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U.S. Department of Justice

Immigration and Naturalization Service

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



**PUBLIC COPY**

File: EAC 01 050 51615 Office: Vermont Service Center Date: 06 NOV 2004

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

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

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 which 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 which 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 which 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, Nebraska Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on a motion to reopen and reconsider. The motion will be dismissed as untimely filed.

The petitioner is a wholesale distributor of gasoline which seeks to employ the beneficiaries as gas pumping station operators for a period of one year. The certifying officer of the Department of Labor declined to issue temporary labor certification because she determined that the petitioner has not established a temporary need for the beneficiary's services. The director concurred with the determination of the certifying officer.

Counsel argues that the motion to reopen be considered timely although it was untimely filed.

8 C.F.R. 103.5(a)(1)(i) states in pertinent part that any motion to reopen a proceeding before the Service must be filed within 30 days of the decision that the motion seeks to reopen. Further, 8 C.F.R. 103.5(a)(4) states, in pertinent part, that the Service shall dismiss any motion that does not meet applicable requirements.

The record reflects that the Associate Commissioner's decision of April 27, 2001 was sent to the petitioner and counsel at their addresses of record. The motion to reopen was received by the Service 48 days later on June 14, 2001. Counsel asserts that the motion was received on May 20, 2001. However, counsel has provided no evidence in support of his assertion. The motion to reopen and reconsider was untimely filed. For this reason, the motion is dismissed.

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 motion is dismissed.