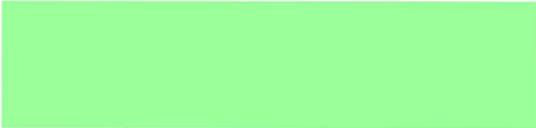


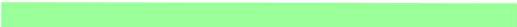


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 25 2013** OFFICE: VERMONT 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)

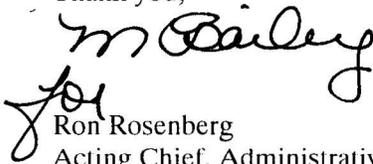
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director 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. The AAO will return the matter to the director for consideration as a motion to reopen and reconsider.

The record of proceeding indicates that the service center director issued the decision on December 7, 2010. The AAO observes that the service center director properly gave notice to the petitioner that it had 33 days (30 days, plus three days for service by mail) to file the appeal. However, the director improperly advised the petitioner as to the filing fee required for submitting a Form I-290B, Notice of Motion or Appeal.

The petitioner submitted an appeal to the service center on January 6, 2011, along with an incorrect filing fee of \$585. The director returned the appeal and notified the petitioner of the correct fee for filing an appeal. The appeal, with the correct filing fee, was resubmitted to the service center on January 18, 2011, or 42 days after the director issued the decision. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) states that an appeal must be accompanied by a nonrefundable fee as set forth in 8 C.F.R. § 103.7. As of November 23, 2010, the fee for filing a Form I-290B, Notice of Appeal or Motion, is \$630.00. *See* 75 Fed. Reg. 58962 (Sept. 24, 2010). A benefit request which is not submitted with the correct fee(s) will be rejected and will not retain a filing date. 8 C.F.R. § 103.2(a)(7)(i) and (iii).

The AAO observes that notice of the change in the fee properly appeared in the Federal Register in accordance with law over one month prior to the director's decision. *See* 75 Fed. Reg. 58962, 58962-58964 (Sept. 24, 2010). As noted in the Federal Register, "[a]pplications or petitions mailed, postmarked, or otherwise filed on or after November 23, 2010 must include the new fee." Moreover, the instructions to the Form I-290B (Rev. 11/23/10) Y (the version utilized by the petitioner) specifies the filing fee as \$630.00. In addition, the U.S. Citizenship and Immigration Services (USCIS) fee schedule also provides the correct fee. Moreover, under the heading "New Fees Effective November 23, 2010," the fee schedule states, in pertinent part, the following:

To avoid processing delays, include the correct fee when you file your form with USCIS. If you do not submit the appropriate fee on or after the effective date, we will reject the form. You will need to resubmit the form with the new fee.

Title 8 C.F.R. § 103.3(a)(2)(v)(B)(I) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed." The regulation is binding on USCIS in its administration of the Act, and it does not have the authority to extend the filing period. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner*, 420 F.2d 809, (C.A. Md. 1969)

(government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures). Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO authority to extend this time limit. Thus, the appeal must be rejected.

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 Vermont Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii).

The matter will therefore be returned to the director. If the director determines that the late appeal meets the requirements of a motion, the motion shall be granted and a new decision will be issued.

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

ORDER: The appeal is rejected.