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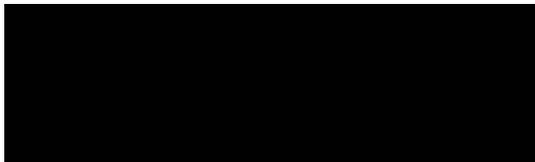
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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File: EAC 08 048 50863 Office: VERMONT SERVICE CENTER

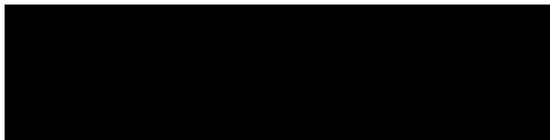
Date: FEB 05 2010

IN RE: Petitioner:
Beneficiary:



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

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The director dismissed the petitioner's subsequent motion to reopen and reconsider as untimely filed. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation established in February 2007, states that it operates a gas station, convenience store and fast food restaurant. It claims to be a subsidiary of [REDACTED] located in Karachi, Pakistan. The petitioner seeks to employ the beneficiary as vice president of its new office in the United States for a period of three years.

The director denied the petition on July 9, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The record shows that the director's decision was mailed to both counsel and the petitioner at their respective addresses of record. The director properly advised the petitioner that any appeal or motion must be filed at the Vermont Service Center on Form I-290B, Notice of Appeal or Motion, within 33 days of the date of the director's decision.

Counsel for the petitioner subsequently filed a motion to reopen and reconsider on Form I-290B on August 15, 2008. The motion was dated August 11, 2008 and mailed on August 12, 2008. Counsel stated that, although the director's decision was dated July 9, 2008, his office did not receive the notice of decision until August 11, 2008. Counsel requested that the director exercise his discretion to consider the motion timely filed. On December 3, 2008, the director dismissed the motion based on the petitioner's failure to submit the motion within 33 days. The director observed that the delay in filing had not been found to be reasonable or beyond the petitioner's control.

On appeal, counsel asserts that the petitioner did in fact show that its failure to file the motion within the required time period was reasonable and beyond the petitioner's control. Counsel asserts that the director failed to acknowledge the petitioner's explanation that the denial was received on August 11, 2008, the same date on which the motion was due to be filed. In support of the appeal, counsel submits an affidavit in which he attests that "we did not receive [the denial] until August 11, 2008."

The sole issue before the AAO is whether the director properly dismissed the petitioner's motion to reopen and reconsider as untimely filed.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.3(a)(1)(i) provides that the affected party must file the appeal within 30 days after service of the unfavorable decision, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. If the decision was mailed, the motion must be filed within 33 days. See 8 C.F.R. § 103.5a(b). The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(A) requires that a motion be in writing and signed by the affected party or the attorney or representative of record, if any.

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 and accompanied by the correct fee. For calculating the date of filing, an application, appeal, or motion shall be regarded as properly filed on the date it is so stamped by the service center or district office. In this case, the motion was received as properly filed on August 15, 2008, or 37 days after the issuance of the director's notice of decision. Accordingly, on December 3, 2008, the director dismissed the motion as untimely filed, without rendering a decision on the merits of the case.

The petitioner has now filed an appeal asserting that the director improperly dismissed the motion as untimely filed because the petitioner established that its failure to timely file the motion was reasonable and beyond the control of the petitioner.

Upon review, the AAO finds that the director properly rejected the motion as untimely filed. While counsel indicates that he did not receive the director's adverse decision until August 11, 2008, the AAO finds insufficient evidence or explanation supporting the reason for this delay. Counsel has neither claimed nor provided evidence that there was any delay on the part of USCIS in mailing the decision. Such evidence would reasonably include a copy of the mailing envelope bearing a postmark indicating the actual date of service. Nor has counsel claimed that USCIS erred by sending the decision to an incorrect address. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director had sole discretion to excuse the petitioner's failure to file the motion within the required time period, and chose not to do so. The reason for the petitioner's delay has not been attributed to any error on the part of the director, nor has it otherwise been demonstrated to be beyond the control of the petitioner.

As the record shows that the motion to reopen the petition was properly dismissed by the director as untimely filed, the appeal will be dismissed. The petitioner failed to file a motion or appeal of the director's July 9, 2008 decision within the required time period, thus the merits of the petition need not and will not be discussed herein.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.