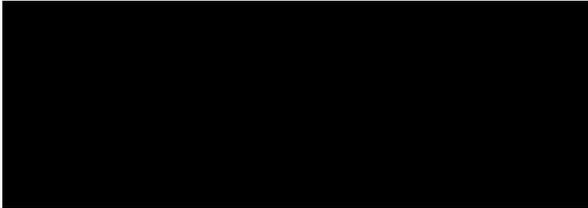


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**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 02 263 53157 Office: CALIFORNIA SERVICE CENTER Date: NOV 02 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner is an electrical contractor. It seeks to employ the beneficiary as a junior mathematician and to classify him as a nonimmigrant worker 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 director denied the petition on April 7, 2003. The petitioner filed a timely appeal, which was dismissed by the AAO on January 5, 2005. The petitioner subsequently filed a motion to reopen that involved the following sequence of events. Counsel mailed a motion to reopen to the service center on February 4, 2005. The motion to reopen was initially stamped as received by the service center on February 7, 2005. The service center sent a rejection notice (From I-797C) to counsel on February 9, 2005, advising him that the motion could not be accepted because the proper fee of \$110.00 was not included. Counsel resubmitted the motion to reopen, which was stamped as received by the service center on February 15, 2005. The service center sent a second rejection notice to counsel on February 16, 2005, advising him that the motion could not be accepted because the check, or other payment form, for the \$110 fee was not signed. Counsel then submitted the motion to reopen for a third time, with the correct fee payment. The motion was stamped as received by the service center on February 22, 2005.

A motion to reopen – like petitions, appeals, and other requests submitted to CIS – is regarded as properly filed when stamped by the receiving office, “if it is signed and executed and the required filing fee is attached.” 8 C.F.R. § 103.2(a)(7). Improperly filed motions “shall be rejected . . . [and] . . . will not retain a filing date.” *Id.* The petitioner’s motion to reopen, therefore, was not properly filed until February 22, 2005.

The regulation specifically governing motions to reopen, at 8 C.F.R. § 103.5, provides as follows:

[W]hen the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding Any motion to reopen a proceeding . . . filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of [Citizenship and Immigration Services] where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

8 C.F.R. § 103.5(a). The regulation further provides – under “Filing Requirements” – that the motion “must be . . . [a]ccompanied by a nonrefundable fee as set forth in §103.7.” 8 C.F.R. § 103.5(a)(iii)(B). Thus, a motion to reopen cannot be filed until the requisite fee is received.

The requisite fee in the instant case was not received until February 22, 2005, which was 48 days after the AAO issued its decision on January 5, 2005. Thus, the petitioner’s motion to reopen was not filed within the 30-day period specified in 8 C.F.R. § 103.5(a). Though the regulation allows for the 30-day filing deadline to be excused if the record demonstrates that the delay was “reasonable” and “beyond the control” of the petitioner, neither condition is met in this case. The failure to submit the required fee with the original mailing of the motion to reopen was neither reasonable nor beyond the control of the petitioner since the fee requirement is clearly stated in the regulations. The failure to sign the check, or

other form of payment, when it was submitted with the second mailing of the motion was not beyond the control of the petitioner. Accordingly, the AAO will not exercise its discretion under 8 C.F.R. § 103.5(a) to waive the 30-day filing deadline and reopen the proceeding.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the motion to reopen will be dismissed.

ORDER: The motion to reopen is dismissed.