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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted] EAC 03 144 50623

Office: VERMONT SERVICE CENTER

Date: DEC 18 2006

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. Wiemani, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. The petitioner filed a motion to reopen the director's decision. After review, the director denied the motion. The matter is now before the Administrative Appeals Office on appeal. The appeal will be rejected as untimely filed.

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 complete appeal within 30 days of after 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).

The record indicates that the director issued the decision on April 4, 2005. The director properly gave notice to the petitioner that it had 33 days to file the appeal. Although counsel dated the appeal May 6, 2005, Citizenship and Immigration Services (CIS) received the appeal on May 9, 2005, 37 days after the decision was issued.<sup>1</sup> Accordingly, the appeal was untimely filed.

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). On June 27, 2005, the director rejected the filing, declining 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.

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<sup>1</sup> Counsel stated upon appeal that the petitioner may utilize a depreciation deduction amount as evidence of the ability to pay the proffered wage. There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. *See Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989).