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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE **MAY 04 2012**

Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. Please note that all documents have been returned to the office that originally decided your case. Please also note that any further inquiry must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (CSC), denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) 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 or the attorney or representative of record must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. 8 C.F.R. § 103.8(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 petitioner's Form I-290B, Notice of Appeal or Motion, was timely submitted and received by the CSC on April 21, 2011. However, the Form I-290B was not accompanied by the required filing fee. On May 2, 2011, the CSC returned the Form I-290B to counsel and indicated that the required filing fee had been omitted. Counsel resubmitted Form I-290B to the CSC on May 13, 2011 without the required fee, claiming that the appeal as initially filed had been accompanied by the correct fee. In support of this contention, counsel submitted a copy of a cancelled check dated April 20, 2011 [REDACTED] payable to the U.S. Department of Homeland Security in the amount of \$ [REDACTED]. Records indicate that this check was cashed on April 27, 2011.

The AAO notes that the beneficiary referenced on Check 1433, [REDACTED] is not the beneficiary in the instant case. A review of U.S. Citizenship and Immigration Services (USCIS) records indicates that counsel is the attorney of record for the petition filed on behalf of [REDACTED] and the CSC denied that petition on the same day as the instant case. USCIS records further indicate that counsel filed an appeal on behalf of that petitioner and beneficiary at the same time as the appeal in this matter. Therefore, while the record reflects that counsel submitted a filing fee of \$630.00 on April 20, 2011, it appears that this fee accompanied the appeal filed under Receipt Number [REDACTED] not the instant petition.

Again, the regulation at 8 C.F.R. § 103.3(a)(2)(i) 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. § 103.8(b), within 33 days if the decision was served by mail. Title 8 C.F.R. § 103.2(a)(7)(i) requires 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, and the record does not contain evidence to refute this finding. Therefore, as this filing did not retain a filing date, the actual filing date for the Form I-290B would have been May 13, 2011, 53 days after the decision was served by mail, if the required filing fee had been provided with this resubmitted appeal. 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 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 Director of the CSC. See 8 C.F.R. § 103.5(a)(1)(ii). In this case, however, the record lacks evidence that the required filing fee was ever submitted. Accordingly, as the untimely submitted appeal was never filed with the required fee, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) is irrelevant and does not apply to this matter.

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.