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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B.L.



FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 19 2007
EAC-04-021-52213

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reconsideration.

The petitioner is a fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a fast food cook (chef). 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 failed to establish its ability to pay the proffered wage at the time of filing and continuing to the present and that the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience for the proffered position. Therefore, the director denied the petition.

The record indicates that the director mailed the decision to the petitioner on August 29, 2005. A Form I-290B, Notice of Appeal to Administrative Appeals Unit (AAO), was received by the Vermont Service Center on September 30, 2005, 32 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=0492178336_2+1+0+0&WAIAction=retrieve; 8 C.F.R. § 103.7. On November 2, 2005, the Vermont Service Center returned the Form I-290B to the petitioner and indicated that it included the incorrect filing fee. On November 14, 2005 counsel for the petitioner re-filed the Form I-290B with the same incorrect fee requesting the Vermont Service Center accept the Form I-290B with the fee of \$110 because the decision instructed to do so. On November 17, 2005, the Vermont Service Center returned the Form I-290B again requesting a correct fee. The Vermont Service Center received the Form I-290B with the proper \$385.00 filing fee on December 5, 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, the initial submission included the incorrect filing fee and counsel insisted on filing with the incorrect fee with the second submission even after the Vermont Service Center informed counsel of the correct fee. Therefore, as these two filings did not retain a filing date, the actual filing date for the Form I-290B is December 28, 2005, 98 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).

The AAO notes that the instructions in the director's August 29, 2005 decision identified the incorrect filing fee of \$110.00 for the appeal. However, the petitioner was put on notice of the change in fee and its effective date in the Federal Register during August 2005. *See* 70 Fed. Reg. 50954 (Aug. 29, 2005). CIS, which includes both the Vermont 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. Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected.

Nevertheless, 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).

On appeal, counsel indicated that she would submit a brief and/or evidence to the AAO within 30 days. Counsel dated the appeal September 29, 2005. As of this date, more than twenty-six (26) months later, the AAO has received nothing further. The AAO sent a fax to counsel on October 24, 2007 informing counsel that no separate brief and/or evidence was received to confirm whether or not she would send anything else in this matter, and as a courtesy, providing her with five (5) days to respond. To date, more than seven (7) weeks later, no reply has been received. Counsel here has not specifically addressed the reasons stated for denial and has not provided any additional evidence. This untimely appeal does not meet the requirements of a motion to reopen or reconsider. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

ORDER: The appeal is rejected.