



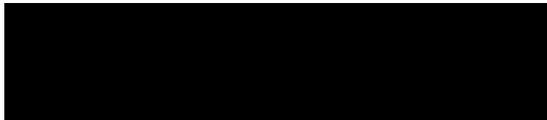
U.S. Citizenship
and Immigration
Services

Handwritten mark resembling a stylized 'B' or '2'



FILE: WAC 02 281 52878 Office: CALIFORNIA SERVICE CENTER Date:

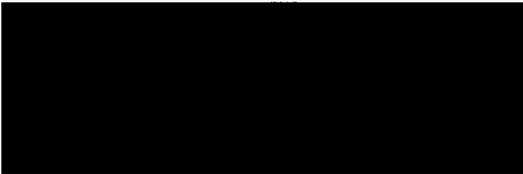
IN RE: Petitioner:
Beneficiary:



SEP 23 2004

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:



PUBLIC COPY

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a manufacturing and food processing company. In order to employ the beneficiary as a bakery sales and operations manager, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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). The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation. The AAO affirmed the director's findings.

An affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider a proceeding before Citizenship and Immigration Services (CIS). 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three-day period is added to the 30-day period. 8 C.F.R. § 103.5a(b). Any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO mailed its decision to the petitioner on April 5, 2004. On May 6, 2004, a date within the time allowed for the filing of a motion, CIS received a Form I-290B (Notice of Appeal) without a brief or evidence. The box at section 2 of the Form I-290B is check marked to indicate that counsel would be sending a brief and/or evidence to the AAO within 30 days, and a brief statement of the reasons for the appeal is entered at section 3.

The AAO received a brief and two exhibits on June 4, 2004, a date within the 30 additional days requested by counsel on the Form I-290B. However, this date was 60 days after the AAO mailed the decision that is the subject of this motion. Neither counsel nor the petitioner presents any evidence for the AAO to consider regarding the delay in filing these documents.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii), pursuant to which a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, does not apply to a motion to reopen or reconsider. CIS regulations contemplate that the matters constituting a motion shall be submitted in one filing (*See* 8 C.F.R. §§ 103.5(a)(2) and (3)), and the regulation governing the time in which a motion must be submitted, 8 C.F.R. § 103.5(a)(1), allows for a late filing only in very limited circumstances. It states, in relevant part:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, 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 Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

The regulation at 8 C.F.R. § 103.5(a)(1) does not allow for an extension of time in order to file a motion to reconsider. This provision allows the AAO to exercise its discretion to excuse a late motion only in the case of a motion to reopen, and then only "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." Neither counsel nor the petitioner demonstrated that the delay was reasonable and beyond the petitioner's control. Consequently, because they were untimely filed, the AAO did not consider the brief and its allied exhibits.

Because the Form I-290B was timely filed, however, the AAO has considered the information that counsel entered at section 3 of the form. Counsel provides only this general and conclusory statement about the basis of the motion:

[CIS] incorrectly classified the position as one that didn't require a Bachelor Degree. Petitioner respectfully disagrees.

The only submission that was timely filed – the Form I-290B – does not constitute a *motion to reopen* as defined by the governing regulation, 8 C.F.R. § 103.5(a)(2), which specifies that 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. Furthermore, counsel's brief statement on the Form I-290B does not satisfy the regulation at 8 C.F.R. § 103.5(a)(3), which requires that a *motion for reconsideration* (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). For these reasons, the motion must be dismissed.

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 met that burden.

ORDER: The motion is dismissed.