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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

B6

FILE:

Office: TEXAS SERVICE CENTER

Date: FEB 23 2011

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 \$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 employment-based preference visa petition was initially approved by the Director, Vermont Service Center. On March 11, 2009, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will remand the matter to the director for consideration as a motion to reopen or reconsider.

In order to properly file an appeal, the regulation at 8 C.F.R. § 205.2(d) provides that the affected party must file the complete appeal within 15 days after service of the decision to revoke the approval. If the decision was mailed, the appeal must be filed within 18 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 NOR on May 13, 2009. It is noted that the director properly gave notice to the petitioner that it had 18 days to file the appeal. Although counsel dated the appeal May 31, 2009, it was received by the director on June 2, 2009, 20 days after the decision was issued.<sup>1</sup> Accordingly, the appeal was untimely filed. The director erroneously certified the appeal and forwarded the matter to the AAO.

Neither the Immigration and Nationality Act (the Act) nor the pertinent regulations grant the AAO authority to extend the 18-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 United States Citizenship and Immigration Services (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).

Here, the untimely appeal meets the requirements of a motion to reconsider.

The AAO notes that the basis of the director's revocation was the fact that the petitioner failed to submit copies of in-house postings and failed to establish that it followed all recruitment procedures in obtaining the approved labor certification. Under the regulations in effect at the time of labor

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<sup>1</sup> Although the decision is date stamped as received by USCIS on June 3, 2009, the U.S. Postal Service Tracking Number reflects that the appeal was received on June 2, 2009.

certification approval in 2002, there was no requirement that employers maintain records of a labor certification that had been approved. *See* 45 Fed. Reg. 83933, Dec, 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; *see also* 56 Fed. Reg. 54927, Oct. 23, 1991. Currently the regulations only require that employers maintain records related to the labor certification (Form ETA 750) for five years. *See* 20 C.F.R. § 656.10(f) (2010).

The record shows that the petitioner filed the labor certification application on April 27, 2001. The DOL approved the labor certification application on January 25, 2002. The director revoked the petition on May 13, 2009. In light of the regulation at 20 C.F.R. § 656.10(f), the director cannot request the petitioner to submit documentation that the petitioner was not required to keep beyond five years and should not have revoked the petition due to the petitioner's failure to submit such documentation.

The AAO notes that the director's findings of fraud and willful misrepresentation are not currently supported by any evidence in the record.

The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

Pursuant to Section 205 of the Act, 8 U.S.C. § 1155, the Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient case, revoke the approval of any petition approved by him under section 204. The Board of Immigration Appeals has held that this requires that the USCIS director issue a notice, specifying the evidence in the record that would have warranted a denial and that, following the issuance of the notice, this evidence remain unexplained and un rebutted. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988); *see also Matter of Arias*, 19 I&N Dec. 568, 569-70 (BIA 1988; *see also Matter of Ho*, 19 I&N Dec. 582, 589-90 (BIA 1988) (holding that USCIS must produce some evidence from the record to establish cause for revocation) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)). The petitioner must be informed of derogatory information USCIS believes would have warranted a denial and provided with an opportunity to inspect, respond to, and rebut the specific evidence USCIS alleges is contained in the record. 8 C.F.R. § 103.2(b)(16)(i); *see Matter of Estime*, at 451.

The record does not currently establish that the party filing the appeal [REDACTED] is the successor-in-interest to the original petitioner [REDACTED] and that [REDACTED] and the original petitioner have the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence. The director left open whether the beneficiary was qualified for the position at the time the labor certification application was filed. Prior to entering a final decision in this case, the director should issue a request for evidence (RFE) to allow the petitioner a reasonable time to address these issues and any other issues the director deems relevant to the adjudication of the motion to reconsider.

**ORDER:** The appeal is rejected. The matter is remanded to the director for consideration as a motion to reconsider.