



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 23093150

Date: FEB. 16, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as an administrative assistant. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it had the continuing ability to pay the Beneficiary the proffered wage. The Petitioner filed a timely combined motion to reopen and reconsider the matter, which the Director dismissed. The Petitioner then filed an appeal of the Director's decision to dismiss the combined motions, which we rejected as untimely. We returned the rejected untimely appeal to the Director for a determination of whether the untimely appeal meets the requirements of a motion to reopen or motion to reconsider. 8 C.F.R. § 103.3(a)(2)(v)(B)(2). The Director again dismissed the motion to reopen and reconsider. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

As an initial matter, we note that our review on appeal is generally limited to the basis for the underlying adverse decision. Thus, we consider whether the Director properly dismissed the Petitioner's motion to reopen and reconsider following our rejection of the untimely appeal.

An appeal must be filed within 30 days of the unfavorable decision (or 33 days if the decision is mailed). 8 C.F.R. §§ 103.3(a)(2)(i) and 103.8(b). Because of the COVID-19 pandemic, USCIS may consider a Form I-290B, Notice of Appeal or Motion, filed within 63 calendar days of an unfavorable decision issued between March 1, 2020, and October 31, 2021.<sup>1</sup>

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<sup>1</sup> See <https://www.uscis.gov/newsroom/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-1>.

The Director initially denied the petition in a decision dated March 4, 2020. The Petitioner's combined motions were dismissed on August 10, 2020. The Petitioner submitted an appeal of the Director's decision on October 21, 2020, more than 63 days from the date of the Director's August 10, 2020 decision.

On appeal, the Petitioner states that it filed an appeal on October 9, 2020, within the 60 calendar days of the unfavorable decision. It further states that, "since the **Appeal was filed to overcome a decision issued by the Administrative Appeals Office it was *wrongly* sent to Washington, DC** directly" (emphasis in original). The Petitioner also submits a Federal Express delivery confirmation for a package delivered on October 9, 2020.

USCIS records indicate that the Petitioner mailed Form I-290B, Notice of Motion or Appeal, directly to the AAO and it was received by our office on October 9, 2020. We notified the Petitioner in correspondence dated October 14, 2020 that, in accordance with the instructions on Form I-290B, it may not file an appeal or motion directly with our office, and we returned the appeal and filing fee.

The Petitioner does not allege USCIS error or provide evidence that we improperly rejected the Form I-290B. A rejected benefit request does not retain a filing date. 8 C.F.R. § 103.2(a)(7)(iii). Thus, the Petitioner's initial Form I-290B, which we received on October 9, 2020, and ultimately returned as improperly filed cannot be considered filed on that date. Rather, the Form I-290B filing date is October 21, 2020, when USCIS received the re-submitted appeal and accepted it for processing. Because that date is outside the 33-day period mandated by the regulations (and outside the 63-day period allowed by the USCIS COVID-19 response), we uphold our previous decision that the appeal was untimely filed.

As noted above, if an untimely appeal meets the requirements of a motion to reopen or motion to reconsider as described in 8 C.F.R. § 103.5(a)(2) and (3), the appeal must be treated as a motion, and a decision must be made on the merits of the case. 8 C.F.R. § 103.3(a)(2)(v)(B)(2). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

On September 17, 2021, the Director considered the untimely appeal and determined that it did not meet the requirements of a motion to reconsider. The Director states the only basis for that decision as the untimeliness of the Form I-290B but does not provide an explanation of why the Petitioner's untimely appeal does not meet the requirements of a motion to reconsider. The Director does not address whether the untimely appeal meets the requirements of a motion to reopen.

The Petitioner's untimely appeal states new facts and includes documentary evidence. Specifically, the Petitioner provides an explanation for anomalies in its federal tax return that the Director noted in his August 10, 2020 decision, and includes an additional tax return.

Because the Director did not address the Petitioner's new facts or additional evidence, or address whether the Petitioner demonstrated an incorrect application of law or policy, we will remand the matter for further consideration of whether the Petitioner's untimely appeal meets the requirements of

a motion to reopen under 8 C.F.R. § 103.5(a)(2) or a motion to reconsider under 8 C.F.R. § 103.5(a)(3), as required by 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

**ORDER:** The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.