



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 04 256 53649

Office: VERMONT SERVICE CENTER

Date: JUN 29 2006

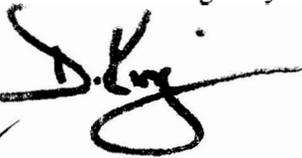
IN RE: Petitioner: [Redacted]

PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be rejected as untimely filed.

The petitioner is a native and citizen of Lithuania who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a citizen of the United States.

The director denied the petition on September 1, 2005, finding that the petitioner failed to establish that she was battered by or subjected to extreme cruelty by her citizen spouse and that she entered into the marriage in good faith.

The record reflects that the petitioner attempted to file an appeal on the director's decision on October 4, 2005, but the filing was rejected because the petitioner failed to attach the correct fee. The regulation at 8 C.F.R. § 103.2(a)(7) indicates that an application or petition that is stamped to show the time and date of actual receipt shall be regarded as properly filed when so stamped if it is signed and executed and contains the required filing fee. An application or petition that is not properly signed or is submitted with the wrong filing fee shall be rejected and will not retain the filing date.

The petitioner's appeal was considered to be properly filed on November 7, 2005, when it was submitted with the appropriate fee. However, in order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the appeal within 30 days after the service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). As noted above, the appeal was considered as filed on November 7, 2005, 67 days after the decision was issued.

Counsel states that despite the fact that the appeal was not timely filed, the Service should accept the petitioner's filing. At issue is the change to the fee amount for appeals which took effect on September 28, 2005. On that date, after notice and comment in the Federal Register, the fee for appeals to the AAO and motions was increased from \$110 to \$385.¹ Counsel states that the director's instructions and the Form I-290B mailed with the director's decision both indicated a filing fee of \$110. Counsel also argues that the language in the fee rule suggests that the new fee was only applicable to appeals where the underlying application was filed with USCIS after September 28, 2005. We do not find counsel's arguments to be persuasive.

The federal rulemaking process, which consists of notice and comment in the Federal Register, is the way that federal agencies notify the public of changes in the regulations, including changes in fees. Given that the appropriate notice and comment were provided in the Federal Register, counsel cannot fault the Service for her lack of knowledge regarding the fee increase or her failure to submit the appropriate fee. The director's reference to the \$110 fee was not improper, nor was it erroneous. On September 1, 2005, the date of the director's decision,

¹ The public was first notified of the proposed fee increase on November 30, 2004. On August 29, 2005, the public was again notified of the fee increase and informed that the new fee would become effective on September 28, 2005. *See* 69 FR 69546 and 70 FR 50954.

the \$110 fee was still in effect. The director cannot be presumed to know whether the petitioner would file prior to or after the effective date of the new fee.

Counsel's second argument regarding the language of the fee rule is equally unconvincing. The rule makes numerous references to the fee being applicable to all motions as well as appeals under the jurisdiction of the AAO. The rule states:

Summary: This rule adjusts the fee for filing appeals of, and motions to reopen or reconsider, any decision . . . other than those . . . over which the Board of Immigration Appeals . . . has appellate jurisdiction.

* * *

This rule applies to fees for appeals and motions relating to the types of cases under the jurisdiction of the AAO.

The rule does not contain any reference to the date of filing "underlying" applications or petitions and appeals thereof. Rather, it specifically indicates that any appeal or motion filed on or after September 28, 2005, requires the new fee. Thus, counsel's confusion, while not disputed, is not a sufficient reason to excuse the initially improperly filed appeal which ultimately resulted in the untimely filing of this 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 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. 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.

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.