

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: **NOV 14 2012** 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.*

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition, which 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.

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 June 11, 2009. The director properly gave notice to the petitioner that it had 33 days to file the appeal.<sup>1</sup> 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 by the service center on July 16, 2009, or 35 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, Texas Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii).

The brief in this matter was not submitted directly to the AAO in accordance with 8 C.F.R. § 103.3(a)(2)(viii).<sup>2</sup> The matter will be returned to the director to review the late appeal to determine whether it meets the requirements of a motion to reopen or a motion to reconsider. 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.<sup>3</sup>

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<sup>1</sup> While the courtesy copy of the decision sent to counsel was returned as undeliverable and mailed again on July 6, 2009, this does not extend the time to file an appeal. The notice of decision sent to the petitioner was not returned as undeliverable.

<sup>2</sup> Although counsel checked the box on Form I-290B indicating that a brief and/or additional evidence would be submitted within 30 days, to date, more than 39 months later, nothing has been received.

<sup>3</sup> The AAO notes that the evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

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

**ORDER:** The appeal is rejected.

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(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that only five to six months of experience in the proffered position of African store retail sales person or in the related occupation of sales of home furnishings and accessories are required for the proffered position. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. This issue must be addressed with any further filings.

The AAO also notes that the record of proceeding contains certain inconsistencies, which call into question whether the job offer is bona fide or not. Schedule C of the sole proprietor's 2001 Form 1040 states that the business is engaged in hair braiding supplies rather than in African art and furniture. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). This issue must be addressed with any further filings.