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U.S. Department of Homeland Security
20 Massachusetts Avenue N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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[Redacted]

FILE:

[Redacted]

Office: TAMPA (MIAMI, FLORIDA)

Date: DEC 05 2008

IN RE:

Applicant:

[Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(g) of the Immigration and Nationality Act, 8 U.S.C. § 1182(g)

ON BEHALF OF APPLICANT:

[Redacted]

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.

Michael Shumy

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Tampa, Florida. 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 District Director for treatment 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 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 August 2, 2006. It is noted that the District Director properly gave notice to the applicant that she had 33 days to file her appeal. On September 11, 2006, the applicant, through counsel, submitted her appeal to the AAO; however, the AAO notes that the District Director's denial clearly stated that the appeal was not to be sent directly to the AAO. Although the applicant dated the appeal September 8, 2006, the District Director received it on September 18, 2006, 47 days after the decision was issued. Accordingly, the appeal was untimely filed.

Counsel contends that the District Director's decision was not sent out until after August 9, 2006, and therefore, the 33 days to file her appeal should be calculated based on the August 9, 2006 date. The AAO notes that counsel failed to provide any evidence that U.S. Citizenship and Immigration Services (USCIS) sent out the decision after August 9, 2006. Moreover, even if the date to file the appeal is calculated from the August 9, 2006 mailing date, the District Director did not receive the appeal until September 18, 2006, or 40 days after the decision was mailed. Therefore, the appeal would still be untimely filed.

Neither the Act nor the pertinent regulations grant the AAO or the District Director the authority to extend the 33-day time limit for filing an appeal. The regulation at 8 C.F.R. § 103.2(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 based on counsel's arguments on the Form I-290B and evidence of the applicant's health insurance. 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 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 the issuance of a new decision.