B2

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 11 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

IN BEHALF OF BENEFICIARY:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected.

The petitioner initially sought to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

> (B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

8 C.F.R. § 103.3(a)(2)(v) states:

> *Improperly filed appeal -- (A) Appeal filed by person or entity not entitled to file it -- (1) Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

The appeal has not been filed by the petitioner, nor by any entity with legal standing in the proceeding, but rather by the attorney for the beneficiary. Therefore, the appeal has not been properly filed, and must be rejected.

The attorney who filed the appeal claims to represent the petitioner as well, but the record does not contain Form G-28, Notice of Entry of Appearance as Attorney or Representative, designating the attorney as counsel for the petitioner. The record does contain a Form G-28 showing that the attorney represents the beneficiary, but because the beneficiary has no standing in this proceeding, this form does not give the attorney standing to file the appeal.

We note that, even if the appeal had been properly filed, it would then have been summarily dismissed. 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part, "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

In this proceeding, the attorney for the beneficiary does not allege any Service error in the rendering of the decision. Instead, the attorney observes that the beneficiary has no lawful status in the United States, and the petitioner had sought to obtain benefits for the beneficiary pursuant to section 245(i) of the Act. The attorney states that the petitioner, in its haste to file a petition before the expiration of the section 245(i) provisions, and under the advice of "the previous attorney," filed a petition seeking to classify the beneficiary under section 203(b)(1)(A) of the Act. The attorney on appeal

requests that the Service "allow [the] alien to resubmit document and labor certification approval to be reconsidered under" a lesser immigrant classification. The attorney states:

> If you allow us to reopen this case, we will immediately file a labor certification application with [the] Georgia Department of Labor and request Recruitment in Reduction to expedite his labor certification application. Thereafter, we will file a new I-140 requesting decision under Employment Category Three.

The attorney explains that "if [the beneficiary] has to file a new petition, he could lose his privilege under 245(i)" and therefore this current petition needs to remain open.

If the petitioner were to obtain a labor certification for the beneficiary, and a new petition were to be approved in the beneficiary's behalf, the priority date would be established as of the date that the Department of Labor received the application for labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Although the present petition was filed while benefits remained available under section 245(i) of the Act, no priority date attaches to the petition unless it is approved. The reopening of a denied petition is not sufficient to preserve a priority date, and even if this petition is simply left pending while a new petition is adjudicated, that new petition would not inherit or retain the filing date ascribed to the earlier petition.

In sum, while the attorney for the beneficiary asserts that the petitioner and perhaps the petitioner's former attorney erred in their handling of the present petition, the attorney does not demonstrate, or even claim, that the director erred in any way, or that the director's decision was incorrect given the evidence available at the time of adjudication. Thus, absent any allegation of Service error, this appeal would have been summarily dismissed if it were not rejected.

ORDER: The appeal is rejected.