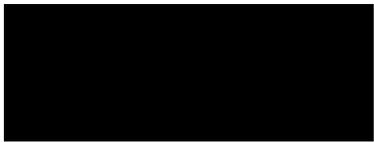




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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: [Redacted]

Office: TEXAS SERVICE CENTER

Date: 28 NOV 2001

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

Petition: Petition for Alien Fiance(e) Pursuant to Section 101(a)(15)(K) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(K)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen 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 the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner on appeal. The appeal will be rejected pursuant to 8 C.F.R. 103.3(a)(2)(v)(B)(1) as untimely filed.

The petitioner is a citizen of the United States who seeks to classify the beneficiary, a native and citizen of Jamaica, as the fiance(e) of a United States citizen pursuant to section 101(a)(15)(K) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(K).

On October 1, 1999, the director denied the petition after determining that the petitioner was not legally able to conclude a valid marriage. Shortly thereafter, the director reopened the matter on a Service motion, as it appeared that the petitioner's response to the director's request for additional information had been inadvertently lost in the Service's mailroom. On November 19, 1999, the director affirmed his previous decision to deny the petition.

The petitioner appealed the director's November 19, 1999 denial, and the Executive Associate Commissioner dismissed the appeal on March 27, 2000. However, it has recently come to the Service's attention that the petitioner also appealed the director's October 1, 1999 denial; however, the Service did not receive the appeal until January 10, 2000. It is this appeal that is currently before the Executive Associate Commissioner for adjudication.

Pursuant to 8 C.F.R. 103.3(a)(2)(i), an affected party has 30 days after service of a decision to file an appeal with the office that made the unfavorable decision. The record reflects that on October 1, 1999, the director sent his decision to the petitioner at her address of record; the Service received the appeal 99 days later on January 10, 2000. The appeal was untimely filed.

The regulation at 8 C.F.R. 103.3(a)(2)(v)(B)(1) states that the Service must reject an appeal that is not filed within the time allowed. 8 C.F.R. 103.2(a)(2)(v)(B)(2), however, 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.

According to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceedings, supported by affidavits or other documentary evidence. 8 C.F.R. 103.5(a)(3) requires that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision must also establish that the decision was

incorrect based on the evidence of record at the time of the initial decision.

The Executive Associate Commissioner already discussed the merits of the petitioner's claim in his March 27, 2000 decision. The petitioner's appeal of the director's October 1, 1999 decision does not present any new facts or state a reason for reconsideration that the Executive Associate Commissioner failed to address in his March 27, 2000 decision. For this reason, the appeal will not be treated as a motion to reopen or reconsider and must, therefore, be rejected.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is rejected as untimely filed.