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U.S. Citizenship
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Services

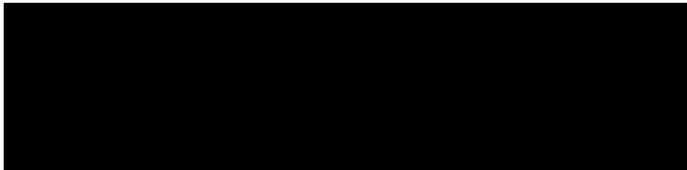
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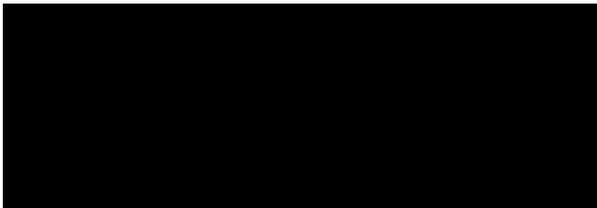
FILE: WAC 02 106 51405 Office: CALIFORNIA SERVICE CENTER Date:

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:



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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition 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 nursing home that seeks to employ the beneficiary as a recruitment director. The director denied the petition on the bases that the proffered position did not meet the definition of a specialty occupation, and the beneficiary is not qualified to perform the duties of 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 prescribed period. 8 C.F.R. § 103.5a(b). The record reflects that the director sent his decision of September 11, 2002 to the petitioner and to counsel at their addresses of record. CIS received the appeal 34 days later on October 15, 2002. 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. 8 C.F.R. § 103.5(a)(3).

On appeal, counsel submits a brief and the following: (1) the beneficiary's educational evaluation; (2) a job advertisement; (3) a letter from Ancestral Home Health Care Providers, Inc.; and (4) information from the Employment Development Department and the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*).

Counsel's submission of evidence does not satisfy either the requirements of a motion to reopen or a motion to reconsider. Counsel's submitted evidence does not constitute new facts. As previously stated, a motion to reopen must state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. Generally, the new facts must have been previously unavailable and could not have been discovered earlier in the proceedings. See 8 C.F.R. § 1003.2(c)(1). Here, the documents submitted - except for the one job advertisement - are the same documents as previously submitted and considered by the director. Furthermore, the job advertisement in this proceeding has nearly the same educational requirement as the advertisement previously submitted and considered by the director. In addition, counsel's assertions in this proceeding reiterate the same assertions as those previously addressed by the director; namely, that the *Handbook* and Employment Development Department state that a bachelor's degree is required for the proffered position, and that the beneficiary's formal education and work experience qualify her for the proffered position. Thus, the evidence contained in this proceeding is not "new" for the purpose of a motion to reopen.

The evidence also fails to satisfy the requirements of a motion to reconsider. Neither counsel nor the petitioner submits new evidence relating to, or presents any statements in rebuttal to, the director's finding that the proffered position is not a specialty occupation.

As neither counsel nor the petitioner presents 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.