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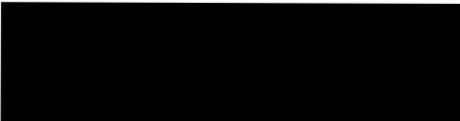
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File: SRC 03 017 50032 Office: TEXAS SERVICE CENTER

Date: JUL 28 2008

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The petitioner subsequently filed an appeal. The Administrative Appeals Office (AAO) determined that the appeal was not filed in a timely manner and rejected the appeal pursuant to 8 C.F.R. §§ 103.3(a)(2)(i) and 103.3(a)(2)(v)(B)(1). The matter is now before the AAO on a combined motion to reopen and reconsider. Although the motion will be granted, the AAO will affirm its prior decision to reject the appeal as improperly filed.

The petitioner seeks to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The director denied the petition on May 14, 2003. On June 17, 2003, counsel for the petitioner filed an appeal seeking review of the director's decision. After reviewing the record, the AAO rejected the appeal as it had not been filed in a timely manner. Any appeal that is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The petitioner has now filed a motion seeking to reopen and reconsider the appeal that was rejected as untimely filed. The motion is hereby granted, and the AAO will provide a full review of its prior decision to reject the appeal as improperly filed.

On motion, counsel argues that, under common law, a postmark may be used to establish timely mailing, and in support of this assertion he cites *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir.) (citing *Rosenthal v. Walker*, 111 U.S. 185, 193-94, 4 S.Ct. 382, 286, 28 L.Ed. 395 (1884)). Counsel's argument is not persuasive. First, the actual delivery of the appeal in this matter and its delivery date is not in dispute and, thus, the facts in the cited cases are not analogous, as they focus instead on evidentiary proof establishing a document's delivery and whether it was ever received by the government.

Second, 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, *see infra*, the courts have declined to apply a date mailed policy in place of a rule's date received requirement. *See 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).

Specifically, 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 U.S. Citizenship and Immigration Services (CIS) 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 May 14, 2003. The petitioner subsequently filed an appeal on Tuesday, June 17, 2003, 34 days after the decision. 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).

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 Citizenship and Immigration Services (CIS) 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 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.

To determine whether the director erred in not treating the late appeal as a motion, the AAO reviewed whether the appeal met the requirements for either a motion to reopen or a motion to reconsider. Upon review, however, the AAO has found that counsel for the petitioner does not state on appeal any reasons for reconsideration, nor does counsel furnish any new facts to be provided in the reopened proceeding.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

On appeal, counsel for the petitioner has submitted (1) an undated brief, signed by counsel, arguing that the beneficiary will be employed in both a managerial and an executive capacity; (2) a synopsis by *Interpreter Releases* of an AAO unpublished decision; (3) the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, signed and dated March 15, 2003; (4) the petitioner's December 31, 2002 projected balance sheet; and (5) the December 20, 2002 memorandum on the definition of a manager by Fujie O. Ohata, Associate Commissioner, Service Center Operations for the legacy Immigration and Naturalization Service (INS).

Contrary to counsel's assertions on motion, a review of the evidence that the petitioner submits on appeal reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). Specifically, all of the evidence submitted could have been presented previously in response to the director's April 19, 2003 Request for Evidence (RFE). There is no explanation provided as to why the petitioner was unable to submit this additional evidence prior to the director's adjudication of the petition. Moreover, the assertion by counsel on motion that it presented new facts for consideration is not persuasive, as the new "facts" submitted are actually legal arguments mischaracterizing the director's decision as being improper. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). In addition, the petitioner's assertions on motion are not persuasive as the result would allow the petitioner to do indirectly, i.e., receive a review on the merits, what it cannot do directly because it failed to timely submit an appeal.

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

Therefore, the evidence as well as the arguments submitted on appeal will not be considered "new" and will not be considered a proper basis for a motion to reopen.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With regard to the treatment of the appeal as a motion to reopen, the movant has not met that burden. The motion to reopen was therefore properly declined by the director.

Furthermore, 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although counsel repeatedly asserts that the late appeal meets the requirements for a motion to reconsider, counsel does not submit any document on appeal that supports this claim. More specifically, counsel does not produce or cite any precedent decisions to establish that the director's denial of the petition was an incorrect application of law or CIS policy. The unpublished AAO decision that counsel cited is not a precedent decision. Moreover, even if the director were to have considered this decision, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. In addition, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, counsel also submits the December 20, 2002 memorandum on the definition of a manager by [REDACTED] Associate Commissioner, Service Center Operations for the legacy INS (now CIS). This memorandum, while obviously not a precedent decision itself, also fails to refer or cite to any precedent decisions. In addition, the memorandum simply reiterates the statutory definition of manager and reminds adjudicators to apply each separate element when processing these types of petitions. Counsel does not specifically identify how the director acted contrary to this memorandum.

Even if counsel did identify such an error by the director, the memorandum does not create any substantive rights in the petitioner, and a director's failure to follow the guidance in the memorandum would not be grounds for a withdrawal of the decision. Courts have consistently supported this position. *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that CIS memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing an INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring

substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an “internal directive not having the force and effect of law”); *Ponce-Gonzalez v. INS*, 775 F.2d 1342, 1346-47 (5th Cir. 1985) (finding that OIs are “only internal guidelines” for INS personnel, and that an apparent INS violation of an OI requiring investigation of an alien’s eligibility for statutory relief from deportation was at worst “inaction not misconduct”).

Accordingly, as counsel failed to specifically identify an error by the director and to support such a claim with precedent decisions to establish that the decision was based on an incorrect application of law or Service policy, the decision by the director to not treat the late appeal as a motion to reconsider was proper.

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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

ORDER: The underlying decision rejecting the petitioner's appeal is affirmed.