

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



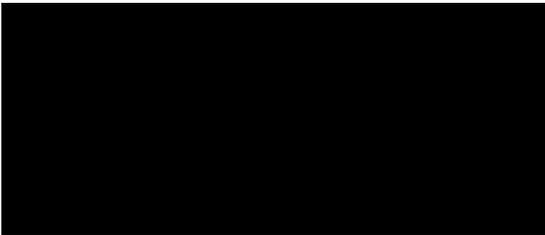
*D 2*

FILE: WAC 03 102 52286 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The previous decision shall be affirmed. The appeal will be rejected as untimely filed.

The petitioner operates residential care homes. It seeks to employ the beneficiary as a quality assurance specialist. The director denied the petition on the ground that the petitioner failed to establish that: (1) the proposed position qualifies as a specialty occupation; and (2) the beneficiary is qualified to perform a specialty occupation.

On motion, counsel states that the previously submitted appeal, which the AAO rejected as untimely filed, should have been treated as a motion for reconsideration as the regulation at 8 C.F.R. § 103.3(B)(2) provides that an untimely filed appeal should be treated as a motion if it meets the requirements of a motion to reopen or reconsider, and a decision should be made on the case's merits. Counsel asserts that pursuant to 8 C.F.R. § 103.3(B)(2) the director should have treated the late appeal as a motion. Counsel states that the regulation at 8 C.F.R. § 103.5(a)(3) discusses the requirements for a motion to reconsider and that the untimely filed appeal satisfies the requirements: it explained the reasons for reconsideration and was supported by pertinent precedent decisions that showed that the denial was based on an incorrect application of the law and regulations. According to counsel, in rejecting the appeal as untimely filed the AAO erroneously applied the regulation at 8 C.F.R. § 103.5(a)(1)(ii) that relates to the original filings of a motion for reconsideration or to reopen; but does not relate to untimely filed appeals. Counsel asserts that rather than rejecting the appeal as untimely filed, the AAO should have remanded the case, which was meritorious and should have been considered its merits, back to the director in order to have a decision rendered based on the merits of the case. Counsel maintains that the director did not address the previously submitted job advertisements and the petitioner's assertions relating to a health services manager as that occupation is described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*). Counsel discusses the *California Occupational Guide* and its description of a health service administrator. Counsel maintains that the petitioner established that its degree requirement is common to the industry in parallel positions, and that the proposed duties are specialized and complex. The director's reference to the petitioner's size is irrelevant, counsel asserts. Counsel discusses the beneficiary's qualifications for the proposed position.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The AAO grants the motion to reconsider.

On motion, counsel states that in rejecting the appeal as untimely filed, the AAO erred by applying the regulation at 8 C.F.R. § 103.5(a)(1)(ii) that relates to the original filings of a motion for reconsideration or to reopen; but does not relate to untimely filed appeals.

Counsel's statement is not persuasive. The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides instruction regarding the proper filing of an appeal; it states that the affected party must file the complete appeal within 30 days after 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 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 as described in 8 C.F.R. §103.5(a)(2), or a motion to reconsider as described in 8 C.F.R. §103.5(a)(3), 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)(1)(i) provides that when the affected party files an motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision; and the regulation at 8 C.F.R. § 103.5(a)(1)(ii) states that the official having jurisdiction over a motion is the official who made the last decision in the proceeding. The AAO correctly determined that the service center director had proper jurisdiction over the motion as the service center director had denied the petition. The record reflects that the director declined to treat the late appeal as a motion and forwarded the matter to the AAO. Because the service center director had taken this course of action, declining to treat the late appeal as a motion and forwarding the matter to the AAO, the AAO properly rejected the appeal as untimely filed as pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1) an appeal that is not filed within the time allowed must be rejected as improperly filed. Accordingly, counsel fails to establish that the AAO erred by rejecting the appeal as untimely filed.

As related in the discussion above, the petitioner has failed to establish that the AAO erred by rejecting the appeal as untimely filed. Accordingly, the AAO shall not disturb the director's denial of the petition.

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 decision of the AAO is affirmed. The appeal is rejected.