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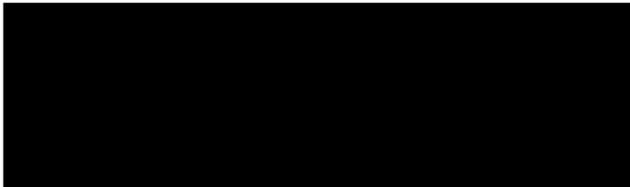
U.S. Department of Homeland Security  
20 Massachusetts Ave, NW, Rm. 3000  
Washington, DC 20539



U.S. Citizenship  
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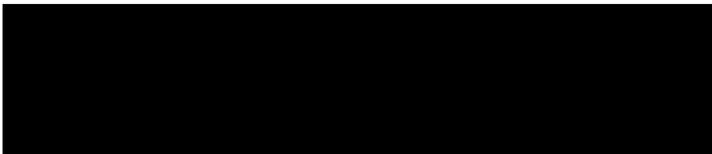


FILE: WAC 04 171 52987 Office: CALIFORNIA SERVICE CENTER Date: JUN 25 2007

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:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The petitioner appealed the decision. On August 2, 2005, the Administrative Appeals Office (AAO) rejected the appeal as untimely filed. Counsel for the petitioner subsequently filed a motion to reopen the matter on August 15, 2005 and on September 14, 2005. In each instance the director denied the motion to reopen. On November 8, 2005, counsel for the petitioner appealed the director's October 17, 2005 motion decision to the AAO. The appeal will be dismissed. The petition will be denied.

The petitioner is a federal credit union that seeks to employ the beneficiary as a service support specialist. The petitioner endeavors to classify the beneficiary 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).

On appeal of the director's motion decision, counsel for the petitioner asserts that the initial Form I-290B, Notice of Appeal was mailed five days prior to the due date of a timely filed appeal. Counsel asserts that the receipt of the Form I-290B after the due date should be excused as the delay in mailing time should be considered unusual circumstances beyond the control or expectation of the petitioner. Counsel cites 8 C.F.R. § 248.1 in support of his assertion.

8 C.F.R. § 248.1(b) states:

Except in the case of an alien applying to obtain V nonimmigrant status in the United States under § 214.15(f) of this chapter, a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service, and without separate application, where it is demonstrated at the time of filing that:

- (1) The failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances.

The issue in question is not that of the effect of a late filing with regard to the beneficiary's authorized status. The Form I-129 was received on May 28, 2004 and the beneficiary's F-1 status expired on June 7, 2004. Therefore, the beneficiary was in valid F-1 status at the time that the initial petition was filed. Counsel does not clarify how 8 C.F.R. § 248.1 applies to this appeal.

The AAO does not consider the delay an extraordinary or an unusual circumstance beyond the control of the applicant or the petitioner. Neither counsel nor the petitioner presents any evidence for CIS to consider regarding the delay in timely filing the initial appeal. 8 C.F.R. § 103.5(a)(1)(i). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the appeal will be dismissed.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

Furthermore, the AAO notes the correct filing fee of \$385.00 was not included with the appeal and under 8 C.F.R. § 103.2(a)(7)(i) an application or petition which is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed.

**ORDER:** The appeal is dismissed. The petition is denied.