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U.S. Citizenship
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FEB 09 2005

FILE: [Redacted]
WAC 03 059 51413

Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

[Signature] Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, and the Administrative Appeals Office (AAO) rejected the petitioner's appeal as untimely. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after 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 director's decision was dated January 16, 2004. Therefore, the appeal had to be filed no later than February 18, 2004. The director received the petitioner's appeal on February 20, 2004, and therefore the AAO rejected the appeal as untimely, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

Counsel observes that the appeal was mailed on February 11, 2004, as shown by postal records. Under current regulations, however, the filing date of an appeal, application, or petition is determined by the date of "actual receipt," not the date of mailing. *See* 8 C.F.R. § 103.2(a)(7)(i).

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 103.5 concern the reopening of decisions rendered by CIS offices. The rejection of an appeal, however, is not a decision; it is a refusal, on technical grounds, to issue such a decision, on the grounds that the appeal was improperly filed and therefore not entitled to a decision. Therefore, there is no provision for the reopening or reconsideration of a rejected appeal, and we must dismiss the motion.

There is a provision for an untimely appeal to be regarded as a motion, at 8 C.F.R. § 103.3(a)(2)(v)(B)(2). In such a case, jurisdiction over the motion would rest not with the AAO, but with the director, pursuant to 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the AAO has no jurisdiction over this matter. Any decision as to whether the untimely appeal qualifies as a motion lies with the director.

We note that, in the rejection notice, the AAO indicated that "[t]he director declined to treat the late appeal as a motion." Review of adjudicator's notes appears to indicate that the adjudicator who first processed the appeal mistakenly classified the appeal as timely. Therefore, there appears to have been no attempt at the Service Center level to determine whether the untimely appeal qualifies as a motion, and the AAO erred in concluding that the director actively refused to consider the appeal as a motion (although the AAO did not err in rejecting the appeal). The AAO hereby instructs the director to evaluate the present matter, in order to determine whether the untimely appeal constitutes a motion.

ORDER: The motion is dismissed. The director shall determine whether the petitioner's untimely appeal constitutes a motion, and take appropriate action from that determination.