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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:

SEP 01 2011

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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]

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 nonimmigrant visa petition was denied due to abandonment by the Director, California Service Center. A subsequent motion to reopen was granted, and the petition was again denied by the Director. The petitioner filed a subsequent appeal to the Administrative Appeals Office (AAO), which rejected the appeal as improperly filed. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

In the visa petition, the petitioner described itself as a pharmacy. To employ the beneficiary in a position designated as an information technology consultant/computer engineer position, the petitioner endeavors to have the beneficiary classified 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).

In a request for evidence it issued on February 9, 2009, the service center noted that, although the petitioner had indicated on the Form I-129 that it was attaching a Form G-28 Notice of Entry of Appearance to show that it was represented by counsel, the record contained no Form G-28. The service center requested, *inter alia*, that the petitioner either explain that omission or provide a G-28. The petitioner failed to respond to that request.

The petition was initially denied as abandoned on March 31, 2009. Pursuant to a motion, the director reopened the matter on May 22, 2009. The director denied the visa petition again on May 22, 2009, based, in this second instance, on her finding that approval of the petition would extend the beneficiary's stay on H-1B status beyond the six-year limit generally imposed by section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), and that the beneficiary is not entitled to an exception to that six-year limit pursuant to AC21.

The AAO rejected an appeal taken from the second decision of denial on July 1, 2010, finding that the appeal was both untimely and improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1), 8 C.F.R. § 103.3(a)(1)(iii)(B), and 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(i). The same unauthorized representative who previously filed the appeals in this matter has now filed a motion seeking to reopen the appeal that was rejected.

The regulation at 8 C.F.R. § 103.5(a)(3) states 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 U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Upon review, the instant motion has not established that the AAO's decision of July 1, 2010 was incorrect based on the evidence of record at the time that decision was issued. 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.*

As clearly explained in the AAO's prior decision, the record of proceeding indicates that the director issued the decision being appealed on May 22, 2009. The director properly gave notice to the applicant that the applicant had 33 days to file the appeal. Although the attorney filing the appeal dated it June 22, 2009, it was not received by the director until Wednesday, June 25, 2009, 34 days after the decision was issued. Accordingly, the appeal was untimely filed. As such, the AAO properly rejected the appeal as improperly filed pursuant to 8 C.F.R. §§ 103.3(a)(2)(i) and 103.3(a)(2)(v)(B)(1). Moreover, the appeal was also filed by an attorney who had not properly entered his appearance at that time on behalf of the petitioner, giving additional grounds to reject the appeal pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

As the AAO did not err in rejecting the petitioner's appeal, the motion to reconsider will be dismissed.

In addition, the motion shall be dismissed for failing to meet another applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions 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." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C).

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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.

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.