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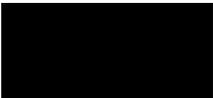
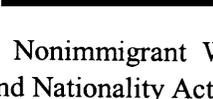
**U.S. Citizenship
and Immigration
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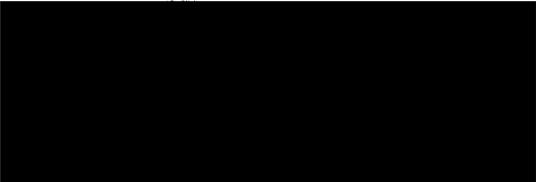


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FILE: WAC 04 151 51622 Office: CALIFORNIA SERVICE CENTER Date: FEB 16 2005
WAC 02 027 56743

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:


INSTRUCTIONS:
This is the decision of the Administrative Appeals Office in your case. All materials have been returned
to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner is a division of S.Com Plc, which supplies telecommunication and information technology professionals to clients. The petitioner seeks to employ the beneficiary as a telecommunications engineer and to extend his classification as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, on February 6, 2002, on the grounds that the petitioner was not the beneficiary's employer, failed to establish its qualifications as an H-1B agent, and was not in compliance with its Labor Condition Application. The petitioner filed a timely appeal, which was dismissed by the AAO on December 3, 2003.

On May 3, 2004 counsel filed a motion to reopen under 8 C.F.R. § 103.5, requesting a new decision "in light of new facts and documentary evidence that were not presented" in the prior proceeding. The regulation provides, in pertinent part, as follows:

[W]hen the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding . . . Any motion to reopen a proceeding . . . filed by an applicant or petitioner 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 [Citizenship and Immigration Services] 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). Counsel requests that the AAO exercise its discretion to reopen despite the fact that more than 30 days passed between the time of the decision and the filing of the motion. Counsel asserts that the petitioner's previous representative, IT Management Consultants (ITMC), was not a law firm and mismanaged the response to the director's request for evidence and the appeal of the service center's decision. In addition, counsel states that the AAO's decision was not sent to ITMC but rather directly to the petitioner, whose management staff was new and did not understand the significance of the decision. When the petitioner asked counsel to take over the case, counsel explains, ITMC's records were not immediately available because they were in transit from the United Kingdom to the United States. Nor were the petitioner's records of the case readily available, according to counsel, because the petitioner had recently changed location from California to Florida and the records were in storage. For all of these reasons counsel asserts that the petitioner was unable to provide counsel with the necessary documentation to file an appeal within 30 days.

Counsel cites a decision by the AAO in 1999 in which a late-filed motion to reopen was granted after the AAO found the delay was reasonable. In that case the filing delay was due to the petitioner's efforts to obtain and translate necessary evidence from the People's Republic of China. Though counsel claims that case is analogous to the instant petition, a crucial difference appears to be that the evidence in that case was outside the petitioner's control until it was received from China, whereas every document bearing upon the instant case was always in the possession and control of the petitioner and/or its original representative. The AAO's decision in the cited case is not a persuasive guideline with respect to the instant petition. In the final analysis, every motion to reopen must be considered on its own merits.

As specified in the regulation, excusing the 30-day filing deadline for a motion to reopen is warranted if the record demonstrates that the delay was “reasonable” and “beyond the control” of the petitioner. Neither condition has been met in this case. It was the petitioner’s choice to be represented initially by ITMC, rather than by an attorney. Further, the failure of the petitioner’s new management to understand the significance of the AAO’s decision on the appeal was not a “reasonable” excuse for neglecting to file a motion to reopen within 30 days because management could have *immediately* (1) contacted ITMC and forwarded a copy of the decision or (2) contacted present counsel for advice on how to proceed. The thrust of counsel’s argument appears to be that the delay in filing the motion was caused primarily by the fact that *both ITMC’s and the petitioner’s records of the case* were in transit or in storage and thus unavailable at the precise time of the 30-day filing window for a motion to reopen. Moreover, counsel has not explained why the motion to reopen could not have been filed much closer to the 30-day deadline, rather than five full months after the appeal was denied. The AAO is not persuaded that the delay in filing the motion to reopen was “reasonable” or “beyond the control” of the petitioner, as the petitioner is required to demonstrate under the regulation. Accordingly, the AAO will not exercise its discretion under 8 C.F.R. § 103.5(a) to waive the 30-day filing deadline and reopen the case.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion to reopen will be dismissed.

ORDER: The motion to reopen is dismissed.