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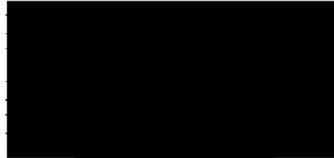
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

Office: VIENNA, AUSTRIA

Date:

OCT 31 2007

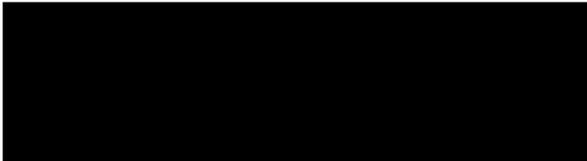
IN RE: Applicant:



APPLICATION:

Application for Waiver of Ground of Inadmissibility under Section 212(a) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(a)

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 Officer-in-Charge, Vienna, Austria, denied the Form I-601, Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9). 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 officer-in-charge for consideration 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 of after service of the unfavorable decision. The appeal must be submitted to the correct office, and must be accompanied by the required filing fee. 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 officer-in-charge issued the decision on December 29, 2006. It is noted that the director properly gave notice to the applicant that she had 33 days to file the appeal. The appeal is dated January 29, 2007, and was received by USCIS on February 1, 2007, 35 days after issuance of the 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. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, 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).

The applicant, through counsel, submits additional evidence in support of her appeal including a report from a psychologist outlining the mental health impact of the separation of the applicant and her spouse. The untimely appeal appears to meet the requirements of 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 officer-in-charge. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the matter will be returned to the officer-in-charge to 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 officer-in-charge for treatment as a motion and issuance of a new decision.