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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

L4

FILE: [redacted] Office: California Service Center Date: JAN 03 2005

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 210 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:

[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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status as a special agricultural worker was denied by the Director, Western Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be rejected.

The director denied the application because the applicant failed to establish the performance of at least 90 man-days of qualifying agricultural employment during the eligibility period. This decision was based on adverse information relating to the applicant's claim of employment for Scott's Cotton Pickers at Christopher Ranch.

Whenever an application for special agricultural worker status is denied or the status of a lawful temporary resident is terminated, the alien shall be given written notice setting forth the specific reasons for the denial on Form I-692, Notice of Denial. Form I-692 shall also contain advice to the applicant that he or she may appeal the decision and that such appeal must be taken within **30 days** following service of the notification of decision. 8 C.F.R. § 103.3(a)(3)(i). An appeal received after the thirty (30) day period has tolled will not be accepted for processing. 8 C.F.R. § 103.3(a)(3)(iv)(C). Form I-694, Notice of Appeal, shall be used to file the appeal and must be accompanied by the appropriate fee. 8 C.F.R. § 103.3(a)(3)(ii). Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. Service by mail is complete upon mailing. 8 C.F.R. § 103.5a(b).

The record contains a file copy of the Notice of Denial, dated December 27, 1991, and a "tracking system" computer printout showing the decision was sent that day. Counsel, in a brief dated April 9, 1998, asserts the applicant never received the notice in the period after December 27, 1991, and points out there is no evidence in the record proving the notice was actually mailed at that point. While counsel is correct on the latter point, she has not cited any requirement that the notice be personally served or that the record contain independent proof of mailing. The dated file copy of the notice is considered evidence that it was mailed.

Counsel also points out that the file copy of the denial notice does not contain the name and address of the applicant. It is noted that the applicant did not file any notification of change of address between the time he filed his application in 1988 and the date of denial, December 27, 1991. There is no reason to believe that the director would have sent the notice to any address other than the one supplied by the applicant on his application.

In the record is a letter from the applicant dated February 10, 1994, inquiring about his case. The worksheet in the record shows the director promptly sent copies of the notice of intent to deny and the notice of denial to the applicant's newly-reported address on March 3, 1994. Counsel states that the

applicant denies receiving the notices. She again stresses that there is no evidence that the copies of the notices were actually mailed or received. However, as stated above, there is no requirement that the record contain such evidence.

Counsel states that even if the applicant is assumed to have received the notices in 1994, the denial notice informed him that the decision would be final if he did not appeal within 30 days. Counsel's apparent point is that the applicant would have realized that it was too late, in 1994, to appeal. However, she states that the "present notice of appeal" should be considered properly filed. (On July 28, 1998, counsel submitted an appeal, subsequent to her April 1998 brief. It does not appear that the director fee-registered this appeal. Nevertheless, counsel provided a copy of a money order dated April 9, 1998 for the proper fee for an appeal, and she will therefore be considered to have filed the appeal on July 28, 1998.)

In addition, the applicant, through an unauthorized representative, filed another appeal on October 29, 2003, apparently unbeknownst to counsel.

There is no reason to conclude that the denial notice was not sent to the applicant's original address of record on December 27, 1991. Even if it were to be concluded that there was a problem in the mailing of the decision, it is concluded that a copy of the notice was sent to the alien on March 3, 1994. The first appeal was not received until July 28, 1998, and was clearly untimely.

Counsel cites 8 C.F.R. § 103.3(a)(2)(v)(B)(2), which allows an untimely appeal to be treated as a motion to reopen. However, that regulation relates only to appeals in *other than special agricultural worker and legalization cases*. The regulations relating to denials and appeals of special agricultural worker and legalization applications begin at 8 C.F.R. § 103.3(a)(3), and contain no provision for treating an untimely appeal as a motion to reopen. As stated above, 8 C.F.R. § 103.3(a)(iv)(C) simply states that an appeal received after the thirty day period has tolled will not be accepted for processing.

ORDER: The appeal is rejected.