

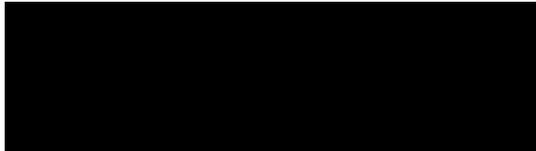
PUBLIC COPY

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

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

DD

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



FILE: WAC-01-202-56943 OFFICE: CALIFORNIA SERVICE CENTER

DATE: **NOV 05 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)

IN 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 Citizenship and Immigration Services (CIS) 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 of the California Service Center and 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 charitable religious organization that employs ten persons and has a gross annual income of \$1,200,000. It seeks to employ the beneficiary as a pastoral/ministerial aide. The director denied the petition because: (1) the petitioner failed to submit a certified labor condition application (LCA), filed with the U.S. Department of Labor (DOL), with the nonimmigrant visa petition; and (2) the position is not a specialty occupation.

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 her decision of March 29, 2002 to the petitioner at its address of record. Citizenship and Immigration Services (CIS) received the appeal 52 days later on May 20, 2002.¹ 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 CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

¹ The petitioner first filed the appeal without the correct filing fee and the director returned the appeal to the petitioner. The petitioner filed the appeal again, however without an originally executed Form I-290B, and the director returned the appeal to the petitioner. All AAO appeals must be filed on an originally executed Form I-290B with the appropriate filing fee in order to be considered properly filed and accepted for processing. According to 8 CFR § 103.2(a)(7)(i), an application or petition will be date stamped as received when properly filed.

8 C.F.R. § 103.5(a)(3).

On appeal, the petitioner submits another position description that reiterates its past description of the proffered position and does not constitute new facts for consideration. Additionally, the petitioner presents a certified labor condition application (LCA). However, the LCA is not probative new evidence because it was filed and certified after the filing of the petitioner's nonimmigrant visa petition. The regulations at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), which govern general requirements for nonimmigrant visa petitions involving a specialty occupation, states the following: "Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed."

In June 2001, the petitioner filed the nonimmigrant visa petition. In August 2001, the director requested from the petitioner evidence of filing an LCA with the Department of Labor (DOL). In her request for evidence, the director stated, "the certification from the Secretary of Labor will be a copy of the original [labor condition application] filed by the petitioner with the DOL. The certification will include the signature stamp of DOL['s] certifying officer, validity dates, ETA case number and the filing date affixed to the form."

The petitioner did not provide a certified LCA in response to the director's request for evidence, and the case was subsequently denied by the director. On appeal, the petitioner submits an LCA certified by the DOL on April 14, 2002. The LCA indicates that the petitioner signed it on April 11, 2002. There is no evidence in the record that proves that the petitioner filed an LCA with the DOL for the nonimmigrant visa petition prior to the nonimmigrant visa petition's filing date. The facts indicate that the petitioner filed the LCA long after it filed the nonimmigrant visa petition. The petitioner has failed to establish that it filed an LCA with the DOL prior to its filing the nonimmigrant visa petition. Thus, the certified LCA submitted on appeal does not constitute new and probative facts for consideration.

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.