

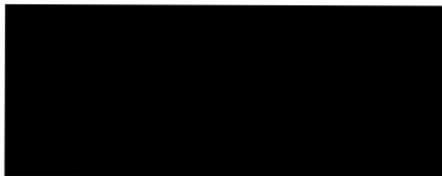
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U.S. Department of Homeland Security  
20 Mass. Ave. NW, Rm. 3000  
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U.S. Citizenship  
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Services

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FILE: SRC 07 103 51075 Office: TEXAS SERVICE CENTER Date: **AUG 28 2008**

IN RE: 

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 Director, Texas Service Center denied the application. The matter 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 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 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 Director issued the decision on January 24, 2008. It is noted that the Director gave notice to the applicant that she had 30 days to file the appeal and that the applicant initially submitted the Notice of Appeal or Motion (Form I-290B) within the period specified by the Director, but with an incorrect filing fee. The Form I-290B was returned to the applicant. The appeal was, therefore, not received by the Director until March 10, 2008, 46 days after the decision was issued. Accordingly, the appeal was untimely filed.

Although the AAO notes that the applicant was instructed to submit the incorrect filing fee by the Director's decision, this error on the part of the Director does not render the applicant's appeal timely. Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO or the Director the 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).

Here, the untimely appeal meets the requirements of a motion to reopen, as the applicant submits a marriage certificate in support of her application as proof of her name change. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the 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 treatment as a motion and issuance of a new decision.