U.S. Department of Justice

Immigration and Naturalization Service

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

File: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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]

PUBLIC COPY

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.

Elizabeth Hayward
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center. On the basis of new information received and on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on May 1, 2002. The matter is now before the Administrative Appeals Office on appeal. The appeal will be rejected.

The petitioner seeks classification 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 sciences. The director determined that whatever acclaim the petitioner had earned was not sustained as required by the pertinent statute and regulations. The petitioner claimed to have earned sustained acclaim as a physicist, but has been working since October 1998 as a software programmer for Information Builders, Inc.

The regulation at 8 C.F.R. § 205.2(d) indicates that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The notice of revocation did not specify the time limit to file an appeal. The I-290B appeal form erroneously stated that the petitioner could file an appeal within 33 days, the last day being June 3, 2002 (the date that the Vermont Service Center received the appeal). Nevertheless, the director's error cannot and does not supersede the pertinent regulations.

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.

8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be proved at the reopened proceeding; and be supported by affidavits or other documentary evidence. The appeal contains no new evidence and counsel claims no new facts germane to the petitioner's eligibility.

8 C.F.R. § 103.5(a)(3) requires that a motion to reconsider 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. Counsel's appeal statement contains no such showing.

The appeal is predicated on counsel's assertion that the petitioner never received the Service's notice of intent to revoke, and therefore the petitioner has not properly been advised of the grounds for revocation. The record shows that, on November 8, 2001, the director sent a notice of intent to revoke via certified mail to 220 72nd Street, # A8, Brooklyn, New York, 11209. This is the address provided on the Form I-140 petition, the Form I-485 adjustment application, and most recently on the Form G-28 Notice of Entry of Appearance as Attorney or Representative submitted on appeal. Thus, the record amply demonstrates that the petitioner was using the above address before and after the November 8, 2001 mailing date of the notice. The notice of intent was returned,

unclaimed, after repeated attempts to deliver the notice to the address that has always been the petitioner's address of record.

Pursuant to 8 C.F.R. § 103.5a(b), service by mail is complete upon mailing. The Service is not and cannot be responsible for the petitioner's failure to claim certified mail sent to the petitioner's correct address of record. Counsel states that the notice should be reissued, but there is no assurance in the record that the petitioner would not again fail to accept delivery.

For the reasons set forth above, the director followed proper procedure as set forth in the regulations with respect to issuing the required notice of intent to revoke. The petitioner's untimely appeal does not meet the requirements of a motion to reopen or to reconsider, and therefore the regulations mandate the rejection of the appeal.

ORDER: The appeal is rejected.