

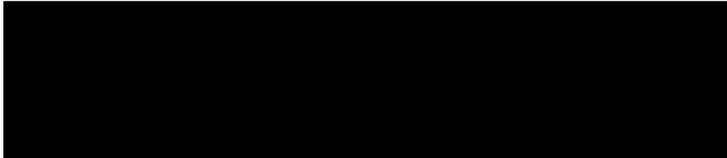
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

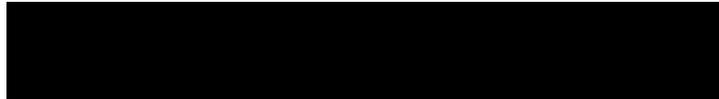
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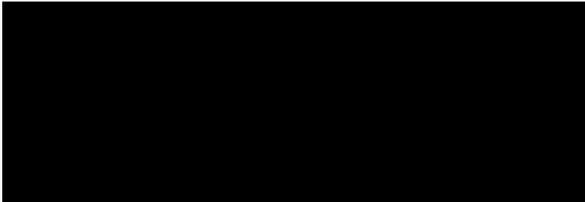
FILE: WAC 08 141 50683 OFFICE: CALIFORNIA SERVICE CENTER DATE: **JAN 19 2010**

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.

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and affirmed her decision in a subsequent motion to reopen or reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner avers that it is in the business of software development and program management, was established in 1998, and currently has 50 employees. It seeks permission to employ the beneficiary as a programmer analyst and, therefore, 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 July 28, 2008, the director denied the petition because: (1) the petitioner does not meet the regulatory definitions of U.S. employer or agent; (2) the labor condition application (LCA) is not valid for all work locations; and (3) the proffered position is not a specialty occupation. On August 29, 2008, counsel filed a motion for the director to reopen her decision to deny the petition. Attached to the motion were a brief from counsel and a letter from [REDACTED] Professor of Computer Science and Director of the Program in Integrative Information, Computer Application Sciences, Princeton University. [REDACTED] offered his opinion regarding the specialty occupation nature of the proffered position. On October 16, 2008, the director dismissed the motion, finding that the petitioner had failed to present any evidence that could be considered new for the purposes of a motion to reopen. On November 19, 2008, counsel filed a Form I-290B to appeal the director's adverse decision on the motion.

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a U.S. Citizenship and Immigration Services (USCIS) 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. 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).

As stated above, the record indicates that the director issued her latest decision on October 16, 2008. According to the date stamp on the Form I-290B Notice of Appeal, it was received by USCIS on November 19, 2008, or 34 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)(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 USCIS policy.

A review of the record indicates that the appeal does not meet the requirements of either a motion to reopen or reconsider. Counsel's statements on appeal relate to the director's decision to not treat the opinion letter from [REDACTED] as "new" for the purpose of establishing that the proffered position is a specialty occupation. The AAO notes, however, that the director denied the petition on three grounds, only one of which related to the proffered position not qualifying as a specialty occupation. Even if the director had considered [REDACTED] letter, it would not have overcome the findings of the director on the other two issues of the denial, namely, that the petitioner did not meet the definitions of U.S. employer or agent, and that the LCA was not valid for all of the work locations. As counsel has not presented any evidence related to all grounds of denial, the AAO does not find that the appellate filing contains new evidence or provides any arguments to establish that the director incorrectly applied the law or USCIS policy.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. As the appeal was untimely filed and the petitioner has failed to provide any new facts or evidence that support a motion to reopen or reconsider, the appeal must be rejected.

ORDER: The appeal is rejected. The petition is denied.