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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

D2



FILE: WAC 07 130 51782 Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 rejected and the petition remanded to the director to treat as a motion.

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 August 17, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although counsel dated the appeal September 12, 2007, it was received by Citizenship and Immigration Services (CIS) on September 20, 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)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly 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, counsel submitted sufficient new evidence to meet the requirements for a motion to reopen. The director denied the petition determining that the petitioner had not established that it qualifies as a U.S. employer or agent, that its certified labor condition application (LCA) is valid, that the proffered position is a specialty occupation, or that it would comply with the terms and conditions as stated on the petition. On appeal, counsel submits a brief and additional evidence. Counsel also requests that, due to the appeal's untimely filing, the director consider it as a motion to reopen/reconsider. 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.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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