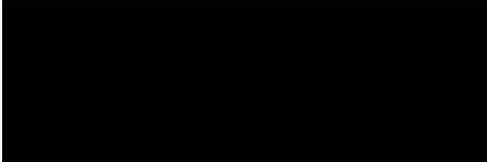


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Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



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FILE: LIN 02 240 52055 Office: NEBRASKA SERVICE CENTER

Date: APR 14 2004

IN RE: Petitioner:
Beneficiary:



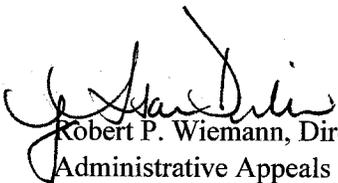
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director to treat the appeal as a motion.

The petitioner is in the motel industry. It seeks to employ the beneficiary as an assistant manager/trainee, and endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to 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). The director denied the petition on the ground that the offered position did not qualify as 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-day period is added to the proscribed period. 8 C.F.R. § 103.5 a(b). The record reflects that the director sent his decision of January 4, 2003, to the petitioner, and petitioner's counsel, at their addresses of record. The appeal was received by Citizenship and Immigration Services (CIS) 59 days later on March 4, 2003. Therefore, the appeal was untimely.

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. 8 C.F.R. § 103.5 (a)(3).

On appeal, counsel acknowledges that the appeal is late, indicating that he was out of the country the entire month of January, 2003, and until February 6, 2003. Though counsel states that he was in India caring for his father, there is nothing in the record to corroborate this assertion. It is further unclear why counsel waited until March 4, 2003, to file his appeal if he returned to the country on or about February 6, 2003. The appeal would have been timely filed if received by CIS on or before February 7, 2003. The appeal shall not be accepted as timely filed.

Counsel has, however, submitted a brief in support of his appeal. The brief satisfies the requirements of a motion. Therefore, the petition will be remanded to the director to treat the appeal as a motion. The director may request any additional evidence deemed necessary to assist him with the determination.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The petition is remanded to the director for entry of a new decision.