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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE

Office: HOUSTON, TX

Date:

OCT 28 2008

IN RE:

Applicant:

APPLICATION: Application for Certificate of Citizenship pursuant to Section 201 of the Nationality Act of 1940; 8 U.S.C. § 601.

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 Field Office Director, Houston, Texas, 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 reopen.

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 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 field office director issued the decision on March 6, 2008. It is noted that the director properly gave notice to the applicant that she had 33 days to file the appeal. The record suggests that the applicant attempted to file the appeal, but did not submit the appropriate fee. The appeal, along with the required fee, was received by the field office director on April 17, 2008, more than 33 days after the decision was issued. Accordingly, the appeal was untimely filed.

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).

Here, the untimely appeal meets the requirements of a motion to reopen. The applicant submits a legible copy of her father's DD-214 military records, indicating his service in the Armed Forces from 1947 until 1950. The applicant also submits a complete copy of the applicant's parents divorce papers and her father's school records reflecting presence in the United States from 1934 until 1948. The AAO notes that the applicant's citizenship claim must be evaluated under section 201 of the Nationality Act of 1940 because she was born prior to the enactment of the Immigration and Nationality Act of 1952. The AAO further notes that the applicant's claim falls within the provisions of the Act of March 16, 1956, Pub. L. 84-430, 70 Stat. 40.¹

¹ That Act provides, in relevant part, "[t]hat section 301(a)(7) of the Immigration and Nationality Act shall be considered to have been and to be applicable to a child born outside of the United States and its outlying possessions after January 12, 1941 and before December 24, 1952, of parents one of whom is a citizen of the United States who has served in the Armed Forces of the United States after December 31, 1946, and before December 24, 1952, and whose case does not come within the provisions of section 201(g) or (i) of the Nationality Act of 1940."

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

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