

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



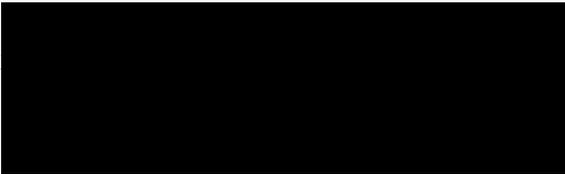
D2

FILE: LIN 03 206 50656 Office: NEBRASKA SERVICE CENTER Date: JUN 30 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 materials have been returned
to the office that originally decided your case. Any further inquiry must be made to that office.

for *Michael T. Kelly*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter was reopened and denied again by the service center director. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be rejected.

The petitioner is a dairy farm. It seeks to employ the beneficiary as an administrative analyst and to classify her 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 for the second time on May 18, 2004, finding that the proffered position does not qualify as a specialty occupation.

As provided in 8 C.F.R. § 103.3(a)(2)(i), an appeal together with the fee specified in 8 C.F.R. § 103.7 must be filed "with the office where the unfavorable decision was made" within 30 days of the date the decision was served. Three additional days are allowed for an appeal if the notice of decision was served by mail. *See* 8 C.F.R. § 103.5a(b). Since the notice of decision was mailed to the petitioner in this case, a 33-day appeal period applies. Furthermore, if the last day of the appeal period falls on a weekend or a holiday, the deadline is extended until the next working day. *See* 8 C.F.R. § 1.1(h).

The service center decision was issued on May 18, 2004 and served by mail. Under the regulations, therefore, the service center was the proper office to receive an appeal and the filing deadline for an appeal was Monday, June 21, 2004. The petitioner's appeal (Form I-290B) bears a receipt stamp showing that it was received by the AAO on June 17, 2004. Thus, the appeal was initially mailed to the wrong office. The AAO returned the appeal to counsel, who subsequently resubmitted it to the service center. The appeal form bears a second stamp showing that it was received by the service center on July 12, 2004. Thus, the petitioner's appeal was filed with the proper office 21 days after the deadline of June 21, 2004. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(I) provides that "[a]n appeal which is not filed within the time allowed must be rejected as improperly filed."¹

¹ Even if the appeal had been timely filed, it would not provide grounds for overturning the director's decision. On the appeal form counsel asserted that the director "erroneously concluded that the position set forth in the petitioner's application does not require a baccalaureate degree." Though counsel indicated that a brief and/or evidence would be submitted to the AAO within 30 days, no such brief or evidence was received thereafter. In a telefax to the AAO on June 14, 2005, counsel stated that he was resubmitting a brief and extensive evidence that had originally been sent to the AAO in March 2004. Those materials were received by the AAO on June 23, 2005. Counsel also submitted a new brief, dated June 13, 2005, which he described as "essentially the same as the one previously filed."

The regulation at 8 C.F.R. § 103.3(a)(2)(vi) states that an appealing party "may submit a brief with Form I-290B." The regulation at 8 C.F.R. § 103.3(a)(2)(vii) provides that additional time may be granted to submit a brief under the following conditions:

The affected party may make a written request to the AA[O] for additional time to submit a brief.
The AA[O] may, for good cause shown, allow the affected party additional time to submit one.

Neither counsel nor the petitioner made a written request to the AAO for additional time, beyond the 30 days indicated on Form I-290B, to file an appeal brief. Nor have they shown good cause why the new brief submitted in

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.3 (a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

Since the appeal was not timely filed with the service center, it must be rejected.

ORDER: The appeal is rejected.

June 2005, nearly one year after the appeal was filed, should be considered at this time. As for the materials from March 2004, which counsel has resubmitted, this documentation was already in the record and fully considered by the director prior to his decision of May 18, 2004, denying the petition for the second time. Accordingly, they add nothing new to the record.

As specified in 8 C.F.R. § 103.3(a)(1)(v), “[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.” The petitioner did not specifically identify any erroneous conclusion of law or statement of fact in the decision of May 18, 2004. Therefore, even if the appeal had been timely filed, it would still be summarily dismissed.