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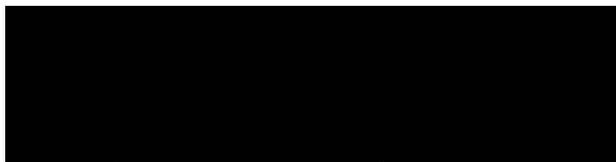
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FILE [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: DEC 03 2008

IN RE: Applicant: [REDACTED]

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

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Mexico City (Ciudad Juarez Field Office), denied the Form I-601, Application for Waiver of Ground of Excludability under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v). The appeal will be rejected as untimely filed. The AAO will return the matter to the district director 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 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 decision in the applicant's case is dated June 26, 2006. It is noted that the district director gave notice to the applicant that an appeal of the decision had to be filed within 33 days, on the appropriate form, and accompanied by the required fee. The district director specifically instructed the applicant to send the appeal to "this" office, meaning the USCIS office in Ciudad Juarez. The appeal was received, with the appropriate fee, on August 24, 2006, more than 33 days after the decision in his case was issued.<sup>1</sup> The appeal is not considered filed until it is received by the appropriate USCIS office, and accompanied by the required filing fee. 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).

Here, the untimely appeal meets the requirements of a motion to reopen. The applicant's appeal is accompanied by a declaration from [REDACTED] regarding the applicant's spouse's mental health. This new evidence warrants reopening of the case and consideration of [REDACTED] opinion in determining whether the applicant's spouse's emotional hardship rises to the level of "extreme."

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<sup>1</sup> The AAO notes that the applicant first attempted to file the appeal directly with the AAO on July 31, 2006, 36 days after issuance of the director's decision. The AAO returned the appeal and instructed the applicant to submit it to the office that rendered the decision. The applicant attempted to do so on August 10, 2006, but the fee was not in a form acceptable by the Ciudad Juarez office. The appeal and appropriate fee were finally received on August 24, 2006.

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 director for consideration as a motion to reopen.