not be disturbed.

ORDER: The appeal is dismissed.

¹ The record shows that the Form I-140, Immigrant Petition for Alien Worker, was denied by the director because the petitioner had failed to demonstrate its continuing ability to pay the proffered wage to the beneficiary pay since the priority date of April 30, 2001, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the United States Department of Labor (DOL). If the AAO were to consider the merits of the petition, it would agree with director's decision to deny the petition for the reasons set forth in the June 11, 2009 decision.