



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

File: EAC 01 109 53289

Office: Vermont Service Center

Date 6 NOV 2001

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen 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 the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected pursuant to 8 C.F.R. 103.3(a)(2)(v)(B)(1) as untimely filed.

Pursuant to 8 C.F.R. 103.3(a)(2)(i), an affected party has 30 days after service of a decision to file an appeal with the office that made the unfavorable decision. The record reflects that the director sent his decision of March 27, 2001 to the petitioner and to counsel at their addresses of record; the Service received the appeal 34 days later on May 1, 2001. Therefore, the appeal was untimely filed.

The regulation at 8 C.F.R. 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. 103.3(a)(2)(v)(B)(2), however, states that if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. 103.5(a)(2) or a motion to reconsider as described in 103.5(a)(3), the appeal must be treated as a motion and a decision must be made on the merits of the case.

8 C.F.R. 103.5(a) states in pertinent part:

(2) *Requirements for motion to reopen.* 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.

(3) *Requirements for motion to reconsider.* A motion to reconsider must 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 and Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On the form I-290B which was filed May 1, 2001, counsel stated that a brief and/or evidence would be submitted to the Administrative Appeals Unit within 30 days. Approximately nine months have passed since counsel made this statement and no additional information has been provided in support of the appeal. Therefore, the record is considered complete.

On the appeal form, counsel argues that there is a ten-month peak season and also a two-month off-season during which, he asserts, a supplemental work force is not needed. However, counsel does not provide any new facts to be considered, state a clear reason why the denial should be reconsidered, or provide any precedent

decisions to establish that the director's decision is based on an incorrect application of law or Service policy. For these reasons, the appeal will not be treated as a motion to reopen or reconsider and must, therefore be rejected.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is rejected as untimely filed..