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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

[redacted]

B6

DATE: APR 2 3 2012 Office: TEXAS SERVICE CENTER [redacted]

IN RE: [redacted]

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:

[redacted]

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 preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will affirm its previous decision. The appeal remains rejected as untimely.

The petitioner is a motel in the hospitality business. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward and that the petitioner also failed to establish that the beneficiary had the experience required for the position offered. The director denied the petition on December 11, 2008.

The petitioner, through counsel, filed an appeal. As stated in the AAO's previous decision of September 8, 2011, rejecting the appeal as untimely, although the I-290B (Notice of Appeal or Motion) was dated January 12, 2009, it was not received by the Texas Service Center until January 15, 2009.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must submit the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The director issued the decision on December 11, 2008. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

The Form I-290B, Notice of Appeal or Motion, was received January 15, 2009, or 35 days after the decision was issued. Accordingly, the appeal was untimely filed as stated in the AAO September 8, 2011, decision. The AAO also stated that:

> 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. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director of the Texas Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii).
>
> In this matter, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider. The appeal does not contain any new evidence and is not supported by any pertinent precedent decisions establishing that the decision was based on an incorrect application of the law, Service

> policy. Furthermore, the record contains a memorandum from the Texas Service Center indicating that the appeal was reviewed prior to its being forwarded to the AAO and that the Service Center was not inclined to grant favorable relief. Accordingly, the untimely appeal has already been considered as a motion.
>
> As the appeal was untimely filed, the appeal must be rejected.

Counsel has filed a motion to reopen and reconsider the AAO's rejection of the appeal as untimely filed.

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 Service 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, counsel asserts that weather conditions affected the delivery of the appeal by the DHL courier service. Counsel submits a certification from her assistant that the appeal package was dated January 12, 2009 and sent via DHL with an anticipated arrival at the Texas Service Center on January 13, 2009. Counsel maintains that the appeal was timely sent and that late receipt was due to weather conditions beyond control.

The AAO accepts counsel's motion as a motion to reopen and reconsider, however the AAO does not find sufficient basis to overturn its decision of September 8, 2011 rejecting the appeal as untimely. Counsel does not submit evidence that the appeal was timely received. No evidence also establishes that the AAO's decision was based on an incorrect application of law or policy. The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i). In this case the date of actual receipt was January 15, 2009, or 35 days after the decision was issued. Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit. Accordingly, the appeal was untimely filed as stated in the AAO September 8, 2011, decision.

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 met that burden.

ORDER: The motion to reopen and reconsider is approved. The AAO affirms its prior decision dated September 8, 2011. The appeal remains rejected.