

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D₂



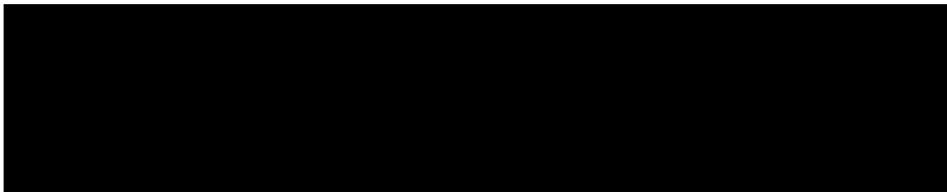
FILE: WAC 07 008 52002 Office: CALIFORNIA SERVICE CENTER Date: FEB 29 2008

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.

for
Michael T. Kelly
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 May 4, 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 May 30, 2007, it was not properly filed with CIS until June 22, 2007, or 49 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 found that the Form ETA 9089 filed with the Department of Labor (DOL) had not been certified, and that the petitioner had not established that it had filed an appeal or reconsideration with the DOL. The director concluded that the petitioner is thus 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).

On appeal, counsel submits a certified permanent employment certification (ETA Form 9089) with a "Date of Acceptance for Processing" of April 12, 2006. Counsel states as follows:

On November 9, 2007, the application/reconsideration of labor certification was certified. . . . The petitioner is now able to file [the] I-140 visa petition for the beneficiary. The beneficiary is eligible for the seventh-year H-1B extension pursuant to the approved labor certification under AC21. . . .

Counsel submits evidence that the petitioner filed a labor certification application Form ETA 9089 on the beneficiary's behalf on April 12, 2006, which is not 365 days prior to the September 27, 2006 filing date of the present petition, as required in § 106(a) of AC21. Accordingly, the certified labor certification application

filed on the beneficiary's behalf cannot 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.