



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: **MAR 19 2012**

Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[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.

Thank you,

Kerai S. Poulos for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reopen and reconsider.

The petitioner operates a dry cleaning business. It seeks to employ the beneficiary permanently in the United States as an advertising and marketing manager. As required by statute, a labor certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner did not establish its continuing ability to pay the proffered wage. Additionally, the director determined that the beneficiary did not meet the requirements set forth on Form ETA 750, Application for Alien Employment Certification.

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 file 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. § 103.5A(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 service center director issued the decision on January 12, 2009. It is noted that the service center director properly gave notice to the petitioner that it had 33 days to file the appeal.¹ Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO authority to extend this time limit.

Although the beneficiary dated the Form I-290B, Notice of Appeal or Motion, January 24, 2009, it was not received by the proper service center until February 19, 2009, or 38 days after the decision was issued. Accordingly, the appeal was untimely filed.

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).

The matter will therefore be returned to the director. If the director determines that the late appeal meets the requirements of a motion, the motion shall be granted and a new decision will be issued.

As the appeal was untimely filed, the appeal must be rejected.²

¹ The January 12, 2009 decision stated that any appeal must be filed with the Texas Service Center. However, the beneficiary first sent the Form I-290B to the AAO where it was rejected.

² The record of proceeding contains a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. It was signed by the petitioner, the beneficiary, and by their representative on July 26, 2007. The instant Form I-290B was signed by the beneficiary, but not by the

ORDER: The appeal is rejected.

petitioner or counsel. United States Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). The record is not clear as to whether the petitioner consented to the filing of the appeal.