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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 MASS. 3/F  
Washington, D.C. 20536

PU



AUG 28 2003

File: EAC 02 041 54146 Office: VERMONT SERVICE CENTER Date:

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:

SELF REPRESENTED

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prevent unauthorized  
invasion of personal privacy

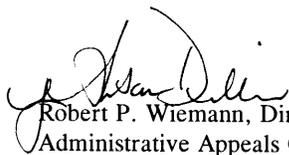
INSTRUCTIONS:

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1) as untimely filed.

The petitioner operates a multiple store complex involved in the retail sale of gas/gas products, food products and automobile repair services. It has nine employees and a gross annual income of \$4,000,000. The petitioner seeks to employ the beneficiary as an assistant manager for a period of three years. The director determined that the proffered position is not a specialty occupation, and that the beneficiary is not qualified to perform the services of a specialty occupation.

An affected party has 30 days after service of a decision to file an appeal with the office that made the unfavorable decision. 8 C.F.R. § 103.3(a)(2)(i). The record reflects that the petitioner was served with the director's decision on May 6, 2002. The petitioner then appealed the director's decision. That appeal was initially received by the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (the Bureau), on June 5, 2002. That filing was, however, returned to the petitioner for failure to submit the appropriate filing fee. The petitioner then resubmitted the appeal with the appropriate filing fee. That appeal was received by the Bureau on June 24, 2002, 49 days after service of the director's decision. The appeal was, therefore, not timely filed.

An appeal that is not filed within the time allowed must be rejected as improperly filed. If however, the untimely appeal meets the requirements of a motion to reopen as set forth in 8 C.F.R. § 103.5 (a) (2), or a motion to reconsider as described in 8 C.F.R. § 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. § 103.3(a)(2)(v)(B)(2).

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. 8 C.F.R. § 103.5 (a)(2). 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 or Bureau policy. 8 C.F.R. § 103.5 (a)(3). A motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On appeal, the petitioner asserts that the subject position is a specialty occupation and that the beneficiary's education and work experience qualify him to perform the services of that

position. The petitioner's appeal neither presents new facts to be considered, nor cites any precedent decision to establish that the director's denial was based on an incorrect application of law or Bureau policy. The appeal cannot, therefore, be treated as a motion to reopen or reconsider, and must 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.