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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**



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MAR 07 2012

Date:

Office: CALIFORNIA 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)

ON 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,

Michael T. DeLoe

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition, and the petitioner filed a late appeal. The director considered the petitioner's late appeal as a motion, dismissed the late motion, and affirmed the previous decision. The petitioner subsequently filed a motion to reopen, which was dismissed as untimely filed. The petitioner appealed to the Administrative Appeals Office (AAO), and the appeal was dismissed. The matter is now before the AAO on motion to reconsider. The motion will be dismissed.

The petitioner is a restaurant that seeks to employ the beneficiary as its sales and customer relations specialist. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

On August 8, 2006, the director denied the petition, finding that the proffered position is not a position in a specialty occupation. The petitioner filed an appeal, which was received by U.S. Citizenship and Immigration Services (USCIS) on September 22, 2006. On October 30, 2006, the director rejected the appeal as late, considered the late appeal as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), dismissed the motion for failure to meet applicable requirements, and affirmed his prior decision denying the petition.

The petitioner filed a motion to reopen, which was not accompanied by the required filing fee. On December 20, 2006, the California Service Center returned the Form I-290B to the petitioner and indicated that it had omitted the required filing fee. The California Service Center received the resubmitted Form I-290B and accompanying motion with the proper \$385.00 filing fee on January 11, 2007. The director dismissed the motion on October 5, 2007, finding that the motion was untimely filed pursuant to 8 C.F.R. § 103.5(a).

The petitioner filed an appeal to the AAO from the director's October 5, 2007 decision. The issue then before the AAO was whether the October 5, 2007 decision was correct. The AAO found that the director was correct that the January 11, 2007 motion was submitted late and that the director, therefore, had correctly dismissed the motion. The AAO therefore dismissed the appeal on June 4, 2009.

The petitioner then filed a motion to reconsider, which motion is the matter now under consideration. The issue before the AAO pursuant to the instant motion is whether the June 4, 2009 decision of the AAO on appeal from the dismissal of the previous motion was correct. As was noted above, that AAO decision on appeal was that the October 5, 2007 decision of the director, that the previous motion had been filed late, was correct. Whether that June 4, 2009 AAO decision on appeal was correct is the only issue properly before the AAO.

On the instant motion, however, counsel made no reference to the validity of the determinations made by the AAO in its June 4, 2009 decision. Rather, counsel focused on the director's decision of October 30, 2006, which is not relevant to this proceeding, arguing that the submission of September 22, 2006 should have been treated as a timely appeal because it was timely mailed.

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 and must establish that the contested decision was incorrect based on the evidence of record at the time of that decision. 8 C.F.R. § 103.5(a)(3). Further, a motion must be “[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding.” 8 C.F.R. § 103.5(a)(1)(iii)(C). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO notes that the instant motion to reconsider does not challenge the rectitude of the AAO’s June 4, 2009 decision, as it must, pursuant to 8 C.F.R. § 103.5(a)(3). Rather, counsel urges that the I-290B and attachments that were rejected as late because they were not received by USCIS until September 22, 2006 would have been timely received but for delay in delivery by the United States Postal Service, and that the service center director should, therefore, have considered the brief that counsel subsequently submitted. The AAO observes that the October 30, 2006 decision that deemed that submission late is not properly before the AAO. On the instant motion, the petitioner is able to challenge the most recent decision, issued by the AAO on June 4, 2009. As counsel and the petitioner have not even asserted that the June 4, 2009 decision was based on an incorrect application of law or USCIS policy, the instant submission does not meet the requirements for a motion contained in 8 C.F.R. § 103.5(a)(3). Accordingly, it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

Further, the instant motion does not contain a statement pertinent to whether the validity of the unfavorable decision has been or is the subject of any judicial proceeding and does not, therefore, meet the requirement for a motion imposed by 8 C.F.R. § 103.5(a)(1)(iii)(C). It must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for this additional reason.

Further still, if counsel had asserted, as required, that the AAO decision of June 4, 2007 was incorrect, and that decision were reviewed, no reason appears that it would be overturned. That decision correctly found that the previous decision, the director’s decision of October 5, 2007 that the previous motion was late filed, was correct. The regulation at 8 C.F.R. § 103.2(a)(7)(i) requires USCIS to reject any petition or application filed without the correct filing fee. Filings thus rejected do not retain filing dates. The petitioner’s December 20, 2006 submission was not accompanied by the required fee, was correctly rejected, and did not retain a filing date. The subsequent submission, received on January 11, 2007, 73 days after the director’s October 30, 2006 decision, was late, and the motion was correctly dismissed on that basis.¹

USCIS regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to file a timely motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party’s control. *Id.* The AAO considered the circumstances of the January 11, 2007 late filing and found that the delay was not reasonable and was within the

¹ It is noted that, according to the date stamp on the original submission, the petitioner’s motion was received by USCIS on December 20, 2006, or 51 days after the director’s October 30, 2006 decision. Even if that initial submission had been accompanied by the appropriate fee, it would have been rejected as late.

petitioner's control. The AAO found that the director's decision was correct. Consequently, the AAO correctly dismissed the appeal taken from the decision of the director on the motion. The decision by the director on October 5, 2007 was, in fact, correct. The AAO correctly found the October 5, 2007 decision to be correct in the AAO's June 4, 2009 decision. Even if the rectitude of the AAO's June 4, 2009 decision were correctly before the AAO, therefore, it would not be disturbed.

Yet further, even if the findings in the decision of October 30, 2006, in which the service center director found that the Form I-290B appeal filed on September 22, 2006 should be considered late, and not considered as an appeal, were correctly before the AAO, the petitioner would not prevail in his argument that it should be considered timely based on the mailing date.

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). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a 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. *Id.* In this case the director denied the petition on August 8, 2006. The appeal was received on September 22, 2006. That date is not disputed. The regulations do not contain a "Mailbox Rule." That is, an appeal is not deemed to be timely or untimely filed based on the date it was mailed, but based on the date it was received.

The regulations preempt the common law mailbox rule by specifying the means by which the date an application or petition is deemed received for purposes of meeting filing deadlines. When a procedural rule is clear, as it is here, the courts have declined to apply a date mailed policy in place of a rule's date received requirement. *Cf. In Re J-J-*, 21 I&N Dec. 976, 982 (BIA 1997); *Guirgus v. INS*, 993 F.2d 508, 510 (5th Cir. 1993) (holding a petition for review of the Board of Immigration Appeal's final order is "filed" on the day of receipt by the Court of Appeals).

On motion, however, counsel further claims (1) that the appeal met the requirements of both a motion to reopen and a motion to reconsider and (2) that U.S Citizenship and Immigration Services (USCIS) abused its discretion in not treating the late appeal as a motion and entering a new decision on the merits. Counsel correctly notes that 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, however, 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). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

Yet further, even if all of the petitioner's submissions had been timely, and the original August 8, 2006 decision of denial, which found that the petitioner had failed to demonstrate that it would employ the beneficiary in a specialty occupation, were properly before the AAO, a cursory examination of that issue reveals that the petitioner would not prevail. However, because that issue is not correctly before the AAO, and because of the AAO's finding, that the instant submission must



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be dismissed as not satisfying the requirements of a motion, is dispositive, the AAO need not address the specialty occupation issue in any further detail.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, and the previous decision of the AAO will not be disturbed.

ORDER: The motion is dismissed.