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[REDACTED]

FILE:

[REDACTED]
EAC 06 126 50599

Office: VERMONT SERVICE CENTER

Date: **MAY 12 2008**

IN RE:

Petitioner: [REDACTED]

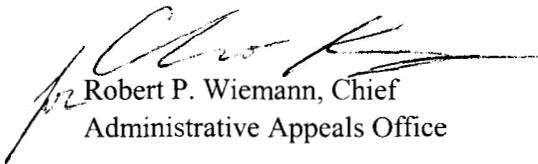
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

ON BEHALF OF PETITIONER:

[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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

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. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the director issued the decision on January 9, 2007. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The appeal was filed on February 26, 2007, 48 days after the decision was issued. As an explanation for the late filing of the appeal, counsel submitted an Order from the Supreme Court of Rhode Island that excused counsel from court from February 12, 2007 until March 5, 2007, for medical reasons.

The petitioner's excusal order does not obviate the late filing of the appeal. The 33-day period for filing the appeal began to run on January 9, 2007. Counsel, at any time prior to the 33rd day, had the opportunity to file the appeal and request additional time to supplement the appeal with a brief. The AAO could have considered counsel's impending medical procedure as demonstrating good cause and granted additional time for him to submit a brief. *See* 8 C.F.R. § 103.3(a)(2)(vii). We note that counsel's Motion for Court Excusal was received by the Clerk's Office of the Supreme Court of Rhode Island on January 23, 2007, well within the 33-day period.

We further note that the period of time granted by the Order of the Supreme Court of Rhode Island covered the period from February 12, 2007 until March 5, 2007. As previously indicated, the 33rd day of the appeal period fell on February 11, 2007, one day prior to the date the court's period of excusal began. Accordingly, even if we were to concede that we fall under the jurisdiction of the order, which we do not, the petitioner was not excused from court until the day *after* the appeal was due.

As discussed above, instead of filing an appeal during the 33-day period and requesting additional time to submit a brief, counsel waited until well after the appeal period had passed to file the appeal. Counsel then requested that the AAO excuse the late filing of the appeal. Although the AAO may extend the time for filing a brief if good cause is shown, neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. However, 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 does not meet the requirements of a motion to reopen or a motion to reconsider. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

ORDER: The appeal is rejected.