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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center (CSC) denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of software development engineer as an H-1B nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petitioner claims to be a software development and consulting company with a staff of 9 employees.

The director denied the petition based on the petitioner's failure to establish that: (1) it is a qualifying United States employer or agent; (2) a valid labor condition application was submitted for all work locations; and (3) the proffered position qualified as a specialty occupation.

The record indicates that the decision, dated August 1, 2009, was mailed to the petitioner on October 13, 2009 and received by the petitioner on October 15, 2009.[1] The petitioner's Form I-290B, Notice of Appeal or Motion, was received by the CSC on November 6, 2009, 22 days after the decision was mailed. However, the Form I-290B was not accompanied by the required filing fee. On November 9, 2009, the CSC returned the Form I-290B to the petitioner and indicated that it had omitted the required filing fee. The CSC received the resubmitted Form I-290B with the proper $585.00 filing fee on December 16, 2009.

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 United States Citizenship and Immigration Services (USCIS) to reject any petition or application filed with the incorrect filing fee. Likewise, filings which were rejected because they were submitted with incorrect or omitted filing fees do not retain filing dates. Therefore, in this matter, USCIS 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 omitted the required fee. Therefore, as this filing did not retain a filing date, the actual filing date for the Form I-290B is December 16, 2009, 62 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 CSC's decision identified the proper filing fee for the appeal as $585.00. Finally, as USCIS, which includes both the CSC and the AAO, lacks the authority to authorize an untimely appeal which failed to hold a filing date due to the omission of a filing fee, USCIS is compelled to reject the 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, USCIS lacks the power 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.

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[1] The record indicates that the decision was originally mailed to the petitioner on August 1, 2009 and October 2, 2009, but was returned to the CSC as undeliverable on both occasions.

§ 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)(l)(ii).

An untimely-filed appeal must meet specific requirements to be treated as a motion. The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Furthermore, 8 C.F.R. § 103.5(a)(3) requires that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy.

Review of the record indicates that the appeal does not meet either of these requirements. On appeal, the petitioner submits a letter accompanied by previously-submitted documentary evidence and contends that the director's denial was erroneous. The petitioner, however, does not provide any new facts to be considered in the reopened proceeding, nor does the petitioner provide affidavits or other documentary evidence. Furthermore, the petitioner neither states a clear reason for reconsideration nor provides any pertinent precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. For these reasons, the appeal will not be treated as a motion to reopen or reconsider.

As the appeal was untimely filed and as it does not meet the requirements of a motion to reopen or a motion to reconsider, the appeal must be rejected.

ORDER: The appeal is rejected.