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File: EAC 06 001 52279 Office: VERMONT SERVICE CENTER Date: MAR 07 2007

IN RE: Petitioner:  
Beneficiary:



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

IN BEHALF OF PETITIONER:



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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(I).

The petitioner is a New York limited liability corporation and is allegedly engaged in the import and export of decorative leather products. The petitioner seeks to employ the beneficiary as its chief operating officer pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The director denied the petition after concluding that the petitioner failed to establish that (1) the beneficiary will be employed primarily in a managerial or executive capacity within one year of the approval of the petition; and (2) the beneficiary was employed for one year by the foreign entity in a qualifying capacity.

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 of 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). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the decision of the director was faxed to the petitioner on December 12, 2005. A Form I-290B, Notice of Appeal to Administrative Appeals Unit, was received by the Vermont Service Center on Friday, January 13, 2006, 32 days after the decision was faxed. The AAO notes that the instructions in the Vermont Service Center's December 12, 2005 decision properly advised the petitioner that the appeal must be received within 30 days. Accordingly, the appeal was untimely filed.

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

Additionally, it is noted that the Form I-290B was not accompanied by the required filing fee. On January 17, 2006, the Vermont Service Center returned the Form I-290B to the petitioner and indicated that it had omitted the required filing fee. The Vermont Service Center received the resubmitted Form I-290B with the proper \$385.00 filing fee on January 27, 2006, along with an undated letter from the petitioner. In the letter, counsel for the petitioner advises that the Vermont Service Center improperly rejected the appeal, and alleges that counsel's check number 212 was enclosed with the submission. Counsel, however, provides no evidence to support this claim, such as a copy of the cancelled check or its check register. Counsel concludes by asserting that the omitted fee was the result of a clerical mistake, and encloses check number 222 for the correct fee in the amount of \$385.

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. As stated above, the appeal was untimely filed since it was received by the Vermont Service Center 32 days after the decision was faxed. If, however, it had been timely filed, it would still be rejected. Title 8 C.F.R. § 103.2(a)(7)(i) requires CIS 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, CIS is required in the alternative to reject the appeal as untimely filed pursuant to 8 C.F.R. § 103.2(a)(7)(i). As the petitioner's initial filing did not retain a filing date, the actual filing date for the Form I-290B is January 27, 2006, 46 days after the decision was served. 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)(I).

The AAO notes that the instructions in the Vermont Service Center's December 12, 2005 decision identified the proper filing fee for the appeal as \$385.00. Finally, as CIS, which includes both the Vermont Service Center and the AAO, lacks the authority to authorize an untimely appeal which failed to hold a filing date due to the omission of a filing fee, CIS is compelled to reject the appeal. 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." Therefore, under the regulations, CIS lacks the power 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.