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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**

b9.

[Redacted]

DATE: **DEC 27 2011** Office: CALIFORNIA SERVICE CENTER 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, California 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 petitioner subsequently filed a late appeal to the Administrative Appeals Office (AAO), which the AAO rejected as untimely filed. The matter is now before the AAO on appeal. The AAO will reject the appeal as improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

The petitioner states that it is a theatrical agency, producer and artist manager. 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, as well as the instant appeal which is now before the AAO.

On April 5, 2011, the AAO rejected the petitioner's previous appeal as untimely, noting that the appeal was filed 516 days after the adverse decision that was being appealed. The petitioner timely filed a Form I-290B, Notice of Appeal or Motion, on April 29, 2011. Counsel indicated on the Form I-290B that he was filing an appeal and would submit a brief and/or additional evidence to the AAO within 30 days. The AAO notes that counsel has raised no specific objection to the AAO's decision to reject the appeal that was filed late, but rather claims, as he did in the previous matter, that the initial appeal filed on May 12, 2009 was timely filed.

The AAO, however, does not exercise appellate jurisdiction over its own decisions. The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).¹ For instance, in the event that a petitioner disagrees with an AAO decision to dismiss an

¹ In the process of reorganizing the immigration regulations, the Department of Homeland Security (DHS) deleted the list of the AAO's appellate jurisdiction that was previously found at former 8 C.F.R. § 103.1(f)(3)(iii) (2002). 68 FR 10922 (March 6, 2003). DHS replaced the appellate jurisdiction provision

appeal, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, the AAO would have had jurisdiction over a timely motion if the petitioner or counsel had checked box D ("I am filing a motion to reopen a decision"), box E ("I am filing a motion to reconsider a decision"), or box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B, Notice of Appeal or Motion. In this case, counsel checked box B ("I am filing an appeal"), instead. Therefore, the appeal is improperly filed and must be rejected on this basis, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

Further, even if the appeal were treated as a motion, it would be dismissed for failing to meet applicable requirements. 8 C.F.R. § 103.5(a)(4). Pursuant to 8 C.F.R. § 103.5(a)(2), 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. Pursuant to 8 C.F.R. § 103.5(a)(3), 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. As noted above, the petitioner requested 30 days in which to submit a brief or evidence in support of its appeal. However, evidence and briefs must be submitted with the motion. Unlike appeals, the regulations pertaining to motions to reopen or reconsider do not permit briefs and/or evidence to be filed subsequently; the evidence must comprise the motion. Accordingly, as the filing does not meet the requirements of 8 C.F.R. §§ 103.5(a)(2) or (3), it would have been dismissed pursuant to 8 C.F.R. § 103.5(a)(4), if it were treated as a motion.

The AAO notes for the record that counsel's primary argument in the instant appeal is that the AAO erred in determining that the initial appeal, filed on May 21, 2009, was not timely filed. Specifically, counsel asserts that "it was not an untimely filing, only it was filed by a non-professional immigration lawyer mistakenly to the AAO directly which is understandable." Counsel's argument is not persuasive.

The record indicates that the director issued the initial adverse decision on April 10, 2009. 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 California Service Center. The decision cover letter states: "Do NOT send the appeal directly to the AAO." Counsel acknowledges that the director advised the petitioner of the proper filing location, yet claims that "the petitioner was not aware of the filing location and filed directly to AAO," and that such error was "understandable." The AAO can find nothing ambiguous in the director's instructions that would leave the petitioner unaware of the proper filing location.

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 California 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

with a general delegation of authority, granting U.S. Citizenship and Immigration Services (USCIS) the authority to adjudicate the appeals that had been previously listed in the regulations as of February 28, 2003. See DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003); 8 C.F.R. § 103.3(a)(iv). As a result, there is no generally accessible list of the AAO's jurisdiction that may be cited in immigration proceedings or in federal court.

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.

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. The initial appeal was stamped as properly filed on May 21, 2009; the petitioner cannot rely on the date on which it was received by the AAO. Accordingly, both the service center director and the AAO properly determined that the initial appeal was untimely filed.

Here, the petitioner's appeal of the AAO's decision to reject the petitioner's prior appeal as untimely filed is not properly before the AAO, and the appeal is rejected as improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

ORDER: The appeal is rejected.