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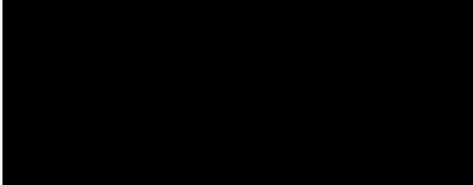


U.S. Citizenship
and Immigration
Services

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MAR 11 2004



FILE: EAC 03 117 52906 Office: VERMONT SERVICE CENTER Date:

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

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

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is seeking O-1 classification of the beneficiary under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in the arts, in order to employ the beneficiary temporarily in the United States for a period of three years as a trombone player.

The director denied the petition on June 23, 2003, finding that the petitioner failed to establish that the beneficiary qualifies as an alien of extraordinary ability.

The evidence in the record indicates that the director's decision, dated June 23, 2003, was mailed to the petitioner at his address of record. The petitioner was allowed 30 days to file an appeal, plus three additional days for mailing, pursuant to regulations at 8 C.F.R. § 103.3(a)(2)(i) and 8 C.F.R. § 103.5a(b).

The regulation at 8 C.F.R. § 103.3(a)(2)(i) states:

Filing appeal. The affected party shall file an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by Sec. 103.7 of this part. The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B) states:

Untimely appeal.

(1) *Rejection without refund of filing fee.* An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service [CIS] has accepted will not be refunded.

(2) *Untimely appeal treated as motion.* 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 Form I-290B, Notice of Appeal, was not filed until July 28, 2003, 35 days after the date of the decision, and as such, is considered as untimely filed.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. Further, 8 C.F.R. § 103.5(a)(3) indicates 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. A review of the record indicates that the untimely appeal does not meet either of these requirements.

On appeal, counsel for the petitioner asserts that the director incorrectly interpreted the law and indicates that he would submit a brief and/or additional evidence within 30 days. More than six months have lapsed since the date of the appeal and nothing more has been submitted for the record.

On appeal, the petitioner has failed to provide any new facts pertaining to eligibility for approval, any clear reason for reconsideration, or any precedent decision to establish that the decision was based on an incorrect application of law or CIS policy. Finally, the petitioner has not addressed any of the director's specific findings set forth in the notice of denial.

As the appeal was untimely filed and does not meet the requirements of a motion to reopen or reconsider, the appeal will be rejected.

ORDER: The appeal is rejected.