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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

[Redacted]

D9

DATE: APR 05 2011 Office: [Redacted] FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(P)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(P)(i)

ON BEHALF OF PETITIONER:  
[Redacted]

INSTRUCTIONS:

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 Director, [REDACTED] Service Center, denied the nonimmigrant visa petition. The petitioner subsequently filed a late appeal. The director treated the late appeal as a motion to reopen or reconsider and dismissed the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject the appeal as untimely filed.

The petitioner states that it is a theatrical [REDACTED]. It seeks to classify the beneficiaries under section 101(a)(15)(P)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(P)(i), as circus entertainers. The beneficiaries were previously granted P-1 status and the petitioner now seeks to extend their status for one additional year.

The director denied the petition, concluding that the petitioner: (1) failed to establish that the beneficiaries are members of an internationally recognized entertainment group that has performed together for more than one year, or that the beneficiaries will be performing in a circus that has been recognized nationally as outstanding for a sustained and substantial period of time; and (2) failed to submit a written consultation from an appropriate labor organization.

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 with the office where the unfavorable decision was made within 30 days 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). 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.

The petitioner in this matter has filed two late appeals, the first of which counsel claims was timely filed. The AAO will address both appeals below.

The record indicates that the director issued the initial adverse decision on April 10, 2009. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal and properly instructed the petitioner to submit the appeal to the [REDACTED] Service Center. The director explicitly advised the petitioner that the appeal may not be filed directly with the AAO.

The AAO notes that Form I-290B, Notice of Appeal or Motion, was initially submitted on May 12, 2009; however, the Form I-290B was submitted to the AAO, and not to the [REDACTED] Service Center, as required by the regulation at 8 C.F.R. § 103.2(a)(7)(i). The AAO returned the appeal to the petitioner, advising that the appeal must be filed with the USCIS office that issued the unfavorable decision. The petitioner properly filed the appeal with the service center on May 21, 2009, 41 days after the director's decision was issued.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states:

If an untimely appeal meets the requirements of a motion to reopen as described in § 103.5(a)(2) of this part or a motion to reconsider as described in § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision made on the merits of the case.

In a decision dated June 4, 2009, the director determined that the petitioner's late appeal did not meet the requirements of a motion to reopen or a motion to reconsider, and therefore dismissed the motion pursuant to 8 C.F.R. § 103.5(a)(4), without disturbing the previous decision. The AAO notes that, upon determining that the late appeal did not meet the requirements of a motion, and therefore did not require a decision on the merits, the director should have forwarded the appeal to the AAO for review. Had the director forwarded the late appeal to the AAO, the appeal would have been rejected as untimely filed.

There are no regulatory provisions that allow the AAO to accept an appeal and filing fee directly from an affected party. Therefore, the AAO properly returned the appeal to the petitioner upon receiving it on May 12, 2009, and no filing date was established. As stated above, 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. Here, the initial appeal was stamped as properly filed on May 21, 2009. Accordingly, it was untimely filed. Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal.

On November 2, 2010, the petitioner filed a Form I-290B, Notice of Appeal or Motion, with the U.S. Citizenship and Immigration Services District Office in [REDACTED], 516 days after the issuance of the director's decision.

On the Form I-290B, counsel states:

The reason of the denial and rejection, dated June 4, 2009, is that the employer did not file the I-290B timely. . . . However, your Service admitted that AAO received the Appeal from the employer on May 12, 2009, which was a timely filing. The only issue was that the Appeal (I-290B) should be filed with USCIS [REDACTED] Service Center, not AAO.

The reason that the employer filed the appeal directly with AAO was that they wished to have a quick decision. The employer understood that the AAO was the organization that makes the decision. The employer received the notice from the AAO dated May 14, 2009, instructing the employer to file the appeal with USCIS Service Center. The employer under the introduction of AAO filed the appeal with [REDACTED] Service Center immediately. . . .

After you [sic] denial, the employer has sent another letter requesting for your consideration, dated June 12, 2009. Over one year and 3 months passed, the employer has not received any reply from your Service yet. Please see the attachment 3.



Counsel requests that the AAO re-open the matter to consider the original appeal filed on May 21, 2009.

Upon review, the AAO will reject the appeal as untimely filed. As stated above, 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 with the office where the unfavorable decision was made within 30 days 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 petitioner improperly filed the appeal with a USCIS District Office 516 days after the director's issuance of the unfavorable decision on June 4, 2009. Again, neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. Thus, the appeal was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

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 as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), 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).

It is noted that the appeal does not meet the applicable requirements of a motion to reopen or reconsider. 8 C.F.R. § 103.5(a). The instant appeal is accompanied by a copy of a brief dated May 8, 2009, which was previously reviewed by the director. 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 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. 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 petitioner offers no "new" evidence, which could not have been presented in the initial proceeding. Likewise, the petitioner fails to cite to any pertinent precedent decisions establishing that the director's decision was based on an incorrect application of law or USCIS policy.

The untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

The record of proceeding shows that the petitioner submitted a letter to the AAO on June 15, 2009, along with a copy of the appeal filed on May 21, 2009. The petitioner requested that the AAO instruct the [redacted] Service Center to re-instate the appeal, or, alternately "accept the appeal directly, bypassing the [Service Center]." This letter was not a properly filed appeal or motion requiring action on the part of the AAO, and does not excuse the late filing of the instant appeal 516 days after the director's prior decision. If the petitioner sought reconsideration of the director's decision dated June 4, 2009, the proper course of action

would have been to file a Form I-290B, with the filing fee, to the [REDACTED] Service Center within 30 days. As the appeal was untimely filed, the appeal must be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

**ORDER:** The appeal is rejected.