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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC-01-081-52455 Office: VERMONT SERVICE CENTER

Date: JUN 28 2005

IN RE: Petitioner:
Beneficiary:

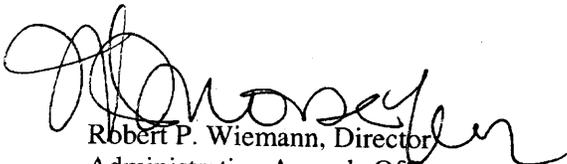


PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 immigrant visa petition was denied by the Director, Vermont Service Center, and an appeal was dismissed by the Administrative Appeals Office (AAO) on appeal. A subsequent motion to reopen was rejected by the AAO. The petition is again before the AAO on a motion to reopen. The motion will be rejected.

The petitioner is a restaurant. It seeks to employ the beneficiary as a cook, for international cuisine.

The director denied the petition in a decision dated January 9, 2002, on the grounds that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In a decision dated September 4, 2002, the AAO dismissed the appeal on the grounds that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period.

The petitioner filed a motion to reopen which was received by CIS on October 4, 2002. That motion was rejected for lack of the proper filing fee.

The motion to reopen was resubmitted by the petitioner and was received by CIS on October 30, 2002. The motion was then rejected by the AAO as untimely, which cited the regulation at 8 C.F.R. § 103.5(a)(1)(i). In its decision, the AAO erroneously stated that the date of its initial decision had been August 4, 2002. That date is stamped on the copy of the decision which was sent to the petitioner, and which was then in turn submitted by the petitioner with its motion to reopen. However, the file copy of the AAO's initial decision shows white correction fluid in the space for the date, over which has been stamped the date September 4, 2002. Therefore the date of the initial AAO decision was September 4, 2002, not August 4, 2002.

In rejecting the motion to reopen the AAO stated that the motion had been filed on October 4, 2002, apparently overlooking the fact that the initial attempted filing of the motion had been rejected by CIS for lack of the proper filing fee, whereas in fact the motion to reopen was not properly filed until October 30, 2002. The AAO stated that the motion had been filed 60 days after the AAO decision, calculating from August 4, 2002 until October 4, 2002. However, the proper calculation of timeliness should have been from September 4, 2002 until October 30, 2002, a period of 57 days. Despite the AAO's errors in calculation, its decision to reject the motion was correct, since even using a correct calculation, the motion was untimely. See 8 C.F.R. §§ 103.5(a), 103.5a(b).

The petitioner was represented by counsel in the proceedings before the director, in the notice of appeal, and in the first motion to reopen.

The instant motion to reopen was filed by new counsel and was received by CIS on March 15, 2004. New counsel submits a Form G-28 Notice of Entry of Appearance as Attorney or Representative dated February 17, 2004 on behalf of the beneficiary, co-signed by the beneficiary in the block at the bottom of the form for the signature of the person consenting.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) states:

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

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Concerning motions to reopen or reconsider, the regulation at 8 C.F.R. § 103.5(a)(iii)(A) states that such a motion must be “[i]n writing and signed by the affected party or representative of record, if any”

The petitioner has not executed a Form G-28 evidencing its consent to be represented by counsel in the instant motion. Therefore the motion is construed as filed by the beneficiary, who has no legal standing in this matter. Thus the motion has not been properly filed and must be rejected.

ORDER: The motion is rejected.

6-22-05/ [REDACTED] I/EAC0108152455.E31