

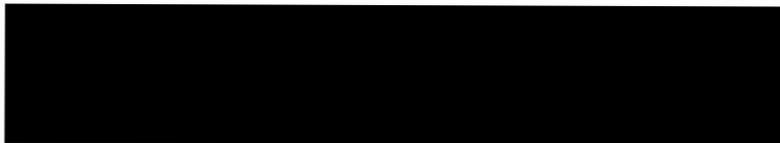
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services



D2

FILE: EAC 07 148 56122 Office: VERMONT SERVICE CENTER Date: JUN 29 2009

IN RE: Petitioner:
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:



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.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected and the petition remanded to the director to treat as a motion.

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).

The record indicates that the director issued the decision on October 15, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The appeal was received by Citizenship and Immigration Services (CIS) with the proper fee on December 14, 2007, or 60 days after the decision was issued. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly 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.

An untimely filed appeal must meet specific requirements to be treated as a motion. The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Furthermore, 8 C.F.R. § 103.5(a)(3) requires 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.

Upon review, counsel submitted sufficient new evidence to meet the requirements for a motion to reopen. The director denied the petition determining that the petitioner had not established that the beneficiary is immediately eligible to receive a teacher's license in the State of Georgia, and thus she is not qualified to perform services in a specialty occupation. On appeal, counsel submits a brief and additional evidence. Upon review, the petitioner submitted new evidence to address the director's objection. Accordingly, the petitioner's untimely filed appeal meets the requirements for a motion to reconsider.

The case will be remanded to the Vermont Service Center to be considered as a motion to reopen/reconsider. The director shall review all the evidence of record, including the evidence submitted on appeal in which the petitioner addressed the issues singled out by the director in the denial notice.

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The burden of proof in these proceedings rests solely 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. The petition is remanded to the director for further consideration and entry of a new decision.