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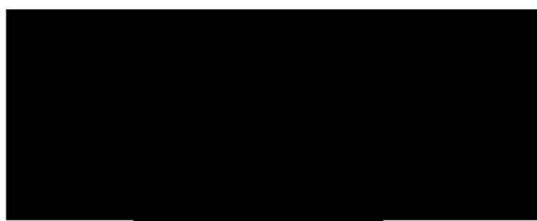
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



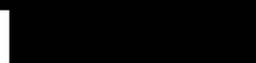
U.S. Citizenship  
and Immigration  
Services

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**PUBLIC COPY**



File:



SRC-05-201-50488

Office: TEXAS SERVICE CENTER

Date: APR 02 2007

In re:

Petitioner:

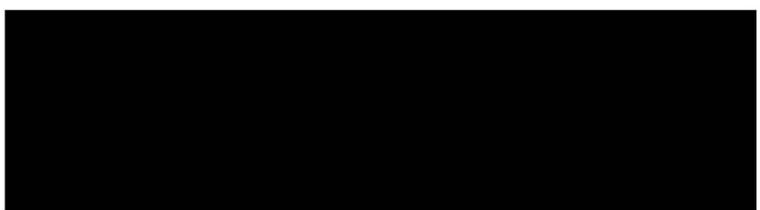
Beneficiary:



Petition:

Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 preference 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 remanded to the director.

The petitioner is a farm. It seeks to employ the beneficiary permanently in the United States as a tree fruit and nut farming supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Therefore, the director denied the petition.

The record indicates that the director mailed the decision to the petitioner on September 7, 2005. A Form I-290B, Notice of Appeal to Administrative Appeals Office, was received by the Texas Service Center on October 4, 2005, 27 days after the decision was mailed. However, the Form I-290B included the incorrect filing fee of \$110.00. A new filing fee of \$385.00 became effective on September 28, 2005. *See* 70 Fed. Reg. 50954, 50954 (Aug. 29, 2005), found at <http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=04921783362+1+0+0&WAIAction+retrieve>; 8 C.F.R. § 103.7. The Texas Service Center returned the Form I-290B to the petitioner and indicated that it included the incorrect filing fee. The Texas Service Center received the resubmitted Form I-290B with the proper \$385.00 filing fee on October 24, 2005.

The regulation at 8 C.F.R. § 103.3(a)(2) requires an affected party to file the complete appeal within 30 days after service of the decision, or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. Title 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. Although the petitioner initially submitted the I-290B within 33 days of service of the decision, this submission included the incorrect filing fee. Therefore, as this filing did not retain a filing date, the actual filing date for the Form I-290B is October 24, 2005, 37 days after the decision was served by mail. Thus, the appeal was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

While the AAO notes that the instructions in the director's September 7, 2005 decision identified the proper filing fee for the appeal as \$110.00, this decision was dated and mailed 21 days before the effective date of the filing fee change to \$385.00. The petitioner was put on notice of the change in fee in that this fee change and its effective date appeared in the Federal Register during August 2005. *See* 70 Fed. Reg. 50954 (Aug. 29, 2005). CIS, which includes both the Texas Service Center and the AAO, has no authority to accept an untimely appeal which failed to hold a timely filing date due to the submission of an incorrect filing fee. CIS is compelled to reject such an appeal. Title 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed." Therefore, under the regulations, CIS lacks the authority to consider the untimely 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 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 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 record does not show that the director has considered this appeal as untimely, and thus to treat as a motion to reopen/reconsider before forwarding to the AAO. In addition, counsel claims that the petitioner's timely response to the notice to intent to deny was not properly considered before the decision of the director. Therefore, the AAO will reject the appeal as untimely and remand to the director to be considered as a motion to reopen.



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**ORDER:** The appeal is rejected as untimely filed but remanded to the director for further consideration as a motion to reopen.