



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **SEP 12 2013** OFFICE: VERMONT 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]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the approval of the 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 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 Monday, December 24, 2012. It is noted that the service center director properly gave notice to the petitioner of the timeframe to file the appeal. Neither the Immigration and Nationality Act (the Act) nor the pertinent regulations grant the AAO authority to extend this time limit.

The Form I-290B, Notice of Appeal or Motion, was received by U.S. Citizenship and Immigration Services (USCIS) on Tuesday, January 29, 2013, which is 36 days after the decision was issued.¹ 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, 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 director declined to treat the appeal as a motion and forwarded the matter to the AAO.

As the appeal was untimely filed, the appeal must be rejected.²

¹ On appeal, counsel claims that while the decision is dated December 24, 2012, it was not mailed until December 26, 2012. In support of this statement, counsel provided a copy of an envelope dated December 26, 2012 from the Vermont Service Center. Counsel asserts that 33 days from the mailing of the decision is January 29, 2013. However, the AAO finds that the enclosed copy of the envelope is not sufficient evidence to establish that the decision was mailed on December 26, 2012 since the envelope does not indicate the name of the recipient. Further, the AAO notes that 33 days from December 26, 2012 is January 28, 2013.

Title 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed." The regulation is binding on USCIS in its administration of the Act, and it does not have the authority to extend the filing period. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

ORDER: The appeal is rejected.

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Since the appeal was untimely filed and rejected, the AAO will not discuss the basis of the director's denial that the petitioner failed to establish that the proffered position is a specialty occupation. However, the AAO notes that there are additional issues (not identified by the director) that are relevant to determining the petitioner's eligibility for the benefit sought. For example, the AAO notes that the Form I-129 petition was not properly signed by the petitioner. Specifically, on page 12, the petitioner failed to certify that it would be liable for the reasonable costs of return transportation if the beneficiary is dismissed from its employment prior to the period of authorized stay, and failed to comply with § 214(c)(5) of the Act and 8 C.F.R. § 214.2(h)(4)(iii)(E).

Further, the AAO notes that the proffered wage of \$34,920 per year for the occupational category "Executive Secretaries and Executive Administrative Assistants"-SOC (ONET/OES) Code 43-6011 at Level I was lower than the prevailing wage in the area of intended employment at the time the LCA was filed. Specifically, the prevailing wage for "Executive Secretaries and Executive Administrative Assistants" at Level I for Queens County, New York was \$41,683 per year when the LCA was filed on May 17, 2012. See the All Industries Database for 7/2011 - 6/2012 for Executive Secretaries and Executive Administrative Assistants at the Foreign Labor Certification Data Center, <http://www.flcdatcenter.com/OesQuickResults.aspx?code=43-6011&area=35644&year=12&source=1> on the Internet at (visited September 12, 2013). The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for the work, as required under the Act, if the petition were granted.

Moreover, on the Form I-129 H-1B Data Collection Supplement (page 18), Part C, Question 1, the petitioner checked the box for option "b," to request that the petition be counted against the cap pertaining to "U.S. Master's Degree or Higher." The instructions for Form I-129 H-1B Data Collection Supplement, Part C, Question 2 state the following: "If you answered question 1b 'CAP H-1B U.S. Master's Degree of Higher,' provide the [requested] information regarding the master's or higher degree the beneficiary has earned from a **U.S. institution** as defined in 20 U.S.C. 1001(a) (emphasis added)." Under Part C, Question 2, the petitioner indicated that the beneficiary was awarded a master's degree from the [redacted] rather than a degree from a United States institution. Additionally, the petitioner failed to provide probative evidence to support a finding that the beneficiary possesses a "U.S. Master's Degree or Higher."

Nevertheless, as the appeal is rejected for the reasons discussed above, the AAO need not nor will it address the issues and deficiencies that it observes in the record of proceeding.
