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U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

OCT 11 2006

EAC 02 266 51407

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(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, Chief
Administrative Appeals Office

DISCUSSION: The Administrative Appeals Office (AAO) dismissed the appeal of the preference visa petition. The matter is now before the AAO on a motion to reopen.¹ The motion to reopen will be rejected.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party must file the motion to reopen within 30 days of service of the adverse decision. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the AAO issued its dismissal of the appeal on June 29, 2005. On August 5, 2005, or 37 days after the decision was issued, the motion to reopen was received by the Vermont Service Center. Accordingly, the motion was untimely filed.²

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states that failure to file within the 30 days of the decision that the motion seeks to reopen may be excused where it is demonstrated that the delay was reasonable and was beyond the control of the applicant. In this instance, counsel failed to provide a reasonable excuse as to why he did not properly file the motion within 30 days of the mailing of the decision.

As the motion was untimely filed, it must be rejected.

ORDER: The motion is rejected as untimely filed.

¹ It is noted that in the motion to reopen counsel suggests that CIS should consider the petitioner's depreciation costs as funds available to pay the beneficiary's proffered wage. Counsel also indicates that CIS should add the petitioner's net income to its net current assets when calculating what funds the petitioner has available to pay the proffered wage. These assertions are misplaced. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) noted judicial precedent supports the use of net income figures as listed on tax returns when determining a petitioner's ability to pay. Any argument that these figures should be revised by adding depreciation costs to net income is without support. *Id. See also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). Further, net current assets and net income may not be *combined* when determining a petitioner's ability to pay the proffered wage. This is because net income and net current assets are not two separate sets of funds available to pay the wage. Rather, net income and net current assets represent two different ways to view the funds available to the petitioner. Net income views the petitioner's funds for the year retrospectively, and net current assets view the petitioner's funds for the year prospectively. As such, a net income that is greater than the amount of the proffered wage indicates that a petitioner could have paid the beneficiary the wages during the year out of its income. Net current assets that are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those funds. Nevertheless, this is all rendered moot because the motion to reopen was not timely filed.

² The petitioner through counsel attempted to file the instant motion to reopen on July 28, 2005, but the motion was rejected as improperly filed due to a failure to submit the proper fee. (Specifically, counsel submitted a post-dated check and CIS may not accept such checks.)