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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JAN 10 2008

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.


Robert P. Wiemahn, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center. 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 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 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 director issued a decision on April 20, 2007. It is noted that the director failed to advise the applicant of her appeal rights under 8 C.F.R. §§ 103.3 and 103.5. The Notice of Appeal was sent to the AAO in error. An appeal is not properly filed until the proper office, in this case the Nebraska Service Center, receives it. The appeal was received at the Nebraska Service Center on June 5, 2007 – 46 days after the issuance of the applicant's denial decision. 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. 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 applicant's Form N-565, Application for Replacement Naturalization/Citizenship Document (N-565, Application) was denied because the applicant failed to establish that the date of birth contained on her certificate of naturalization contains a U.S. Citizenship and Immigration Services (CIS) clerical error, as described in 8 C.F.R. § 338.5.¹ On appeal, the applicant asserts that her certificate of

¹ The regulation at 8 C.F.R. § 338.5, provides in pertinent part that:

- (a) Whenever a Certificate of Naturalization has been delivered which does not conform to the facts shown on the application for naturalization, or a clerical error was made in preparing the certificate, an application for issuance of a corrected certificate, Form N-565, without fee, may be filed by the naturalized person.
- (e) The correction will not be deemed to be justified where the naturalized person later alleges that the name or date of birth which the applicant stated to be his or her correct name or date of birth at the time of naturalization was not in fact his or her own name or date of birth at the time of naturalization.

naturalization erroneously contains the date that her birth was registered in Mexico (August 19, 1972) rather than her actual birth date (July 20, 1972.) The applicant submits a copy of her birth certificate to corroborate her assertions.

The AAO finds the untimely appeal to meet 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 director, Nebraska Service Center. 8 C.F.R. § 103.5(a)(1)(ii). The director must therefore consider the untimely appeal as a motion to reopen and render a new decision accordingly. The AAO notes that the director also failed to notify the applicant of her appeal rights under 8 C.F.R. §§ 103.3 and 103.5. The present matter is thus remanded to the director for issuance of a new decision on this basis as well.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reopen and for issuance of a new decision.