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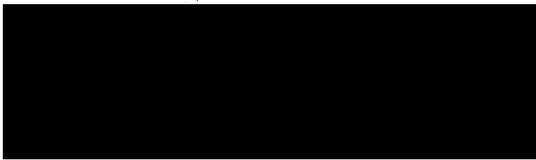
U.S. Department of Homeland Security

Citizenship and Immigration Services

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DA

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street NW  
Washington, DC 20536

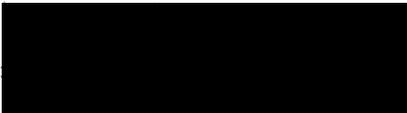


FILE: SRC 01 127 51797

Office: TEXAS SERVICE CENTER

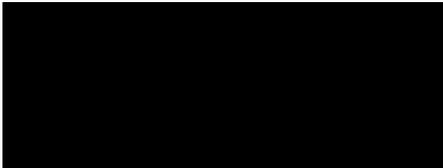
Date: NOV 18 2003

IN RE: Petitioner:  
Beneficiary



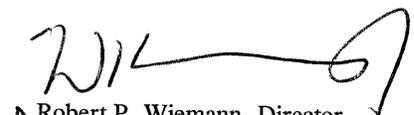
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision 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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject the appeal as untimely filed.

In pertinent part, the regulation at 8 C.F.R. § 103.3(a)(2)(i) states: "The affected party shall file the complete appeal including any supporting brief . . . within 30 days after service of the decision." Additionally, because the director mailed the decision, three days shall be added to the prescribed period for a total of 33 days. See 8 C.F.R. § 103.5a(b).

In this matter, the director issued the decision on January 2, 2002. The decision properly notified the petitioner that it had 33 days to file an appeal. CIS received the petitioner's Form I-290B within 33 days on February 4, 2002; however, CIS properly rejected the Form I-290B because the person filing the appeal had failed to sign the form. See 8 C.F.R. § 103.2(a)(7). CIS received a properly signed form on February 21, 2002 - 50 days after service of the decision. 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.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part, "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." Based on the plain meaning of "new," a new fact is evidence that was unavailable and could not have been discovered or presented in the previous proceeding.

On appeal, the petitioner submitted evidence which could have been discovered or presented in the previous proceeding. Also, on appeal, counsel submitted evidence pertaining to events that occurred after the U.S. entity filed its petition. Thus, the petitioner has failed to meet the requirements of a motion to reopen. CIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Additionally, CIS will adjudicate the appeal based only on the record proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Turning to the question of whether the petitioner submitted a viable motion to reconsider, the AAO notes that in relevant part, 8 C.F.R. § 103.5(a)(2) states:

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 [Bureau] 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.

Although the motion states reasons for reconsideration, the motion presents no precedent decisions to support those reasons; therefore, the petitioner has failed to establish any incorrectly applied law or CIS policy. Consequently, the petitioner has failed to meet the requirements of a motion to reconsider. The AAO, therefore, declines to treat the late appeal as a motion and will reject the appeal as untimely filed.

The AAO further notes that the director specifically denied the request to change the beneficiary's status as it was filed more than two years after the beneficiary's previously authorized status expired. On appeal, counsel asserts that the petitioner presented sufficient reasons for the director to accept the change of status petition as timely filed. Two regulations apply to this question. In relevant part, 8 C.F.R. § 248.1(b) states, in pertinent part:

[A] change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of [CIS], and without separate application, where it is demonstrated at the time of filing that:

- (1) The failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;

- (2) The alien has not otherwise violated his or her nonimmigrant status;
- (3) The alien remains a bona fide nonimmigrant; and
- (4) The alien is not the subject of removal proceedings under 8 C.F.R. part 240.

Additionally, the regulations at 8 C.F.R. § 248.3(g) state:

*Denial of application.* When the application is denied, the applicant shall be notified of the decision and the reasons for the denial. There is no appeal from the denial of the application under this chapter.

In sum, the director may use her discretion to excuse the late filing of an extension application. In this matter, the director declined to favorably exercise her discretion and denied the change of status. As the director's decision on the change of status issue is final, the AAO may not disturb the director's change of status denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The appeal is rejected as untimely filed.