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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

[Redacted]

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DATE **MAY 04 2012**

Office: VERMONT SERVICE CENTER

File: [Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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. Please note that all documents have been returned to the office that originally decided your case. Please also note that any further inquiry must be made to that office.

Thank you,

Michael T. Kelly
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the approval of the visa petition. The matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reopen and reconsider.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides 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. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(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 February 2, 2010.¹ It is noted that the service center director properly gave notice to the petitioner that it had 33 days to file the appeal. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

Counsel dated the Form I-290B March 18, 2010, but the appeal was not received by the service center until Monday, March 22, 2010, which is 48 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 or a motion to reconsider, the appeal must be treated as a motion,

¹ The regulation at 8 C.F.R. § 103.8(a)(1)(i) states that "routine service consists of mailing the notice by ordinary mail addressed to the affected party and his or her attorney or representative of record at his or her last known address." Service is complete upon the mailing of the notice. *See* 8 C.F.R. § 103.8(b).

In the instant case, the service center director issued the decision on February 2, 2010. The denial notice was sent to the last known addresses of the petitioner and counsel. A review of USCIS records indicates that neither the petitioner nor counsel advised USCIS, in writing, of a change of address or change of representation **prior** to the issuance of the decision. Moreover, the petitioner and counsel do not assert that they advised USCIS of a change of address subsequent to the filing of the petition and before the the decision was issued and that the notice did not go to the new address.

On February 9, 2010 (seven days after the director issued the decision in this case), USCIS received a new Form G-28 with a request to update counsel's address. As a courtesy, USCIS resent the denial notice to the petitioner and counsel. The denial notice clearly indicates that it was issued on February 2, 2010 and that the notice was simply being remailed. There is no indication that the petitioner was granted an extension of time to submit an appeal.

To be timely, the petitioner's appeal must have been received by Monday, March 8, 2010. However, the appeal was not received by USCIS until Monday, March 22, 2010, which is 48 days after the director issued the decision. It is noted that neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit for the submission of an appeal.

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 Vermont Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii).

The matter will therefore be returned to the director. If the director determines that the late appeal meets the requirements of a motion, the motion shall be granted and a new decision will be issued.

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

ORDER: The appeal is rejected.