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FILE: WAC 07 091 51560 Office: CALIFORNIA SERVICE CENTER Date: **AUG 05 2008**

IN RE: Petitioner:
Beneficiary:



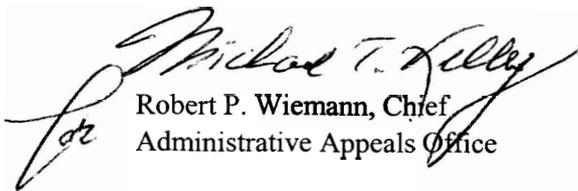
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

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 29, 2007. It is noted that the instructions on the Form I-290B (Notice of Appeal) gave notice to the petitioner that it had 33 days to file the appeal. Although the petitioner dated the appeal September 18, 2007, it was received by Citizenship and Immigration Services (CIS) on October 2, 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.

Review of the record indicates that the appeal does not meet either of these requirements.

The director denied the petition on the ground that the beneficiary is ineligible for the benefits provided for in Section 106(a) of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (DOJ 21). Specifically, the director found that neither the Form ETA 750 nor the Form I-140 filed on behalf of the beneficiary had been pending for at least 365 days prior to the requested start date of the request for an extension.

On appeal, counsel states, in part, that the director's decision should be reversed because the beneficiary's labor certification application was approved by the Department of Labor on December 27, 2006, and the beneficiary's employer filed an I-140 petition on his behalf on June 18, 2007. Counsel also states that the lawful permanent resident status of the beneficiary's wife and the U.S. citizen status of the beneficiary's child should be taken into consideration.

The record contains evidence that the petitioner filed a labor certification application Form ETA 9089 and a Form I-140 on the beneficiary's behalf on November 20, 2006 and June 18, 2007, respectively, neither of which is 365 days prior to the March 13, 2007 filing date of the present petition, as required in § 106(a) of

AC21. Accordingly, neither the certified labor certification application nor the I-140 petition filed on the beneficiary's behalf can be the basis for extending his authorized period of stay in the United States in H-1B status beyond the maximum six-year limit. The petitioner does not provide any relevant facts to be considered in the reopened proceeding, nor does the petitioner provide relevant documentary evidence. Furthermore, the petitioner neither states a clear reason for reconsideration nor provides any precedent decision to establish that the decision was based on an incorrect application of law or CIS policy. For these reasons, the director appropriately declined to treat the appeal as a motion to reopen or reconsider.

As the appeal was untimely filed and the petitioner has failed to provide any new facts or evidence that support a motion to reopen, the appeal must be rejected.

ORDER: The appeal is rejected as untimely filed.