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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

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U.S. Citizenship
and Immigration
Services

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Date:

DEC 01 2011

Office: VERMONT SERVICE CENTER

File:



IN RE:

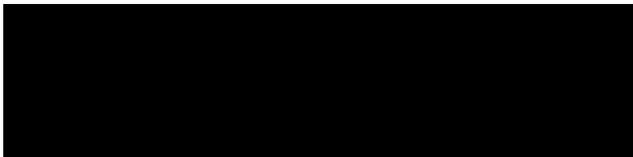
Petitioner:

Beneficiary:



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)

IN BEHALF OF PETITIONER:



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, Vermont Service Center, denied the nonimmigrant visa petition and, although a subsequent motion to reopen and motion to reconsider was granted, the director affirmed his initial decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ 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 “with the office where the unfavorable decision was made.” If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a U.S. Citizenship and Immigration Services (USCIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

According to the initial date stamp on the Form I-290B Notice of Appeal, it was received by the AAO on March 15, 2010 with the fee of \$585. On March 16, 2010, the AAO returned the appeal to the petitioner and advised that the Notice of Appeal and fee must be filed with the service center which rendered the decision. The materials were then submitted to the Vermont Service Center on March 19, 2010, or 35 days after the decision was issued. Accordingly, the appeal was untimely filed.

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 as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), 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).

An untimely-filed appeal must meet specific requirements to be treated as a motion. The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Furthermore, 8 C.F.R. § 103.5(a)(3) requires that 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 USCIS policy.

Review of the record indicates that the appeal does not meet either of these requirements. On appeal, counsel for the petitioner submits a letter accompanied by previously-submitted documentary evidence and contends that both the director’s denial and dismissal of the petitioner’s motion were

¹ It is noted for the record that the service center director erred in his decision when he stated that the decision to affirm his initial denial of the petition may not be appealed. As an appeal could have been filed on the underlying decision, the motion decision was also appealable. *See* 8 C.F.R. §§ 103.5(a)(6) and 214.2(h)(12)(i). However, as the petitioner attempted to file an appeal in this matter, the director’s erroneous statement is deemed to be harmless error.

erroneous. Counsel, however, does not provide any new facts to be considered in the reopened proceeding, nor does he provide affidavits or other documentary evidence. Furthermore, counsel neither states a clear reason for reconsideration nor provides any pertinent precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. More importantly, however, the petitioner has failed to establish that the director's decision to grant the motion but affirm his initial decision denying the petition was incorrect based on the evidence of record at the time that decision was issued. For these reasons, the appeal shall not be treated as a motion to reopen or reconsider.

As the appeal was untimely filed and as it does not meet the requirements of a motion to reopen or a motion to reconsider, the appeal must be rejected.

ORDER: The appeal is rejected.