



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



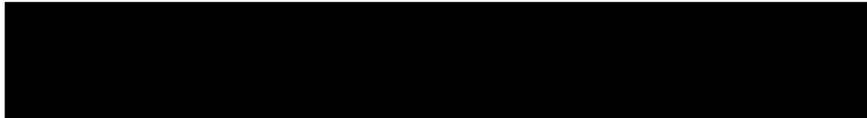
bb

File: [REDACTED]
EAC-05-073-51789

Office: VERMONT SERVICE CENTER

Date: **MAY 24 2007**

IN RE: Petitioner:
Beneficiary:



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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the preference visa petition that 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a physical therapy service. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petitioner accordingly.

The record contains Form G-28 properly executed by the petitioner's authorized legal representative for [REDACTED] as recorded attorney for the instant case. However, the record also contains a letter dated March 16, 2006 from Brook Medical Health Practice, P.C. addressed to the AAO indicating that [REDACTED] has recently passed away. The record does not contain any Form G-28 for any other counsel. Thus, the petitioner is considered self-represented in this matter.

The record indicates that the director mailed the decision to the petitioner on September 7, 2005. A Form I-290B, Notice of Appeal to Administrative Appeals Unit (AAU), was received by the Vermont Service Center on October 7, 2005, 30 days after the decision was mailed. However, the Form I-290B included the incorrect filing fee of \$110.00. A new filing fee of \$385.00 became effective on September 28, 2005. *See* 70 Fed. Reg. 50954, 50954 (Aug. 29, 2005), found at <http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=04921783362+1+0+0&WAISaction=retrieve>; 8 C.F.R. § 103.7. On October 12, 2005, the Vermont Service Center returned the Form I-290B to the petitioner and indicated that it included the incorrect filing fee. The Vermont Service Center received the resubmitted Form I-290B with the proper \$385.00 filing fee on October 21, 2005, along with a letter from the petitioner's counsel dated October 20, 2005. In the letter, counsel urges the AAO to consider that the appeal instructions in the director's September 7, 2005 decision identify the filing fee as \$110.00 and to accept the appeal based on the fact that the initial attempted filing was proper, but for the \$110.00 fee submitted by the petitioner.

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 were rejected because they were 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 October 20, 2005, 43 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).

While the AAO notes that the instructions in the director's September 7, 2005 decision identified the proper filing fee for the appeal as \$110.00, this decision was dated and mailed 21 days before the effective date of the filing fee change to \$385.00. The petitioner was put on notice of the change in fee in that this fee change and its effective date appeared in the Federal Register during August 2005. *See* 70 Fed. Reg. 50954 (Aug. 29, 2005). CIS, which includes both the Vermont Service Center and the AAO, has no authority to accept an untimely appeal which failed 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 director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

ORDER: The appeal is rejected.