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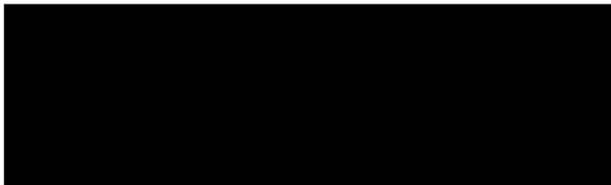
FILE: WAC 07 138 52562 Office: CALIFORNIA SERVICE CENTER Date: NOV 05 2008

IN RE: Petitioner:  
Beneficiary:



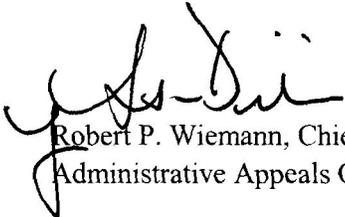
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

  
Robert P. Wiemann, Chief  
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 and remanded to the director to consider 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 August 24, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The petitioner attempted to file the appeal directly with the AAO on or about September 25, 2007. The appeal was not accepted for filing, however, as it was improperly filed. The director's decision of August 24, 2007 states clearly the procedure for filing the appeal:

The petitioner, may, if he or she wishes, appeal the Director's decision using the enclosed Notice of Appeal to the Administrative Appeals Office ("AAO"), Form I-290B. The petitioner must submit such an appeal to **THIS OFFICE** with a filing fee of \$585.00. Do NOT send the appeal directly to the AAO. If the petitioner does not file an appeal within the time allowed, this Decision is final.

The petitioner then properly filed the appeal with Citizenship and Immigration Services (CIS) and the appeal was accepted for filing on October 5, 2007, 42 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.

Upon review, the petitioner's untimely appeal meets the requirements of a motion to reconsider. The petitioner states that the director's decision was based on an incorrect application of law or policy and the petitioner has stated reasons for reconsideration, supported by documentary evidence. Accordingly, the petitioner's untimely-filed appeal must be adjudicated as a motion to reconsider.

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

**ORDER:** The case is remanded to the director for further consideration and entry of a new decision.