

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

C1

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: ~~AD 1/15/08~~

WAC 01 218 55980

IN RE:

Petitioner:

[Redacted]

Beneficiary:

PETITION: 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:

[Redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent motion to reconsider. The matter is now before the AAO on motion to reopen and reconsider. The petitioner's motion has caused us to reopen and reexamine the record. Accordingly, the previous decision of the AAO will be withdrawn and the motion will be rejected.

The petitioner is a church. It seeks to classify the beneficiary as a 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), to perform services as its minister of music. The director determined that the petitioner had not established the position qualified as that of a religious worker.

In her March 15, 2002 decision, the acting director advised that the petitioner could file an appeal of her decision "using the enclosed Notice of Appeal . . . Form I-290B." The petitioner's initial filing was submitted in accordance with these instructions and the regulation at 8 C.F.R. § 103.3(a)(2)(i). The petitioner's initial submission was improperly dismissed by the AAO as an untimely-filed motion. Therefore, the previous decision of the AAO is withdrawn and the appeal is rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

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 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 record indicates that the director issued the decision on March 15, 2002. The petitioner's appeal, dated May 30, 2002, was received by the service center on May 31, 2002, 77 days after the decision was issued. Accordingly, the appeal was untimely filed.

Counsel states on appeal that the director's decision was not mailed to counsel until May 28, 2002. Counsel asserts that, therefore, the period for filing the appeal begins on May 28, 2002.

The record reflects that the director's decision was mailed to the petitioner at its address of record. The regulation at 8 C.F.R. § 103.5a states in pertinent part:

- (a) Definitions – (1) *Routine Service*. Routine service consists of mailing a copy by ordinary mail address to a person at his last know address.
- (2) *Personal Service*. Personal service, which shall be performed by a Government employee, consists of any of the following, *without priority or preference* [emphasis added]:
 - (i) Delivery of a copy personally;
 - (ii) Delivery of a copy at a person's dwelling house or usual place of abode by leaving it with some person of suitable age and discretion;

(iii) Delivery of a copy at the office of an attorney or other person including a corporation, by leaving it with a person in charge;

(iv) Mailing a copy by certified or registered mail, return receipt requested, addressed to a person at his last known address.

The record reflects that the petitioner was timely served with notice of the director's decision.

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 service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

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

The beneficiary has also filed a motion seeking to reopen and reconsider the decision to dismiss the petitioner's initial filing. However, as that decision has been withdrawn and the appeal is now rejected by the AAO, there is no decision on the part of the AAO that may be reopened in this proceeding. According to 8 C.F.R. § 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding. The AAO did not enter a decision on this matter. Because the director rendered the disputed decision, the AAO has no jurisdiction over this motion and the motion is rejected.

ORDER: The petitioner's previous appeal is rejected and the motion to reopen and reconsider is rejected.