

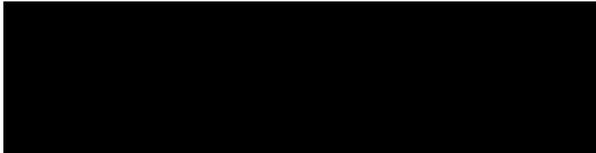
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **JUN 20 2011** Office: TEXAS SERVICE CENTER

FILE: 

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, denied the immigrant visa petition. The petitioner filed an untimely appeal of that decision on August 11, 2009. The director treated the untimely appeal as a motion to reopen or reconsider. The director deemed the appeal deficient as a motion, and dismissed the motion. The Administrative Appeals Office (AAO) will withdraw the director's decision to dismiss the motion. The AAO will reject the appeal as untimely filed, and will return the matter to the director for consideration as a motion to reopen.

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 the decision on July 7, 2009. The director properly gave notice to the petitioner that it had 33 days to file the appeal. The director received the appeal on August 11, 2009, 35 days after the decision was issued. Thus, the appeal was untimely filed.

The director erroneously treated the appeal as a motion, even though counsel had clearly marked on the Form I-290B, Notice of Appeal or Motion, that it was an appeal, and that the petitioner would be sending additional evidence in support of the appeal directly to the AAO within 30 days.

The AAO has exclusive jurisdiction over appeals of immigrant visa petitions based on employment such as the instant appeal.¹ If a petitioner files the Form I-290B and requests additional time to file a brief, the regulations at 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. In these cases, 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. Additionally, 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).

Therefore, the AAO hereby withdraws the December 4, 2009 decision in which the director treated the instant late appeal as a motion to reopen or reconsider and then rejected the appeal.

¹ 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).

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).

Here, the untimely appeal meets the requirements of a motion to reopen because counsel has submitted new evidence related to the basis of denial, specifically of its ability to pay the proffered wage. 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 reopen and render a new decision accordingly. All issues of eligibility shall be re-examined and if the director deems it appropriate, he may certify his decision to the AAO.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reopen.