

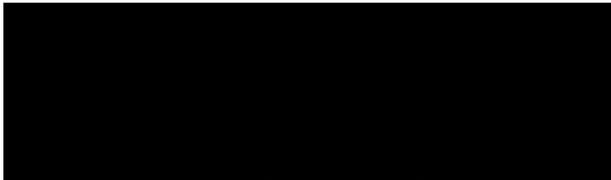
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



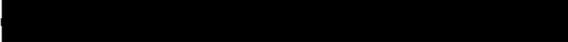
U.S. Citizenship
and Immigration
Services

PUBLIC COPY



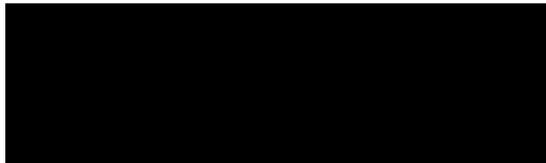
B6

FILE:  Office: TEXAS SERVICE CENTER Date: JAN 07 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 Director, Texas Service Center (TSC), approved the petition on May 21, 2001. The director issued a notice of intent to revoke the petition's approval on January 23, 2009 and subsequently revoked the petition's approval on March 20, 2009. On June 3, 2009, the beneficiary of the visa petition filed an appeal on Form I-290B, Notice of Appeal or Motion, with the Administrative Appeals Office (AAO). On August 31, 2009, the director rejected the appeal, finding that the appeal had not been filed by an affected party. On July 12, 2010, the director, pursuant to 8 C.F.R. § 103.5(a)(5), reopened the proceeding on his own motion and withdrew the revocation decision dated March 20, 2009. The director also issued a notice of intent to revoke (NOIR) to the petitioner on the same date. Counsel for the beneficiary responded to the director's NOIR on August 16, 2010. The director revoked the petition's approval on September 8, 2010. The director's revocation came with the following instruction:

Your previously filed appeal has been reopened on U.S. Citizenship and Immigration Services (USCIS) motion and forwarded to the Administrative Appeals Office for consideration. The filing fee of \$585 is not required to appeal the revocation of your immigrant petition.

The matter is now before the Administrative Appeals Office (AAO). The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon *de novo* review, the director's decision dated August 31, 2009 rejecting the June 3, 2009 appeal will be withdrawn as is the July 12, 2010 purported Service motion, the July 12, 2010 NOIR, and the September 8, 2010 second revocation. The matter will be remanded to the Texas Service Center for consideration as a motion to reconsider and opportunity to properly certify its decision to the AAO.¹

The decision of the director rejecting the appeal on August 31, 2009 and all actions stemming therefrom, are procedurally erroneous. The AAO has exclusive jurisdiction over appeals of immigrant visa petitions based on employment such as the instant appeal.² Further, the AAO, not the director, pursuant to 8 C.F.R. § 103.3(a)(2)(iv) shall have the jurisdiction over appeals in

¹ The director ordered the appeal to be forwarded to the AAO "for review" which fails to comply with the standards and criteria set forth at 8 C.F.R. § 103.4 for certifying a decision to the AAO.

² The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) (which includes petitions for immigrant visa classification based on employment at 8 C.F.R. § 103.1(f)(3)(iii)(B)), with one exception - petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement (ICE).

which the director will not be taking favorable action.³ The governing regulations only permit the director to treat an appeal as a motion in the event the director will take favorable action. *See* 8 C.F.R. § 103.3(a)(2)(iii).

In addition, the regulation 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii) and the instructions on the Form I-290B direct the petitioner to submit its brief and/or additional evidence directly to the AAO, not to the director. As such, only the AAO has access to and may review any additional evidence or brief submitted to this office in support of the appeal to determine if the late appeal meets the requirements of a motion to reopen or reconsider.

In this case, the director neither treated the appeal as a motion, nor did he take favorable action. Pursuant to the regulations as noted above, the director should have forwarded the appeal and all supporting documentation to the AAO.

The appeal filed on June 3, 2009 is untimely, however. In order to properly file an appeal of the revocation of a petition's approval, 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 unfavorable decision. 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). In this case, the director issued the decision revoking the approval of the petition on March 20, 2009 and gave the petitioner 15 days to file an appeal. The appeal was received by the director on June 3, 2009, 75 days after the decision was issued.

Neither the Immigration and Nationality Act (the Act) nor the pertinent regulations grant the AAO authority to extend the 33-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).

³ The regulation at 8 C.F.R. § 103.3(2)(iv) specifically states, "If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAO in Washington, DC."

Here, the untimely appeal meets the requirements of a motion to reconsider. On appeal, the applicant and his counsel of record have provided compelling reasons explaining why the appeal could not be filed within the time constraints.⁴ Further, counsel makes a specific allegation of error in law or fact and provides citations to appropriate statutes, regulations, and precedent decisions. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the director of Texas Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the director must consider the untimely appeal as a motion to reconsider and certify his or her decision to the AAO.

ORDER: The appeal is remanded. The matter is returned to the director for consideration as a motion to reconsider. The director shall enter a new decision and certify it to the AAO following the procedures outlined in 8 C.F.R. § 103.4.

⁴ In his affidavit, the beneficiary describes how his former attorney did not effectively communicate with him about the progress of his immigration case, did not inform him in timely fashion that the immigrant visa petition his former employer filed in March 2002 had been denied, and did not give him the file when he wanted to hire another attorney to represent him in his appeal. Current counsel of record also submits an affidavit explaining her efforts to file the appeal immediately after she was hired by the beneficiary. The AAO reserves comment on the standing issues involved in this case until the procedural defects in this matter are cured.