

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



FILE: SRC 03 109 51558 Office: TEXAS SERVICE CENTER Date: **NOV 03 2004**

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)

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The director dismissed a subsequent motion to reopen as late. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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), a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a software consultant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. In a decision dated August 25, 2003, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On October 3, 2003, the director received the petitioner's motion to reopen with fee. The director denied the motion as untimely, concluding that it was submitted after the period defined in the regulations and the petitioner had not demonstrated "that the delay in filing was reasonable and beyond the control of the petitioner."

The regulation at 8 C.F.R. § 103.5(a)(1)(i), states that a motion must be filed within 30 days of the decision that the motion seeks to reopen or reconsider. The regulation at 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. Failure to file the motion before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. 8 C.F.R. § 103.5(a)(1)(i).

On appeal, counsel asserts that the motion was not untimely and, even if considered untimely, the delay was reasonable and beyond the control of the petitioner. Counsel correctly notes that the 33<sup>rd</sup> day was September 27, 2003, a Saturday. Counsel asserts that the motion was ready on that day, but that the post office was not open for counsel to obtain a receipt as proof of filing. Thus, counsel waited until Monday, September 29, 2003, to mail the motion.

The regulation at 8 C.F.R. § 1.1(h) provides:

The term "day" when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

As the 33<sup>rd</sup> days was a Saturday, the motion was not due until the following Monday, September 29, 2003. While service by CIS is complete upon mailing, 8 C.F.R. § 103.5a(b), the filing date of an application filed with CIS is the date it is received by the appropriate office. *See generally* 8 C.F.R. § 103.2(a)(7). No regulatory provision indicates that CIS must accept the postmark date as the date of filing for motions. As stated above, the filing date of the motion before the director was October 3, 2003, four days after the motion was due. Thus, we concur with the director that the motion was untimely.

The motion filed with the director did not include any explanation for the motion being untimely, even though, being mailed on the due date, it would clearly be untimely. The director was under no obligation to "ascertain [the] reasons of delay," as claimed by counsel. Based on the record before him, the director did not err in determining that the delay was not reasonable and beyond the control of the petitioner.

On appeal, counsel asserts that the motion was "ready" on September 27, 2003. Counsel continues:

In this case, the delay was totally reasonable. The [U.S.] Postal Service [does] not open on Saturdays. If the Appellant had filed the Motion on September 27, 2003 (a Saturday), it would have been filed without a certified receipt. Typically, [CIS] does not enter the filing immediately into its system. It could take another week or so before [CIS] would enter the filing into its system. In that case, the filing date would be way beyond September 27, 2003, and Appellate would have nothing to prove that it had properly filed the Motion. Filing the case on the following Monday, although late by 2 days, is a reasonable [delay] under the circumstance.

Appellant definitely had no control over the [U.S.] Postal Service. It did the best it could under the circumstances to file the Motion on time. [CIS] abused its discretion by not granting the Motion under the circumstances.

Counsel's assertions are not persuasive. First, as stated above, the Motion was due to be *received* on September 29, 2003, not *mailed* on that date. Second, whether or not the delay of four days might be considered reasonable, it was not beyond the control of the petitioner. The petitioner had 33 days in which to file the Motion. The Motion is considered filed as of the date it is received, in this case October 3, 2003, not the date it is entered into the system, in this case October 4, 2003. Thus, concerns regarding when the Motion might get entered into the system are groundless. Regardless, if counsel or the petitioner was concerned about delays at the Service Center, then it is the responsibility of counsel or the petitioner to have the Motion "ready" in time to be sent return receipt requested prior to the due date. Counsel provides no explanation for why the Motion was not "ready" prior to September 27, 2003. Finally, while the hours of the U.S. Postal Service may be beyond the petitioner's control, the knowledge of those hours is widely available and could have been taken into consideration when preparing the Motion.

It remains, the Motion is stamped by the Service Center as received on October 3, 2003, four days late. The petitioner has not overcome the director's determination that the delay was reasonable and beyond the control of the petitioner.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.