

PUBLIC COPY

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

BS

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



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



FILE: [REDACTED]
SRC 01 229 56565

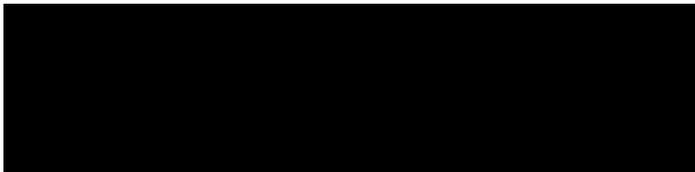
Office: VERMONT SERVICE CENTER

Date: **JAN 21 2004**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Texas Service Center. On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the case for further action. The director reopened the petition and again denied it. The matter is now before the AAO on appeal. The appeal will be rejected as untimely filed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time of filing on July 9, 2001, the petitioner stated: "At the present, [the beneficiary] holds the position of Director of International Sales with this company and is being promoted to that of Manager in our Recycling Division..." 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 found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but 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.

8 C.F.R. § 103.3(a)(2)(i) states:

Filing appeal. The affected party shall file an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by Sec. 103.7 of this part. The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

8 C.F.R. § 103.3(a)(2)(v)(B) states:

Untimely appeal.

(1) *Rejection without refund of filing fee.* An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

(2) *Untimely appeal treated as motion.* If an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) of this part or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The petition was denied on June 13, 2003. The petitioner was allowed 30 days to file an appeal, plus three additional days for mailing, pursuant to regulations at 8 C.F.R. § 103.3(a)(2) and 8 C.F.R. § 103.5a(b).

The petitioner submitted the Form I-290B, Notice of Appeal, to the Service Center on July 10, 2003. However, the appeal was not accepted because it had not been signed by either counsel or the petitioner. On July 11, 2003, the Service Center issued a notice rejecting the appeal and requesting that the petitioner or counsel sign the Form I-290B in the appropriate place. On July 21, 2003, the petitioner submitted a properly signed Form I-290B along with the correct fee.

The petitioner's appeal in this case was not properly filed until July 21, 2003, more than thirty-three days subsequent to the denial of the petition. Because the appeal has not been timely filed, it must be determined whether the appeal should be treated as a motion pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. Here, counsel simply repeats previous assertions and re-submits a copy of a letter from the petitioner dated May 22, 2003. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In this matter, the petitioner has failed to provide any new facts or relevant evidence that supports a motion to reopen.

The May 22, 2003 letter describes the beneficiary's current job duties, but it does not establish the extent to which his work has had a measurable national impact. *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), indicates that while education and pro bono legal services are in the national interest, the impact of an individual teacher or lawyer would be so attenuated at the national level as to be negligible. We find such reasoning applicable to the beneficiary's managerial position as well. In this case, the beneficiary's impact as a manager of his company's grease recycling division would generally be limited to the producers and buyers that his company directly serves. Moreover, the record contains no objective evidence showing that the beneficiary's past work was of greater benefit than that of others in the recycling industry. While beneficiary's current work may benefit various business endeavors undertaken by his employer, his ability to impact the industry beyond his company's projects has not been demonstrated. The performance of managerial services for a given employer is of interest mainly to that particular employer. The petitioning entity's business interests may extend beyond the Southeastern United States, but it has not been shown that the beneficiary is recognized throughout his industry as an innovator or leader in business recycling processes.

According 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 CIS policy. A motion to reconsider a decision on a petition must also, when filed, establish that the decision was incorrect based on the evidence of record at the time of the initial decision. In this matter, the petitioner has failed to specifically identify any erroneous conclusion (supported by evidence contained in the record) that demonstrates the director erred in analyzing the documentation presented by the petitioner. Nor does counsel offer a clear reason for reconsideration or any meaningful analysis of a precedent decision to establish that the director's decision was based on an incorrect application of law or CIS policy.

Counsel states:

It is clear that the petitioner initially sponsored the beneficiary in obtaining a classification as a non-immigrant (H1-B) simply because of its immediate need and the inability to obtain U.S. workers with the education, training and experience along with the specific knowledge of Latin American importers, exporters or bankers.

It is also noted that the employer's failure to find qualified U.S. workers to fill a critical position further supports the argument that the beneficiary does in fact have superior credentials...

Pursuant to *Matter of New York State Dept. of Transportation, supra*, a shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. Counsel's assertions regarding the petitioner's "failure to find U.S. workers to fill a critical position" only strengthen the director's conclusion that the beneficiary should be subject to the labor certification process. After reviewing the untimely appeal, we conclude that it contains no substantive arguments or evidence to establish that the director's decision was based on an incorrect application of law or that the decision was inconsistent with the guidelines set forth in the above precedent.

As the appeal was untimely filed and does not meet the requirements of a motion to reopen or reconsider, the appeal must be rejected.

ORDER: The appeal is rejected.