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U.S. Department of Homeland Security  
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U.S. Citizenship  
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FILE:



Office: VERMONT SERVICE CENTER

Date: **JUL 30 2007**

EAC-04-199-50772

IN RE:

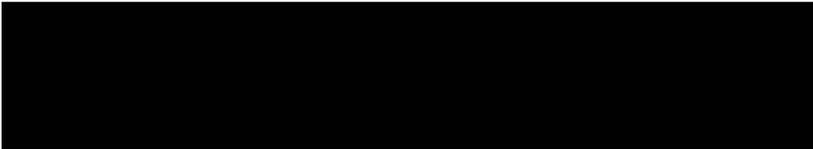
Petitioner:



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 Director of the Vermont Service Center denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The petitioner is an information technology company. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 the beneficiary met the minimum educational requirements set forth on the Form ETA 750 prior to the priority date of the visa petition and thus is not qualified for the proffered position. Therefore, the director denied the petition.

The record indicates that the director mailed the decision to the petitioner on January 7, 2005. A Form I-290B, Notice of Appeal to Administrative Appeals Unit (AAU), was received by the AAO on February 4, 2005, 28 days after the decision was mailed. However, the Form I-290B was filed at the wrong place, and therefore, was returned to the petitioner's counsel. The Vermont Service Center received the resubmitted Form I-290B on February 16, 2005, along with a letter from counsel dated February 15, 2005. In the letter, counsel requests to accept the late appeal as a result of misinformation by a National Customer Service Agent.

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. Although counsel initially submitted the I-290B within 33 days of service of the decision, this submission was filed at the wrong place. Receipt dates are not assigned until a filing is perfected according to the regulation requirements of 8 C.F.R. § 103.2(a). Therefore, as this filing did not retain a filing date, the actual filing date for the Form I-290B is February 16, 2005, 40 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 director of the Vermont Service Center properly instructed the petitioner to file an appeal within 30 days from the date of his notice (33 days if the notice was received by mail) and to file an appeal with his office at the Vermont Service Center. The petitioner was also put on notice of the period and correct office to file an appeal. The AAO has no authority to accept an untimely appeal which failed to hold a timely filing date and is compelled to reject such an appeal. 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, the AAO 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 director declined to treat the late appeal as a motion and forwarded the matter to the AAO. In addition, it is noted that while this untimely filed appeal is pending with the AAO, the director dismissed the petitioner's concurrently filed motion to reopen/reconsider on June 27, 2005.

**ORDER:** The appeal is rejected.