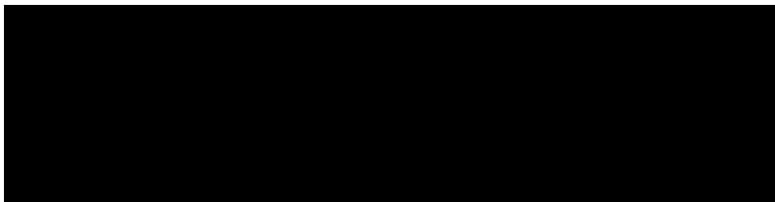


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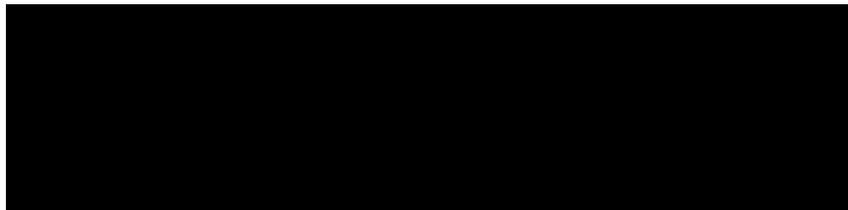
Date: **NOV 13 2007**

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal is rejected as untimely filed.

The petitioner imports, distributes, and sells wine. It seeks to employ the beneficiary as a market research analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. See 8 C.F.R. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the director issued the decision on November 16, 2006. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. According to the date stamp on the Form I-290B Notice of Appeal, it was received by CIS on December 20, 2006, or 34 days after the decision was issued. Accordingly, the appeal was untimely filed.

Regulations at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) state that CIS must treat certain untimely appeals as motions pursuant to the following guidelines:

If an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) of this part or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Upon review, the petitioner claims that the director's decision was based on an incorrect application of law or policy and has cited precedent decisions or law in support of this claim. Accordingly, the petitioner's untimely-filed appeal meets the requirements for a motion to reconsider. The AAO notes that the director did

not determine whether the proffered position was a specialty occupation; thus, the only issue to be considered is whether the beneficiary is qualified to perform the duties of the specialty occupation pursuant to Section 214(i)(2) of the Act; 8 U.S.C. § 1184(i)(2) and the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C).

The case will be remanded to be considered as a motion to reconsider. The director shall review all the evidence of record, including the evidence and argument submitted on appeal in which the petitioner addressed the issues singled out by the director in the denial notice.

**ORDER:** The appeal is rejected. The case is remanded to the director for further consideration of the appeal as a motion and the entry of a new decision.