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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

D13

[Redacted]

DATE: **MAR 05 2012** 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)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1)

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.

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that, in order to properly file an appeal, 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 appeal must be filed 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 indicates that the service center director issued the decision on May 3, 2011. It is noted that the director properly gave notice to the petitioner that it had 30 days to file the appeal. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

The petitioner, through counsel, initially submitted the Form I-290B, Notice of Appeal or Motion, on May 31, 2011. Counsel checked the blocks on the Form I-290B indicating that the petitioner was filing both an appeal and a motion to reopen and to reconsider. By notice dated June 6, 2011, the director rejected the Form I-290B, advising the petitioner to fully and accurately complete the form and return it with the appropriate fees and supporting documentation. The petitioner filed the properly completed Form I-290B and supporting brief on June 28, 2011, 56 days after the director issued her decision. Accordingly, the appeal was untimely filed.

In a June 22, 2011 “motion to accept late filed motion to reopen/reconsider and appeal,” counsel states that the two blocks were initially checked on the Form I-290B because the petitioner believed that all three actions were appropriate. Counsel asserts that “there is no “statute or regulation limiting the ability of a petitioner to request that a decision of the District Director be reconsidered, reopened and appealed” and requests that the motion for late filing be accepted. Counsel’s assertion that there is no statutory or regulatory provision limiting the petitioner’s ability to file a motion and appeal is clearly in error.

As discussed above, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the complete appeal must be filed within 30 days of service of the unfavorable decision, and the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that a motion to reopen or to reconsider must also be filed within 30 days. Furthermore, the regulation at 8 C.F.R. § 103.2(a)(1) provides, in pertinent part:

Preparation and submission. Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

Page 3 of the Instructions for Form I-290B, Notice of Appeal or Motion, advises that the appeal or motion must be filed within 30 days after service of the decision (33 days if the decision was

mailed). Page two of the instructions advises the appellant, "you must clearly indicate if you are filing an appeal or a motion." The instructions to Part 2 of the Form I-290B instruct the appellant to "check one box below that best describes your request."

Additionally, regarding counsel's argument that the petitioner believed that a motion to reopen, a motion to reconsider, and an appeal were appropriate in the instant case, the regulation at 8 C.F.R. § 103.2(a)(2)(iii) provides, in pertinent part:

Favorable action instead of forwarding appeal to AAU. The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under § 103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal.

Finally, 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 Director of the California Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director determined that the late appeal did not meet the requirements of a motion and forwarded the matter to the AAO.

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

ORDER: The appeal is rejected.