

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

PUBLIC COPY

D2

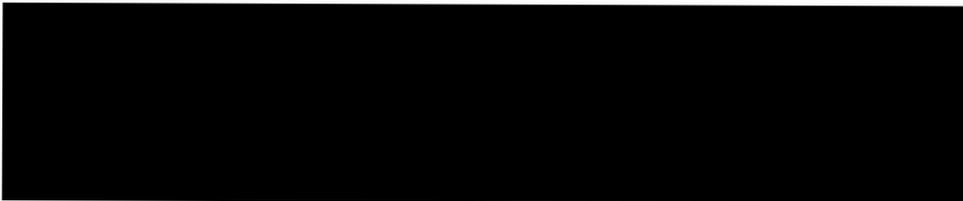
FILE: WAC 06 270 50204 Office: CALIFORNIA SERVICE CENTER Date: **MAR 31 2008**

IN RE: Petitioner:
Beneficiary:



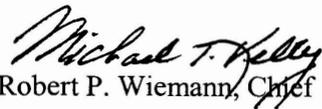
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 
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 and returned to the director for treatment 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 April 27, 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. Counsel dated the appeal June 22, 2007, and it was received by CIS on June 25, 2007, or 59 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.

The director denied the petition on the basis that the petitioner did not submit the following requested evidence: a notification from the Department of Labor (ETA Backlog Notice) verifying that the labor certification application had been pending for 365 days; and a labor condition application (LCA) reflecting all the areas of the beneficiary's intended employment.

On appeal, counsel for the petitioner stated that the beneficiary is eligible for the classification sought and that the findings and conclusions of the director are unjustifiable.

The AAO finds that the matters presented in the late appeal are sufficient to merit consideration as a motion to reopen and reconsider, in accordance with the above-cited regulations on late appeals and motions.

As the appeal was untimely filed, the appeal must be rejected. Because the matters raised in the late appeal meet the requirements of a motion, the director must adjudicate them as a motion and render a new decision on the merits based upon reconsideration of the entire record of proceedings as expanded by the matters that were submitted as an appeal.

ORDER: The appeal is rejected as untimely filed. The director will treat the late appeal as a motion and will issue a new decision based on the merits of the entire record of proceedings.