



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

identifying data deleted to

**PUBLIC COPY**

B6

FILE:

SRC 07 168 51404

Office: TEXAS SERVICE CENTER

Date:

**JUL 06 2009**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition. The matter is now 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 must file the complete appeal within 30 days of after 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). 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 director issued the decision on January 8, 2008.<sup>1</sup> It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal with the Texas Service Center. Although counsel dated the appeal February 1, 2008, it was received by the director on February 14, 2008, 37 days after the decision was issued.<sup>2</sup> Accordingly, the appeal was untimely filed.<sup>3</sup>

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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.

---

<sup>1</sup> It is noted that the decision was misdated as January 8, 2007. Based on other evidence in the record, it is more likely than not that the correct date of the decision is January 8, 2008.

<sup>2</sup> It is noted that the petitioner apparently attempted to file this appeal directly with the AAO on or about February 6, 2008. However, the regulations at 8 C.F.R. § 103.2(a)(6) and 8 C.F.R. § 103.3(a)(2)(i) require that the instant appeal be filed within 30 days with the Texas Service Center, not directly with the AAO. The service center only forwards appeals, such as the present matter, to the AAO if it will not be taking favorable action or if it decides that favorable action is not warranted. 8 C.F.R. § 103.3(a)(2)(iii). The applicant's attempt to file this appeal directly with the AAO did not establish a receipt date of February 6, 2008, as this attempted filing violated the regulations and the instructions in the decision. Therefore, the receipt date for the instant motion was the day it was received by the Texas Service Center, February 14, 2008, or 37 days after the decision was served by mail.

<sup>3</sup> It is noted that the petitioner submits a copy of an envelope from U.S. Citizenship and Immigration Services (USCIS) bearing a postmark of January 11, 2008. Counsel asserts that the January 8, 2008 decision was served by mail in this envelope. Regardless, even if the AAO considered the decision to have been served by mail on January 11, 2008, the appeal would still be untimely filed as February 14, 2008 is 34 days after January 11, 2008.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 USCIS 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the untimely appeal meets the requirements of a motion to reopen and reconsider. 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). Therefore, the director must consider the untimely appeal as a motion and render a new decision accordingly.<sup>4</sup>

**ORDER:** The appeal is rejected. The matter is returned to the director for consideration as a motion to reopen and reconsider.

---

<sup>4</sup>According to the corporate records of the Commonwealth of Virginia, the petitioner's corporate status in Virginia appears to have been terminated on December 1, 2008. Accordingly, it does not appear as if the petitioner is still a functioning legal entity in the United States. This would call into question the petitioner's continued eligibility for the benefit sought if the appeal were not being rejected for the reasons set forth herein.