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U.S. Citizenship and Immigration Services
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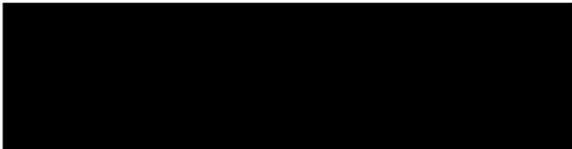
File: WAC 06 163 51001 Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2009

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)

IN 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition, and the petitioner filed a late appeal. The director considered the petitioner's late appeal as a motion, dismissed the late motion, and affirmed the previous decision. The petitioner subsequently filed a motion to reopen, which was dismissed as untimely filed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant that seeks to employ the beneficiary as its sales and customer relations specialist. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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).

On August 8, 2006, the director denied the petition, finding that the proffered position is not a specialty occupation. The petitioner filed an appeal, which was received by U.S. Citizenship and Immigration Services (USCIS) on September 22, 2006. On October 30, 2006, the director rejected the appeal as late, considered the late appeal as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), dismissed the motion for failure to meet applicable requirements, and affirmed his prior decision denying the petition.

The petitioner filed a motion to reopen, which was not accompanied by the required filing fee. On December 20, 2006, the California Service Center returned the Form I-290B to the petitioner and indicated that it had omitted the required filing fee. The California Service Center received the resubmitted Form I-290B and accompanying motion with the proper \$385.00 filing fee on January 11, 2007. The director dismissed the motion on October 5, 2007, finding that the motion was untimely filed pursuant to 8 C.F.R. § 103.5(a).

The issue before the AAO on appeal is whether the director's October 5, 2007 decision dismissing the petitioner's motion was erroneous. Upon review, the AAO concurs with the director's ultimate conclusion.

The regulation at 8 C.F.R. § 103.2(a)(7)(i) requires USCIS to reject any petition or application filed with the incorrect filing fee. Likewise, filings which were rejected because they were submitted with incorrect or omitted filing fees do not retain filing dates. In this matter, the petitioner's original submission omitted the required fee; therefore, as this filing did not retain a filing date, the actual filing date for the motion to reopen is January 11, 2007, 73 days after the director's October 30, 2006 decision.¹

USCIS regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* In this matter, it appears that the director dismissed the motion solely on the basis that it had been untimely filed. While this action, pursuant to 8 C.F.R. § 103.5(a)(1)(i), is appropriate for motions to reconsider, it appears the director may not have evaluated the petitioner's motion to determine whether the delay in filing was reasonable and was beyond the affected party's control. Here, however, the director's error, if any, is harmless, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the

¹ It is noted that, according to the date stamp on the original submission, the petitioner's motion was received by USCIS on December 20, 2006, or 51 days after the director's October 30, 2006 decision.

record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Upon review, the AAO determines that the delay was not reasonable and was within the control of the petitioner. The motion, initially submitted without the required fee and without the required Form I-290B, was dated November 29, 2006 and received by USCIS on December 20, 2006, 51 days after the director's October 30, 2006 decision. Even if the motion to reopen had been accompanied by the required fee at that time, the motion was still untimely filed, and counsel for the petitioner's statements therein presented no evidence or reasons to justify the late filing. Without good cause or explanation to justify the late filing of the motion, the delay in filing cannot be excused.

On appeal to the AAO, counsel for the petitioner makes no reference to the validity of the determinations made by the director in the October 5, 2007 decision. Rather, counsel focuses the appeal solely on the director's decision of August 8, 2006, which is not relevant to these proceedings. The issue before the AAO is whether the director's decision rendered on October 5, 2007 was proper. For the reasons set forth above, the AAO finds that the director's decision was correct.

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. Accordingly, the appeal will be dismissed, and the previous decisions of the director will not be disturbed.

ORDER: The appeal is dismissed.