U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FEB 06 2004

FILE: WAC 00 196 52961 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1) as untimely filed.

The petitioner is an entertainment and sporting event promoter. It seeks authorization to extend employment of the beneficiary as a vice president. The director denied the petition because the petitioner did not establish that the proffered position is a specialty occupation.

An affected party has 30 days from the date of an adverse decision to file an appeal. 8 C.F.R. § 103.3(a)(2)(i). If the adverse decision was served by mail, an additional three days is added to the proscribed period. 8 C.F.R. § 103.5a(b). The record reflects that the director sent his decision of October 23, 2001 to the petitioner and counsel at their addresses of record. Citizenship and Immigration Services (CIS) received the appeal 34 days later on November 26, 2001. Therefore, the appeal was untimely filed.

An appeal that is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). If, however, an untimely appeal meets the requirements of a motion to reopen or reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On appeal, counsel states that the exact same position and duties had been previously approved as a specialty occupation. In addition, counsel states that the petitioner established that the duties are both complex and analytical and that the industry standard is for individuals in this position to have a baccalaureate degree. Counsel submits: 1) a copy of the beneficiary's previous approval; 2) Internet listings for jobs with the same title; 3) a copy of a page from Martin Lawler's *Professionals: A Matter of Degree, Cases and Materials;* 4) a credentials evaluation for the beneficiary; 5) the beneficiary's resume; and 6) a copy of a page from the Department of Labor's *Occupational Outlook Handbook.*

Counsel's submissions cannot be considered new facts, as they were available at an earlier date, but not submitted at that time.

As counsel presents no new facts to be considered, or provides any precedent decisions to establish that the director's denial was based on an incorrect application of law or CIS policy, the appeal will not be treated as a motion to reopen or reconsider and will, therefore, be rejected.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is rejected as untimely filed.