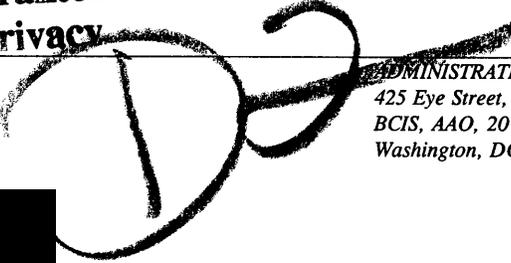


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**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

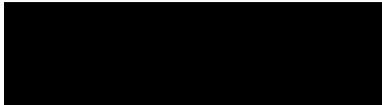
ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536



File: LIN 02 197 54676 Office: NEBRASKA SERVICE CENTER Date:

DEC 04 2003

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

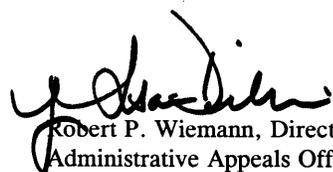
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and 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 is a private citizen who desires to extend the H-2B visa of the beneficiary who was employed by the petitioner as a nanny. According to the petitioner, the beneficiary received her H-2B visa and entered the United States only a month prior to the expiration of the original H-2B visa petition. The director determined that prior to the filing of the instant petition, the petitioner had not submitted a Department of Labor certification on Form ETA 750 or a statement why the Department of Labor could not certify the nanny position. Based on this documentary omission, the petitioner had not fulfilled the regulatory requirements for filing the H-1B petition.

An affected party has 30 days from the date of an adverse decision to file an appeal. 8 C.F.R. § 103.3(a)(2)(i). If the adverse decision was served by mail, an additional three days is added to the proscribed period. 8 C.F.R. § 103.5a(b). The record reflects that the director sent his decision of February 20, 2003, to the petitioner at her address of record. The petitioner initially submitted an appeal on March 19, 2003, which was not processed and returned to the petitioner for lack of a current check or money order. The petitioner resubmitted the appeal and Citizenship and Immigration Services (CIS) received it thirty-nine days later on April 2, 2003. Therefore, the appeal was untimely filed.

An appeal that is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). If, however, an untimely appeal meets the requirements of a motion to reopen or reconsider, 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: (1) 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; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On appeal, the petitioner asserts that neither she nor the beneficiary should not be held accountable if the requested labor

certification was not certified prior to May 30, 2002, the date when the initial petition was submitted. The petitioner asked CIS to consider the fact that the original labor certification for the position was certified from December 1, 2002 to September 30, 2003. The petitioner does not submit evidence relating to, or presents any statements in rebuttal to, the director's finding that she had not submitted a certified ETA Form 750 prior to the filing of the instant petition.

As the petitioner does not present new facts to be considered, or provides any precedent decisions to establish that the director's denial was based on an incorrect application of law or CIS policy, the appeal will not be treated as a motion to reopen or reconsider and will, therefore, be rejected.

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 sustained that burden.

ORDER: The appeal is rejected as untimely filed.