



U.S. Citizenship  
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FILE: [REDACTED]  
EAC 03 233 55636

Office: VERMONT SERVICE CENTER

Date: NOV 10 2005

IN RE: Petitioner: [REDACTED]

PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON 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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The petitioner is a native and citizen of Thailand who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen.

The record reflects that the instant petition was filed by the petitioner on August 13, 2003. On July 15, 2004, the director requested the petitioner to submit further evidence to support her claim of good moral character. The petitioner failed to respond to the director's request for evidence and the director denied the petition in accordance with the regulation at 8 C.F.R. § 204.1(h), finding that the record did not contain sufficient evidence to support eligibility.

The petitioner, through counsel, submits a Form I-290B, Notice to Appeal to the Administrative Appeals Office (AAO). Despite the filing of the I-290B, however, counsel indicates that she is not filing an appeal, but rather, a motion to reopen because she missed the filing deadline for appeal due to surgery and resulting complications which arose from the surgery.

The regulation at 8 C.F.R. § 103.2(a)(1) provides:

*General.* Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission.

As it pertains to the proper filing of an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides:

*Filing Appeal.* The affected party shall file an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by § 103.7 of this part. The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.<sup>1</sup>

The record reflects that the director issued his decision on December 23, 2004. The Form I-290B was received on February 1, 2005, 40 days after the decision was issued.

It appears that counsel is relying on the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2), which 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 service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii).

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<sup>1</sup> If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The regulation at 8 C.F.R. § 103.5(a)(2) states that a “motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” Although counsel submitted additional evidence to be considered, the documents do not contain a police clearance or any other evidence related to the petitioner’s good moral character such as to be considered “new facts” as required by the regulation.<sup>2</sup> Accordingly, as the director found the petitioner’s motion did not meet the requirements of the regulation, he declined to treat the late appeal as a motion and forwarded the matter to the AAO.

As the director declined to treat the late appeal as a motion, the matter is, therefore, before the AAO on appeal. The appeal must be rejected as untimely filed.

**ORDER:** The appeal is rejected.

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<sup>2</sup> It is further noted that in instances where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. If the petitioner had wanted the submitted evidence to be considered, she should have submitted the documents in response to the director’s request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Therefore, even if the petitioner had submitted additional evidence on appeal, the AAO need not and would not consider the sufficiency of the evidence submitted on appeal.