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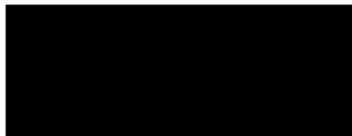
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JAN 10 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed; however, the matter will be remanded as a motion to reopen and reconsider.

The petitioner, a sole proprietor, claims to be a laundry and dry cleaning business. The petitioner seeks to permanently employ the beneficiary as a laundry and dry cleaning worker. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is January 29, 2009, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The instant petition was filed on March 18, 2010. The director denied the petition on May 25, 2010. The decision states that the petitioner failed to establish that it possessed the ability to pay the proffered wage of \$8.76 per hour (\$18,220.80 per year).¹ The decision properly gave notice to the petitioner that it had 33 days to file the appeal.

The instant appeal was filed on July 21, 2010, 57 days after the decision denying the petition was issued.² 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

¹ The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date.

² The decision also instructed the petitioner to file the appeal with the Texas Service Center and not with the AAO. On July 15, 2010, 51 days after the decision denying the petition was issued, the petitioner incorrectly submitted the appeal to the AAO. The AAO returned the application to the petitioner and instructed the petitioner to file the appeal with the Texas Service Center.

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 by U.S. Citizenship and Immigration Services. *See* 8 C.F.R. § 103.2(a)(7)(i). Neither the 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)(1) states that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed."

However, 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 provided 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 policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet these requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On appeal, counsel submits copies of statements from a joint bank account the petitioner shares with his wife for 2009 and 2010. Counsel claims that the bank statements show additional funds available to the petitioner to pay the proffered wage. Counsel also submits the 2008 and 2009 individual tax returns jointly filed by the beneficiary and her husband. The beneficiary's 2009 tax return contains a 2009 Form 1099-MISC issued by the petitioner to the beneficiary in the amount of \$25,589.80, an amount that exceeds the proffered wage. Counsel also submits the petitioner's 2009 individual tax return, which includes a Schedule C.

Based on the plain meaning of "new," a "new fact" is evidence that was not available and could not have been discovered or presented in the previous proceeding.³ Although most of the evidence submitted on appeal does not meet the definition of "new," the petitioner's 2009 tax return was not due until April 15, 2010, after the date the instant petition was filed.⁴

The priority date of the instant petition is January 29, 2009. The petitioner's 2009 federal tax return is one of the documents required for the determination of ability to pay the proffered wage. *See* C.F.R. § 204.5(g)(2). Therefore, it is concluded that counsel has submitted relevant evidence that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen and reconsider.

³ The word "new" is defined as "having existed or been made for only a short time . . . 3. Just discovered, found, or learned." *Webster's II New Riverside University Dictionary* (Riverside, 1984).

⁴ The director issued a Request for Evidence (RFE) on March 31, 2010. Counsel submitted a response on May 6, 2010. Although the petitioner's 2009 federal tax return would have been due at the time the response was submitted, the RFE did not specifically request a copy of the petitioner's most recent tax return.

The evidence in the record meets the requirements of a motion to reopen and reconsider. However, the record does not contain a Form G-28 authorizing counsel to file the instant untimely appeal or any of the supporting documentation. Accordingly, provided the petitioner and counsel submit a properly executed Form G-28, the case will therefore be remanded to the director for further consideration of the evidence in the record. This decision does not address whether or not the evidence in the record is sufficient to overcome the grounds of the director's decision concerning the petitioner's ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.⁵

ORDER: The appeal is rejected. The petition is remanded to the director as a motion to reopen and reconsider for further action in accordance with the foregoing and entry of a new decision.

⁵ It is noted that, on August 9, 2010, the Texas Service Center attempted to reject the petitioner's July 21, 2010 appeal as untimely. However, this August 9, 2010 rejection was improper and is hereby withdrawn. A Service Center may only consider an appeal as a motion if it is granting favorable relief. 8 C.F.R. § 103.3(a)(2)(iii). Otherwise, it must forward the appeal to the AAO. If an appeal is untimely, the AAO will reject the appeal and, if appropriate, remand the matter to the Service Center to be treated as a motion to reopen or reconsider.