



U.S. Citizenship
and Immigration
Services

DI

[Redacted]

FILE: SRC 03 071 50156 Office: TEXAS SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)

ON BEHALF OF PETITIONER:

[Redacted]

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

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 director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The petition shall be remanded back to the director to treat the appeal as a motion.

The petitioner is an automotive retailer that seeks to employ the beneficiary as an automotive service technician – BMW. The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation and that the beneficiary is not qualified to perform the services of a specialty occupation.

An affected party has 30 days from the date of an adverse decision to file an appeal. 8 C.F.R. § 103.3(a)(2)(i). If the adverse decision was served by mail, an additional three days is added to the prescribed period. 8 C.F.R. § 103.5a(b). The record reflects that the director sent her decision of March 3, 2003 to the petitioner and to counsel at their addresses of record. The AAO received the appeal 59 days later on May 1, 2003. Therefore, the appeal was untimely filed.

An appeal that is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). If, however, an untimely appeal meets the requirements of a motion to reopen or reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On appeal, counsel submits evidence that satisfies the requirements of a motion. Therefore, the petition will be remanded to the director to treat the appeal as a motion. The director may request any additional evidence deemed necessary to assist her with the determination. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The petition is remanded to the director for entry of a new decision.