

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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

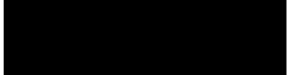


U.S. Citizenship
and Immigration
Services

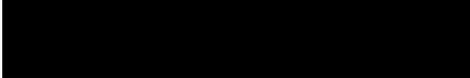
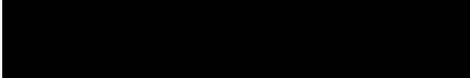
B6



Date: Office: NEBRASKA SERVICE CENTER

FILE: 

SEP 14 2012

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: On August 26, 2011, the Administrative Appeals Office (AAO) dismissed an appeal to the denial of an employment-based preference visa petition by the Director, Nebraska Service Center (NSC). The matter is now before the AAO again on appeal. The appeal will be rejected.

The petitioner is a restaurant and is seeking to permanently employ the beneficiary in the United States as a cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL) as required by section 212(a)(5)(A) of the Act. The director determined that the petitioner failed to establish the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director further determined that the petitioner failed to establish that the beneficiary met the experience requirements of the labor certification. The director denied the petition accordingly.

The petitioner subsequently filed a timely appeal on December 19, 2008. Although the AAO determined that the petitioner established its continuing ability to pay the proffered wage to the beneficiary since the priority date, the AAO upheld the director's determination that the petitioner failed to establish that the beneficiary met the experience requirements of the labor certification and dismissed the appeal on August 26, 2011. The cover page of the AAO's decision instructed the petitioner that it may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5, and that any motion must be filed with the office that originally decided the case within 30 days of the decision that the motion seeks to reconsider or reopen as required by 8 C.F.R. § 103.5(a)(1)(i).

Counsel subsequently attempted to file another appeal on the petitioner's behalf on September 30, 2011. The AAO, however, does not exercise appellate jurisdiction over its own decisions. The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). For instance, in the event that a petitioner disagrees with an AAO decision, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, the petitioner did not check box D ("I am filing a motion to reopen a decision"), box E ("I am filing a motion to reconsider a decision"), or box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B, Notice of Appeal or Motion. While counsel indicated that he was filing a motion to reopen or in the alternative a motion to reconsider in his appellate statement, counsel checked box B ("I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days"), instead. Therefore, the appeal is improperly filed and must be rejected on this basis pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

In the alternative, the appeal must be rejected because it has been untimely filed. 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).

As noted above, the AAO dismissed the petitioner's initial appeal on August 26, 2011, and gave proper notice to the petitioner that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen as required by 8 C.F.R. § 103.5(a)(1)(i).

The Form I-290B, Notice of Appeal or Motion, was received by the service center on Friday, September 30, 2011, or 35 days after the decision was issued. Accordingly, the appeal was untimely filed. *It is noted that even if counsel had properly filed the Form I-290B as either a motion to reopen or motion to reconsider on the petitioner's behalf, such motion would also be dismissed as untimely filed pursuant to 8 C.F.R. § 103.5(a)(1)(i).*

Therefore, as the appeal was both untimely and not properly filed, it will be rejected.

ORDER: The appeal is rejected. The AAO's previous decision dated August 26, 2011 shall not be disturbed.