

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

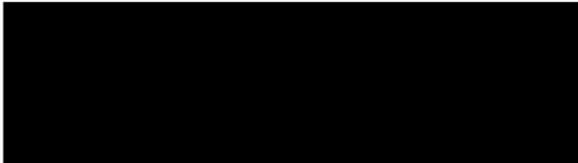
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



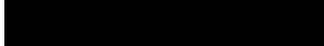
U.S. Citizenship
and Immigration
Services

12

PUBLIC COPY

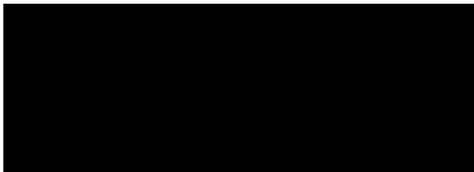


FILE: WAC 06 169 52632 Office: CALIFORNIA SERVICE CENTER Date: **APR 30 2008**

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, California Service Center, denied the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be treated as a motion and the case will be remanded to the director.

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).

The record indicates that the director issued the decision on July 26, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although the petitioner dated the appeal August 27, 2007, it was received by Citizenship and Immigration Services (CIS) on August 29, 2007, or 34 days after the decision was issued. Accordingly, the appeal was untimely filed.

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.

An untimely filed appeal must meet specific requirements to be treated as a motion. The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Furthermore, 8 C.F.R. § 103.5(a)(3) requires that 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 CIS policy.

Upon review, the petitioner submitted sufficient new evidence to meet the requirements for a motion to reopen. The director denied the petition determining that, due to discrepancies in the record, the petitioner had not established: who controls the actual work of the beneficiary; the overall nature, scope, and complexity of the proposed duties; or whether the proposed duties require theoretical and practical application of a body of highly specialized knowledge. On appeal, counsel states, in part, that the instant petition contains no discrepancies, and that the director based her decision on questions regarding other petitions. Counsel also states that that the petitioner has at no time provided false information or tried to mislead any party, and that the number of the petitioner's employees is constantly changing due to a myriad of reasons, such as unpaid leave to travel to a home country, and leave pursuant to the Family Medical Leave Act. Counsel submits leave applications forms and a chart with employee statistics, as supporting documentation. Upon review, the petitioner submitted new evidence to address the director's objections. Accordingly, the petitioner's untimely filed appeal meets the requirements for a motion to reconsider.

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

ORDER: The case is remanded to the director for further consideration and entry of a new decision.