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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



JAN 13 2003

File: EAC-01-234-59769 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)

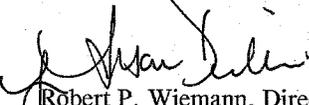
IN BEHALF OF PETITIONER: SELF-REPRESENTED

PUBLIC COPY

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, 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.

The petitioner is a skilled nursing facility with 500 employees and a stated gross annual income of \$15 million. It seeks to employ the beneficiary as a registered nurse for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner's administrator submits a statement.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 103.3(a)(2)(i) states:

Filing appeal. The affected party shall file an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by section 103.7 of this part. The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

8 C.F.R. 103.3(a)(2)(v)(B) states:

Untimely appeal--(1) Rejection without refund of filing fee. An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

The record indicates that the petition was denied on January 16, 2002. The record further indicates that the appeal was filed on March 11, 2002, more than 54 days after service of the decision. Therefore, the appeal was not timely filed.

As noted above, 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. 103.3(a)(2), or a motion to reconsider as described in 8 C.F.R. 103.3(a)(3), the appeal must be treated as a motion and a decision 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 provided 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 decision to establish that the decision was based on an incorrect application of law or 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 appeal, the petitioner's president states that it cannot fill vacant nursing positions because of a shortage of qualified recruits. However, this statement standing alone cannot be considered as sufficient to identify any erroneous conclusion of law or statement of fact.

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

In visa petition proceedings, the burden of proof 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.