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U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: NEW YORK, NY

DATE: OCT 30 2007

IN RE:

APPLICANT:



APPLICATION:

Application for Replacement Naturalization/Citizenship Document under Section 338
of the Immigration and Nationality Act, 8 U.S.C. § 1149.

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director Services, New York, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The matter will be returned to the district director for consideration as a motion to reopen and for issuance of a new decision.

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. 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. 8 C.F.R. § 103.2(a)(7)(i).

The record reflects that the district director issued the applicant's decision on May 6, 2004. The district director properly gave notice to the applicant that he had 33 days to file the appeal. The appeal was received by the New York, New York district office on June 14, 2004 – 39 days after the denial decision was issued. Accordingly, the appeal was untimely filed.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an 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 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).

In the present matter, the application was denied because the applicant failed to establish that a correction of his date of birth was justified under 8 C.F.R. § 338.5. The applicant's untimely appeal contains a letter and a new declaration of age document signed by the applicant's brother. The untimely appeal thus meets the requirements for consideration as a motion to reopen. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the district director, New York, New York. 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the district 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 district director for treatment as a motion and for issuance of a new decision.