

identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3100
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



tl3

FILE:

Office: LIMA, PERU

Date: OCT 30 2007

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v) and 8 U.S.C. § 1182(i) respectively.

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Lima, Peru. 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 OIC for consideration as a motion to reopen.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that an affected party must file an appeal within 30 days after service of an unfavorable decision. If the decision is mailed, the 30-day period for submitting an appeal begins 3 days after it is mailed. 8 C.F.R. § 103.5a(b). The date of filing is the date of actual receipt of the appeal, not the date of mailing. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record reflects that the OIC sent the decision on August 22, 2005 to the applicant at the applicant's address of record. It is noted that the OIC stated that the applicant had 33 days to file an appeal. It is also noted that the OIC stated that any appeal was to be filed with that office, not the AAO. Nevertheless, the appeal was received by the AAO on September 26, 2005, 35 days after the decision was issued. The appeal was re-filed with USCIS on October 4, 2005, 43 days after the decision was issued. Therefore, the appeal was untimely filed and must be rejected.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit for filing an appeal. However, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) provides that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), 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 OIC at the U.S. Embassy in Lima, Peru. *See* 8 C.F.R. § 103.5(a)(1)(ii). The OIC declined to treat the late appeal as a motion and forwarded the matter to the AAO.

Here, the applicant has submitted sufficient new evidence—including, among other documentation, affidavits from the applicant and the applicant's spouse, letters from psychologists and letters from the applicant's spouse's employers—to meet the requirements for a motion to reopen.

Therefore, the OIC 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 OIC for consideration as a motion to reopen.