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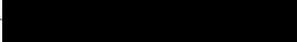
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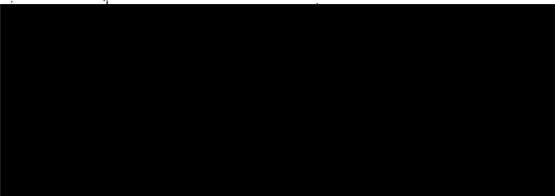
**U.S. Citizenship
and Immigration
Services**



FILE: WAC 02 082 50140 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 2004**

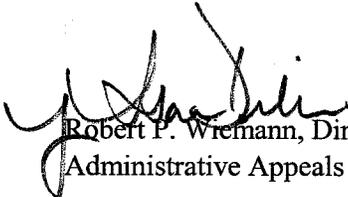
IN RE: Petitioner: 
Beneficiary: 

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. Wriemann, 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 matter will be remanded to the director to treat the appeal as a motion.

The petitioner is a furniture company that seeks to employ the beneficiary as a purchasing agent. In order to employ the beneficiary, the petitioner seeks 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 basis that the proffered position did not meet the definition of a specialty occupation.

An affected party has 30 days from the date of an adverse decision to file an appeal, and the appeal must be filed with the Citizenship and Immigration Services (CIS) office where the unfavorable decision was made. 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. § 103.5a(b).

The record reflects that the director sent his decision of May 27, 2002 to the petitioner and its counsel at their addresses of record. Citizenship and Immigration Services (CIS) received the appeal 35 days later on May 1, 2002. Therefore, the appeal was untimely filed.¹

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 evidence that satisfies the requirements of a motion. Therefore, the matter 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.

¹ As the mailing date of the director's denial of the petition was March 27, 2002, for timely filing CIS would have to have received the petition by Monday, April 29, 2002, which is within 33 days of the mailing of the denial. See 8 C.F.R. §§ 1.1(h) and 103.5a (b). CIS regulations make no allowance for delays in mailing channels, and the postmark of April 18, 2002 is not alone a sufficient basis to overcome the presumption that CIS accurately stamped the date of its receipt as May 1, 2002.