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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**

C1

[Redacted]

DATE: OCT 17 2011 OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

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:
[Redacted]

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, California Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen the proceeding, and the director dismissed the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject the appeal as untimely filed.

The petitioner is a non-denominational Christian 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 a pastor. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) requires that the affected party or the attorney or representative of record must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the petitioner must file the appeal within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

The director denied the petition on August 18, 2010. The petitioner filed a motion to reopen the proceeding on September 13, 2010. The director dismissed the motion on November 3, 2010, stating that the petitioner's motion did not meet the requirements of a motion to reopen. Specifically, the director cited the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.5(a)(2), which requires: "A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence."

On November 23, 2010, USCIS increased its appeal fee from \$585 to \$630. On December 3, 2010, the petitioner filed an appeal of the director's decision, including the lower fee amount. USCIS returned the filing because of the improper fee, and the petitioner re-filed the appeal with the correct fee on December 16, 2010, 43 days after the director issued the decision. Accordingly, the appeal was untimely filed. The director annotated the appeal as untimely and forwarded the matter to the AAO.

USCIS must reject, as untimely filed, an appeal which is not filed within the time allowed. In such a case, any filing fee the Service has accepted will not be refunded. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal.

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.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent

decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In the latest appeal, the petitioner disputes the original denial notice from August 18, 2010. The petitioner does not address or discuss the director's more recent decision from November 3, 2010, in which the director found that the petitioner's September 13, 2010 filing did not meet the requirements of a motion to reopen. The petitioner, however, must first overcome the director's November 3, 2010 decision before the AAO can turn to the underlying question of the beneficiary's eligibility for the classification sought. Only after the petitioner shows that the director erred in dismissing the petitioner's motion to reopen is there a basis for a review of the petition itself. The petitioner has not shown that the director's November 3, 2010 decision was in error, and therefore the petitioner has not put the director's August 18, 2010 decision properly before the AAO for appellate review.

The director had originally denied the petition because USCIS had terminated the beneficiary's status as an F-1 nonimmigrant student, leaving him without lawful immigration status. On motion from that decision, the petitioner submitted a statement from the beneficiary (with supporting evidence) attempting to explain the interruption of his student status. The petitioner did not, however, refute or even directly contest the core finding that USCIS had terminated the beneficiary's F-1 nonimmigrant status. The AAO finds that the director acted properly in dismissing the motion, because the motion did not address the grounds for denial.

For the reasons discussed above, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

As the appeal was untimely filed and does not qualify as a motion, the AAO must reject the appeal.

ORDER: The appeal is rejected.