



U.S. Citizenship
and Immigration
Services

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invasion of personal privacy

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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 22 2008
SRC 06 202 53380

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

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)

IN BEHALF OF PETITIONER:

[REDACTED]

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. The case 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 a machine shop. It seeks to employ the beneficiary permanently in the United States as a machine try-out setter.

The record indicates that the director denied the I-140, Immigrant Petition for Alien worker on September 22, 2006. A Form I-290B, Notice of Appeal to Administrative Appeals Unit (AAU), was received by the Texas Service Center on October 24, 2006, 32 days after the decision was issued. However, the Form I-290B included an incorrect filing fee. The correct filing fee is \$385.00. On October 24, 2006, the Texas Service Center issued a rejection notice, returning the appeal and the fee to the petitioner, and advising the petitioner that it could not accept or assign any priority or processing date to the appeal because it had not been properly filed with the correct filing fee. 8 C.F.R. § 103.2(a)(7)(i). It advised the petitioner to resubmit the package with the correct amount. The Service Center received the resubmitted Form I-290B with the proper \$385.00 filing fee on November 3, 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 are rejected because they are 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 November 3, 2006, 42 days after the director's decision. CIS, which includes both the Texas Service Center and the AAO, has no authority to accept an untimely appeal that fails 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 untimely appeal meets the requirements of a motion to reopen because it contains new evidence. The matter will be returned to the director for consideration as a motion to reopen.

ORDER: The appeal is rejected as untimely filed. The matter will be returned to the director for consideration as a motion to reopen.