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FILE: WAC 05 076 52949 Office: CALIFORNIA SERVICE CENTER Date: OCT 03 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition. The matter 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 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 date of filing is not the date of mailing, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the director issued the decision on September 16, 2005. The director properly gave notice to the petitioner that it had 33 days to file the appeal. The director received the petitioner's appeal on October 17, 2005, 31 days after the date of the decision. The Form I-290B was unsigned, however, and did not include the correct fee, and the director accordingly returned the appeal to the petitioner. The director did not receive a properly signed appeal form, with the correct fee, until November 1, 2005. Accordingly, the appeal was untimely filed.

We note that, in the denial decision, the director stated that the appeal fee was \$110. The director failed to add that this fee was set to increase to \$385 as of September 28, 2005, and that any appeal filed after that date would require the higher fee. The petitioner's payment of the obsolete lower fee, therefore, was due in part to the director's incorrect instructions. That being said, we also acknowledge that the timing of the petitioner's initial attempt at filing left negligible time to correct this error in a timely manner.

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. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director erroneously annotated the appeal as timely and forwarded the matter to the AAO. We cannot consider the appeal in this proceeding to have been timely filed. The appropriate course of action here would be for the director, whose error is partly responsible for the lateness of the appeal, to review the petitioner's untimely appeal and treat it as a motion if it meets the necessary requirements thereof.

As the appeal was untimely filed, the appeal must be rejected.

**ORDER:** The appeal is rejected.