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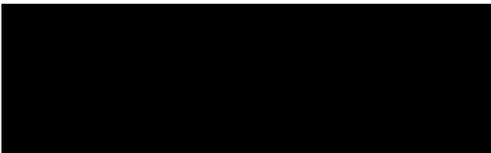


File: EAC 07 010 52651 Office: VERMONT SERVICE CENTER Date: OCT 04 2007

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

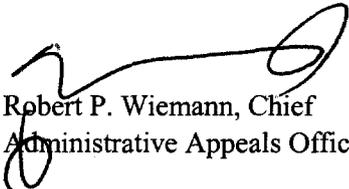
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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 Director, Vermont Service Center, 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). 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 decision on January 19, 2007. 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 Thursday, February 22, 2007, or 34 days after the decision was issued. Accordingly, the appeal was untimely filed.¹ The director erroneously annotated the appeal as timely filed and forwarded the matter to the AAO.

The brief accompanying the appeal is alternatively titled as a motion to reconsider. 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 official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

The regulation at 8 C.F.R. §103(a)(3) 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 [CIS] 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.

Counsel's assertions in the Motion to Reconsider do not overcome the director's finding that the evidence in the record of proceeding was insufficient. Counsel cites no pertinent precedent decisions to establish that the decision of the director was based on an incorrect application of law or policy. In his motion, counsel provided

¹ It is noted that the Form I-290B and accompanying appeal brief was returned to the petitioner on two occasions due to a problem with Form G-28, Notice of Entry of Appearance as Attorney or Representative, and for failure to file the appeal with the service center directly. Regardless, the fact remains that the 33rd day for the appeal in this matter was Wednesday, February 21, 2007. Since the initial filing was received on the 34th day, the appeal must be rejected as untimely filed, notwithstanding the other deficiencies identified by the service center. The appeal was ultimately received as properly filed on March 21, 2007.

an updated list of the beneficiary's responsibilities and the amount of time the beneficiary devoted to each duty. Furthermore, in response to the director's denial on the basis that sufficient physical premises had not been secured, counsel resubmits the original lease signed and dated on November 11, 2006, which merely crosses out the word "restaurant" and replaces it with the handwritten word "store." No formal amendment to the lease is provided. Finally, no new or additional evidence is submitted to overcome the director's finding that a qualifying relationship did not exist between the petitioner and the foreign entity. Despite these attempts to overcome the basis for the director's denial, counsel makes no attestation that the evidence in the record at the time of the initial decision contributed to an incorrect or erroneous finding by the director.

The untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider. The AAO, therefore, finds that the director's decision to not treat the late appeal as a motion was correct. As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

ORDER: The appeal is rejected.