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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2010

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

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the instant nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

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 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 director issued the decision on August 23, 2009. The director properly gave notice that the applicant had 33 days to file the appeal. Counsel dated the appeal September 28, 2009. It was received by the service center on Tuesday, September 29, 2009, 37 days after the decision was issued. The service center erroneously annotated the appeal as timely and forwarded the matter to the AAO.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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 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).

Here, 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 appeal must be rejected.¹

¹ It is noted that, even if the appeal had been timely filed or the motion requirements had been met and the stated grounds of denial overcome, the petition could not be approved due to two bases of denial not addressed by the director in the initial decision. First, the submitted Labor Condition Application (LCA) does not correspond to the petition. More specifically, the petitioner indicated on the LCA that the proffered position has an "Occupational Code" of 161. The proffered position, as titled and as described, is that of a credit analyst (Dictionary of Occupation Titles (DOT) code 160.267-022). As such, the petitioner was required to submit an LCA in support of the petition with an Occupational Code of 160, not 161, and the petition could not be approved due to this evidentiary failure even if a valid and corresponding LCA were submitted after the fact. *See* 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.705(b); 8 C.F.R. § 103.2(b)(1). Second, according to both the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) and its sponsored

ORDER: The appeal is rejected.

Occupational Information Network (O*Net), the proffered position of credit analyst (O*Net 13-2041) is not a specialty occupation. Although "most" entrants to this occupation may have a bachelor's degree, there is no indication that (1) this is a normal entry requirement or (2) a bachelor's degree, or its equivalent, *in a specific specialty* is required. Therefore, the petition is not approvable for this additional reason.