



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: SAN DIEGO, CA Date: SEP 18 2007

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under Section 320 of the Immigration and Nationality Act; 8 U.S.C. §1431.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 application was denied by the District Director, San Diego, California, and 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 reconsider.

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 after 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). 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 record indicates that the district director issued the decision on January 13, 2004. It is noted that the district director properly gave notice to the petitioner that it had 33 days to file the appeal with the filing fee. Although the record indicated that the Form I-290B, Notice of Appeal, was submitted on February 10, 2004, it appears that the required fee was not paid until September 1, 2004. The appeal is considered filed when, accompanied by the required fee, it is submitted to the appropriate office. Accordingly, the appeal in this case was untimely filed. The district director erroneously annotated the appeal as timely and forwarded the matter to the AAO.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The applicant's father's statement on the Form I-290B, Notice of Appeal, suggests that although his ex-wife was awarded physical custody, both parents shared legal custody of their minor children upon their divorce. The AAO notes that the applicant has resided with her father since 2002, pursuant to a lawful admission for permanent residence. The AAO notes further that included with the appeal is a notarized statement executed as required by the custody order by the applicant's mother authorizing the applicant's father to travel with the applicant to the United States.

Here, the untimely appeal meets the requirements of a motion to reconsider. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the district director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the district director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

**ORDER:** The appeal is rejected. The matter is returned to the district director for consideration as a motion to reconsider.