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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

PUBLIC COPY

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[REDACTED]

DATE: NOV 18 2011 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(i) of the
Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(i)

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 nonimmigrant visa petition for abandonment. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject the appeal as improperly filed.

The director issued a request for evidence on August 19, 2010. The director sent the notice to the address shown on the Form I-129 petition, filed May 26, 2010.

The director received no response during the time permitted, and on October 25, 2010, the director denied the petition for abandonment, in keeping with the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.2(b)(13)(i). In the denial notice, the director stated: "Submission at this time of the information and/or evidence previously requested will not serve to overcome this decision."

A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen. 8 C.F.R. § 103.2(b)(15). Under the USCIS regulation at 8 C.F.R. § 103.5(a)(1)(iii), a petitioners wishing to file a motion to reopen must do so on Form I-290B.

In a letter dated November 23, 2010, counsel stated that the request for evidence "was lost and the petitioner did not receive it until after the deadline . . . [had] passed." Counsel requested an additional 30 days in which to submit the requested evidence.

The director did not accept counsel's submission as a motion to reopen, because it included an incorrect fee and no Form I-290B. The petitioner, through counsel, eventually filed a Form I-290B with the proper fee on February 28, 2011. (This submission was well past the 30 days that counsel requested in November 2010, but it did not include the requested evidence.) On the first page of Form I-290B, asked to specify whether the filing was a motion or an appeal, counsel called the filing an "appeal."

Under the plain wording of the regulation at 8 C.F.R. § 103.2(b)(15), a petitioner cannot appeal a denial for abandonment. The AAO must therefore reject the appeal.

Even if the AAO were to consider the filing as a motion to reopen, a motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- (i) The requested evidence was not material to the issue of eligibility;
- (ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- (iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the

applicant or petitioner advised the Service [now USCIS], in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

8 C.F.R. § 103.5(a)(2). The petitioner has not established any of the above conditions. The petitioner's continued use of the same address shown on Form I-129 rules out a change of address, and the petitioner does not claim that the requested evidence was immaterial or submitted previously. Therefore, the filing would not qualify as a motion to reopen under the regulations quoted above.

Furthermore, 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. 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. 8 C.F.R. § 103.5(a)(1)(i).

If the director mailed the decision, 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).

The record shows that the petitioner filed Form I-290B four months after the director issued the denial notice. Therefore, whether the petitioner's filing is an appeal or a motion, it was not timely. With respect to filing a motion to reopen, the petitioner has not claimed or shown that the delay in filing was reasonable and beyond the petitioner's control. Neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit to file an appeal or motion.

The untimely filing of the appeal is another reason that the AAO must reject the appeal (or motion).

ORDER: The appeal is rejected.