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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

B7

DATE: JUN 09 2011 Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

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 preference visa petition. The Director, California Service Center, dismissed as untimely a subsequent filing purporting to be a motion. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds and that the petitioner had created or would create the necessary jobs.

The director denied the petition on October 25, 2007. The petitioner subsequently filed what purported to be a combined motion to reopen and reconsider that decision. The director received the filing on Thursday, November 29, 2007, 35 days after the decision was issued. On November 30, 2007, the director returned the document, noting that a fee has been submitted without an application or petition. On December 14, 2007, counsel returned the purported motion, stating "THE MOTION TO REOPEN AND RECONSIDER DOES NOT REQUIRE THE FILING OF THE FORM." The director issued a receipt for this filing. On May 6, 2009, the director dismissed the "motion" as untimely filed, noting that the Form I-290B, Notice of Appeal or Motion is available on the U.S. Citizenship and Immigration Services (USCIS) website.

On June 8, 2009, counsel filed an appeal, asserting that the "motion" was originally "sent via postal overnight delivery on November 27 and although guaranteed on the 28<sup>th</sup>, [the director] keyed in the receipt on November 29." Counsel concludes that the delay in filing was beyond the petitioner's control pursuant to 8 C.F.R. § 103.5(a).

The director's decision on the motion is appealable to the AAO. 8 C.F.R. § 103.5(6). The decision under review on appeal is the director's most recent decision, the dismissal of the "motion" as untimely on May 6, 2009. Thus, the only issue on appeal was whether the director properly dismissed the "motion" as late.

As noted in the AAO's previous decision, the regulation at 8 C.F.R. § 103.5(a)(i) provides, in pertinent part:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The AAO concluded that the motion was due on November 27, 2007.<sup>1</sup>

The AAO noted that the regulation at 8 C.F.R. § 103.5(a)(1)(iii) states, as it did in 2007, that a motion “shall be submitted on Form I-290B.” Thus, the AAO concluded: “the petitioner has never filed a proper motion through the submission of a signed Form I-290B.” While the AAO also stated: “Even if we accept the November 29, 2007 date as the date the ‘motion’ was filed, it was filed on the 35<sup>th</sup> day and, thus, untimely,” the AAO unambiguously concluded that the petitioner had never filed a motion.

On motion, counsel submits an envelope from the Service Center postmarked October 30, 2007 that purportedly contained the director’s October 25, 2007 decision. Thus, counsel concludes that the motion was timely. Significantly, counsel did not assert that the decision was mailed October 30, 2007 in the previous filing. Instead, counsel acknowledged that the decision was issued October 25, 2007. Regardless, counsel’s statement on the current motion that the AAO was willing to accept the first filing as the filing date is false. The AAO’s statement that, in the alternative, the first receipt date was also late does not in any way suggest an acceptance of that filing as the proper filing date.

The petitioner was on notice from the regulation at 8 C.F.R. § 103.5(a)(1)(iii) that he must submit a motion on a Form I-290B. It remains, the petitioner failed to file a proper motion.

In light of the above, the AAO’s previous decision is affirmed.

**ORDER:** The motion is granted; the AAO’s decision of September 9, 2010 is affirmed.

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<sup>1</sup> As October has 31 days, the 33<sup>rd</sup> day following October 25, 2009 was November 27, 2009.