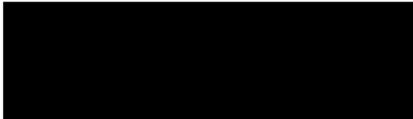


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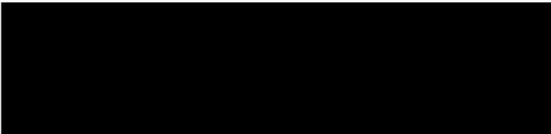
AUG 09 2007

FILE: [REDACTED] Office: LOS ANGELES Date:

IN RE: [REDACTED]

APPLICATION: Application for Adjustment of Status to Permanent Residence under section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255, and for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B).

ON BEHALF OF APPLICANT:



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 cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application and adjustment application were denied by the District Director, Los Angeles, California, and the waiver application is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

An affected party filing from within the United States has 30 days from the date of an adverse decision to file an appeal. An appeal received after the 30-day period has tolled will not be accepted. The 30-day period for submitting an appeal begins 3 days after the Notice of Decision is mailed. 8 C.F.R. § 103.5a(b).

The record reflects that the District Director sent the decision on December 23, 2004 to the applicant at her address of record. USCIS received the appeal 34 days later on January 26, 2005. Therefore, the appeal was untimely filed.

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: (1) 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 USCIS policy; and (2) 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).

The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the District Director of the Los Angeles, California District Office. See 8 C.F.R. § 103.5(a)(1)(ii). The District Director declined to treat the late appeal as a motion and forwarded the matter to the AAO. On appeal, counsel submits a brief in which she asserts that denial of the applicant's I-485 application for adjustment of status on the same date as the denial of her waiver application constituted a denial of her constitutionally guaranteed right to due process. Counsel contends that if the applicant had been given an "equal opportunity" to appeal her decision, she "would have been able to hire the services of an attorney who could have assisted her in preparing and filing meritorious, truthful and objective application for *I-601 Waiver*." Counsel contends that the applicant's removal would result in extreme hardship to the applicant's husband and children, but neither counsel nor the applicant submits evidence relating to, or presents any detailed statements in rebuttal to, the director's finding that the applicant failed to establish that denial of her waiver application would result in extreme hardship to the qualifying relative. Counsel cites no precedent decisions to establish that the director's denial was based on an incorrect application of law or policy.

As neither counsel nor the applicant presents new facts to be considered, or provides any precedent decisions to establish that the director's denial was based on an incorrect application of law or USCIS policy, the appeal will not be treated as a motion to reopen or reconsider and will, therefore, be rejected.

As always, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not sustained that burden.

ORDER: The appeal is rejected.