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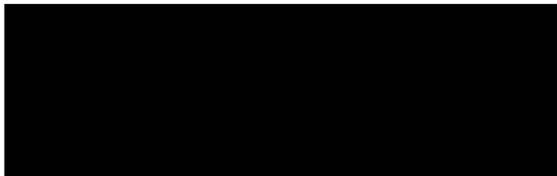
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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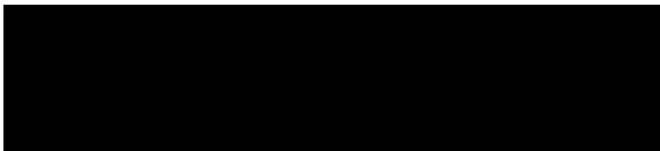


FILE: EAC 06 183 52214 Office: VERMONT SERVICE CENTER Date: **MAY 30 2008**

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

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.

For Michael T. Kelly
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. The petition will be remanded for consideration as a motion.

The petitioner operates a theatre. It seeks to employ the beneficiary as a theatre director. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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 March 1, 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 properly signed, executed, accompanied by the correct fee, and received by CIS on July 2, 2007, or 121 days after the decision was issued. Accordingly, the appeal was untimely filed.

Regulations at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) state that CIS must treat certain untimely appeals as motions pursuant to the following guidelines:

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 regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that 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.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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 Service 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.

On appeal, the petitioner submits three letters: a March 27, 2008 letter written by [REDACTED] Ph.D., an Assistant Professor of Theatre, Loyola Marymount University who states his opinion that a person who is going to establish and manage a theatre company would need a university degree, like a bachelor's of arts in theatre; (2) a letter dated March 27, 2007 written by [REDACTED], head of the program for educational and community theater in the theater department of Tel Aviv University, who indicates that in her 40-year career she has never met "a theater director, writer, teacher and even an actor who [did] not have higher education, in most cases PhD or a Masters degree;" and (3) a March 26, 2007 letter written by the petitioner's owner who indicates that he applied for the beneficiary's H-1B classification as she has a bachelor's degree in theatre art and is a real professional in the field. Although the letters submitted are not supported by affidavits, the letters are considered documentary evidence. The petitioner asserts that these letters establish that a degree requirement is common to the industry in parallel positions among similar organizations as well as indicating that the position is so complex that it can successfully be performed only by an individual with a degree and knowledge of the elements involved.

The additional documentary letters in support of the appeal are sufficient to reopen the matter. Accordingly, the petitioner's untimely-filed appeal meets the requirements for a motion to reopen.

The case will be remanded for consideration as a motion to reopen. The director shall review all the evidence of record, including the evidence and argument submitted on appeal in which the petitioner addressed the issues singled out by the director in the denial notice.

ORDER: The appeal is rejected. The case is remanded to the director for further consideration of the appeal as a motion and the entry of a new decision.