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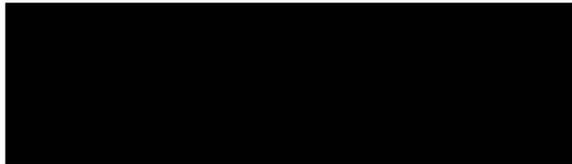
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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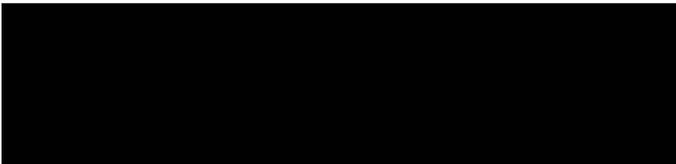


File: WAC-05-198-52802 Office: CALIFORNIA SERVICE CENTER Date JUN 28 2007

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 of the California 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 excavating/grading company. It seeks to employ the beneficiary permanently in the United States as an operating engineer & other construction equipment operator (construction worker). 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 had not met the minimum requirements prior to 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 February 14, 2006. A Form I-290B, Notice of Appeal to Administrative Appeals Unit (AAU), was received by the California Service Center on March 15, 2006, 29 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. On March 22, 2006, the California Service Center returned the Form I-290B to the petitioner and indicated that it included the incorrect filing fee. The California Service Center received the resubmitted Form I-290B with the proper \$385.00 filing fee on March 28, 2006.

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 March 28, 2006, 42 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 February 14, 2006 decision identified the proper filing fee of \$385.00 for the appeal. The petitioner was also 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 California 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 director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

**ORDER:** The appeal is rejected.