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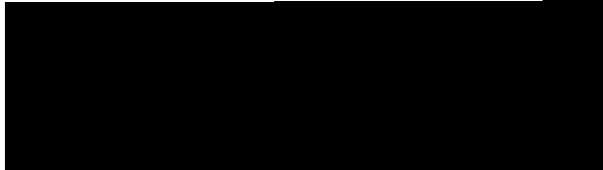
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 145 50451 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

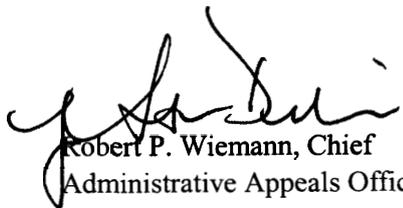
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 visa petition. The matter is now before the AAO. The appeal will be rejected as untimely filed. The petition will be remanded for consideration as a motion.

The petitioner provides information technology consulting and software development services. It seeks to employ the beneficiary as a programmer analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the director issued the denial decision on August 23, 2007.¹ It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. According to the date stamp on the Form I-290B Notice of Appeal, it was initially received by CIS on October 9, 2007, or 47 days after the decision was issued. Accordingly, the appeal was untimely filed. The AAO observes that although the appeal was untimely, on October 10, 2007 the director issued a rejection notice on the basis that the proper fee was not submitted and requested that the petitioner attach a check or money order for the correct amount and resubmit the appeal package. On October 22, 2007, CIS received the resubmitted package and correct fee. The appeal package includes documents not previously submitted and considered by the director.

Regulations at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) state that CIS must treat certain untimely appeals as motions pursuant to the following guidelines:

If an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) of this part or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

¹ The AAO notes the petitioner's claim that it did not receive the denial decision until September 24, 2007; however, the petitioner does not provide documentary evidence to support the claim and does not otherwise explain the late filing of the Form I-290B, Notice of Appeal.

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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Upon review, the AAO finds that the director improperly directed the petitioner to resubmit an untimely filed appeal with fee. The AAO also finds that the petitioner has submitted additional documentary evidence in support of the appeal and accordingly, the petitioner's untimely-filed appeal meets the requirements for a motion to reopen.

The case will be remanded for consideration as a motion to reopen. The director shall review all the evidence of record, including the evidence and argument submitted on appeal.

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