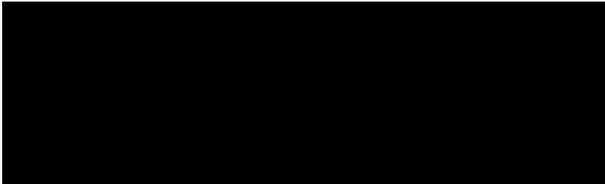


Analysing data collected to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D
I

FILE: WAC 03 102 51494 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2005

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

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:
[Redacted]

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.

for Michael T. Kelly
Robert P. Wiermann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner filed an appeal, but it was rejected by the AAO on the ground that it was not timely filed. The matter is now before the Administrative Appeals Office (AAO) on a motion to reconsider. The motion will be dismissed. The petition will be denied.

The petitioner is a restaurant chain. It seeks to employ the beneficiary as a business manager/financial analyst for food and beverage services and to classify him 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 service center director denied the petition on the ground that the record failed to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner appealed. As provided in 8 C.F.R. § 103.3(a)(2)(i), an appeal together with the fee specified in 8 C.F.R. § 103.7 must be filed at the service center within 30 days of the date the decision was served. Three additional days are allowed for an appeal if the notice of decision was served by mail. *See* 8 C.F.R. § 103.5a(b). Since the notice of decision was mailed to the petitioner in this case, a 33-day appeal period applies. Furthermore, if the last day of the appeal period falls on a weekend or a holiday, the deadline is extended until the next working day. *See* 8 C.F.R. § 1.1(h).

The service center decision was issued on December 11, 2003. The deadline for filing an appeal was 33 days later – January 13, 2004 (a Tuesday). The petitioner’s appeal bears a receipt stamp of the service center dated January 16, 2004. Noting that this date was 36 days after the decision was issued, the AAO rejected the appeal as untimely filed.

Counsel has filed a timely motion to reconsider, asserting that the petitioner’s appeal was timely filed. Upon consideration of counsel’s motion and all the accompanying documents, the AAO determines that the petitioner has not overcome the grounds for the AAO’s previous decision.

Counsel points out that the notice of appeal was sent to the service center by certified mail from South Pasadena on January 8, 2004, but not stamped as received in Laguna Niguel until January 16, 2004. The certified mail receipt is stamped January 20, 2004. Counsel also submits a map showing the distance between counsel’s office and the California Service Center to be around 52 miles. According to counsel, the post office has confirmed that is “impossible” that it would take eight days to deliver a piece of certified mail from one part of Greater Los Angeles to another. Counsel implies that the appeal must have been received by the service center prior to the filing deadline, notwithstanding the later date of the receipt stamp, and requests that the appeal be treated as timely filed. The undocumented communication between counsel’s office and a local post office official has no evidentiary weight. Mere assertions by counsel will not satisfy the petitioner’s burden of proof. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel’s motion to reconsider cannot prevail. The regulations expressly provide that filing is accomplished upon proper receipt of the subject document by Citizenship and Immigration Services (CIS), not its mailing by the petitioner or counsel.

An application or petition received in a [CIS] office shall be stamped to show the *time and date of actual receipt* and . . . shall be regarded as properly filed when so stamped, if

it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted.”

8 C.F.R. § 103.2(a)(7). (Emphasis added.) The date stamped by the service center on the envelope containing the petitioner’s appeal is January 16, 2004, and a penned notation next to the date states “a.m.” A Form I-797 sent by the service center to counsel likewise states that the appeal was received on January 16, 2004. There is no evidence in the record that the appeal was received by the service center before January 16, 2004.

Thus, the record does not establish that the petitioner’s appeal was filed by the regulatory deadline of January 13, 2004. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) provides that “[a]n appeal which is not filed within the time allowed must be rejected as improperly filed.”

For the reasons discussed above, the petitioner has not established that the AAO’s rejection of the appeal was based on an incorrect application of law or CIS policy, as required under 8 C.F.R. § 103.5(a)(3) for the AAO to grant the motion to reconsider.

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.

ORDER: The motion is dismissed. The previous decision of the AAO, dated September 13, 2004, is affirmed.