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U.S. Department of Homeland Security
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 07 023 51682

Office: TEXAS SERVICE CENTER

Date:

MAR 05 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigrant and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reopen.

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 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 date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the director issued the decision on March 14, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal.

The petitioner filed an appeal with the Texas Service Center without the proper filing fee. The Texas Service Center issued a rejection notice, advising the petitioner that it could not accept or assign any priority or processing date to the appeal because it had not been properly filed with the correct filing fee. 8 C.F.R. § 103.2(a)(7)(i). The petitioner subsequently resubmitted the appeal with the correct filing fee. It was postmarked May 2, 2007 and received by the director on May 7, 2007, 54 days after the director's decision was issued. Accordingly, the appeal was untimely filed.

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 Citizenship and Immigration Services (USCIS) to reject any petition or application filed with the incorrect filing fee.** Likewise, filings, which are rejected because they are submitted with incorrect filing fees, do not retain filing dates. Therefore, in this matter, USCIS is required to reject the appeal as untimely filed. USCIS, which includes both the Texas Service Center and the AAO, has no authority to accept an untimely appeal that fails to hold a timely filing date due to the submission of an incorrect filing fee. USCIS 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, USCIS lacks the authority to consider the untimely appeal.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be **supported by affidavits or other documentary evidence**. 8 C.F.R. § 103.5(a)(2). 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 U.S. Citizenship and Immigration Services policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the untimely appeal meets the requirements of a motion to reopen because additional new evidence was submitted. 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). Therefore, the director must consider the untimely appeal as a motion to reopen and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reopen.