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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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

**PUBLIC COPY**



MAR 28 2007

File: WAC-01-242-57064 Office: California Service Center Date:

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

**Identifying data deleted to prevent clearly unwarranted invasion of personal privacy**

ON BEHALF OF PETITIONER: SELF-REPRESENTED

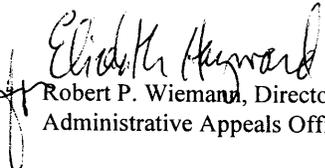
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

  
Robert P. Wieman, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director did not contest that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

According to 8 C.F.R. § 103.3(a)(2)(i), an appeal must be filed with the office where the unfavorable decision was made within 30 days after service of the decision. 8 C.F.R. § 103.5a(b) states that whenever a person is required to act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. The appeal was filed on June 21, 2002, four months after the decision was rendered. According to the pertinent regulations, the appeal was not timely filed.

While the petitioner asserts that the delay was due to ineffective assistance of counsel, 8 C.F.R. § 103.3(a)(2)(v)(B) states that an appeal that is not filed within the time allowed must be rejected as improperly filed. Nevertheless, 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. While 8 C.F.R. § 103.5(a)(1)(i) provides that a motion must also be filed within 30 days, it excuses the failure to do so if the party filing the motion demonstrates that the delay was reasonable and beyond the control of the petitioner or applicant.

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. 8 C.F.R. § 103.5(a)(3) requires that 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 bureau policy. Such a motion must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

According to 8 C.F.R. § 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding. Because, in this case, the disputed decision was rendered by the director, the AAO has no jurisdiction over this motion and the case must be remanded to the director for a decision pursuant to the regulations governing motions to reopen.

Should the director determine that the appeal constitutes a motion to reopen or reconsider, the director may wish to review his determination that the petitioner holds an advanced degree and that the position of general manager requires any degree. In the absence of an advanced degree

or its equivalent, the petitioner would need to demonstrate exceptional ability pursuant to 8 C.F.R. § 204.5(k)(3)(ii).

**ORDER:** The petition is remanded to the director for further action in accordance with the foregoing. In the event that a new decision is rendered which is adverse to the petitioner, the decision is to be certified to the Administrative Appeals Office for review.