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U.S. Citizenship  
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FILE:



Office: TEXAS SERVICE CENTER

Date:

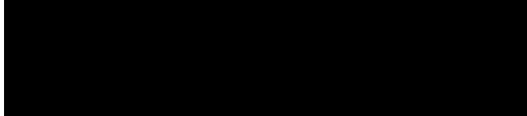
JAN 30 2008

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IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

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 along with the correct fee within 30 days of 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. § 1.1(h) explains that when the last day of a period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the director issued the decision on November 22, 2006. It is noted that the director properly gave notice to the petitioner that he had 33 days to file the appeal. The Form I-290B, Notice of Appeal to the AAO, was postmarked December 22, 2006, but not received by the Texas Service Center until December 27, 2006, 35 days after the decision was issued. Accordingly, the appeal was untimely. Further, the Form I-290B included an incorrect filing fee of \$110.00. A new filing fee of \$385.00 became effective on September 28, 2005. 70 Fed. Reg. 50954-50957 (Aug. 29, 2005); 8 C.F.R. § 103.7. On December 27, 2006, the Texas Service Center returned the Form I-290B to the petitioner and indicated that his appeal included an incorrect filing fee. The Texas Service Center received the resubmitted Form I-290B with the proper \$385.00 filing fee on January 26, 2007, along with a letter from the petitioner dated January 22, 2007. In the letter, the petitioner specifically makes reference to the appeal instructions in the director's November 22, 2006 notice of decision, which incorrectly identify the filing fee as \$110.00.

The regulation at 8 C.F.R. § 103.2(a)(7)(i) requires Citizenship and Immigration Services (CIS) to reject any petition or application filed with the incorrect filing fee. Likewise, filings which were rejected because they were submitted with incorrect filing fees do not retain filing dates. Therefore, in this matter, CIS is required to reject the appeal as untimely filed. As the Form I-290B submitted by the petitioner on December 27, 2006 did not retain a filing date, the actual filing date for the Form I-290B is January 26, 2007, 65 days after the decision was served by mail. As such, the appeal was not timely filed and must be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(I). The director, however, erroneously annotated the appeal as timely and forwarded the matter to the AAO.

The AAO acknowledges that the instructions in the Texas Service Center's November 22, 2006 decision incorrectly identified the filing fee for the appeal as \$110.00. Nevertheless, the initial appellate submission with the incorrect fee was untimely. Further, as the fee change properly appeared in the Federal Register in accordance with law, the petitioner was charged with notice of the appropriate fee change. *See* 70 Fed. Reg. 50954-50957 (Aug. 29, 2005). The regulation at 8 C.F.R. § 103.2(a)(1) provides that "[e]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form." In this instance, the instructions on the back of the Form I-290B submitted by the petitioner specifically state: "You must pay only one fee of \$385.00 to file this form." Finally, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(I) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed."

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. 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.

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 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider. The petitioner's submission includes no discussion of the new facts to be proved in the reopened proceeding. Nor is there a statement addressing the reasons for reconsideration or information indicating the director's decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

**ORDER:** The appeal is rejected.