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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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APR 19 2010

FILES:

[Redacted]

Office: NEW YORK, NEW YORK

Date:

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to section 101(b)(1)(F)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)(i)

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The district director initially approved the Form I-600, Petition to Classify Orphan as an Immediate Relative. However, upon receipt of correspondence from the United States Consulate in Bridgetown, Barbados, the director issued a notice of intent to revoke, and ultimately revoked, approval of the petition. 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 director for consideration as a motion to reconsider.

The regulation requires that an appeal from the revocation of the approval of a petition must be filed within 15 days after service of the notice of revocation. 8 C.F.R. § 205.2(d). If the notice was mailed, the appeal must be filed within 18 days. *See* 8 C.F.R. § 103.5a(b).

The director revoked approval of the petition on August 20, 2009. U.S. Citizenship and Immigration Services (USCIS) received the petitioner's Form I-290B, Notice of Appeal, on September 9, 2009, 20 days after the director's decision was issued. Accordingly, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 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 that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Counsel's submission qualifies as a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, the following:

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.

Counsel contends that the director misapplied section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i) which defines an orphan, in pertinent part, as follows:

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption [emphasis added]. . . .

Thus, the petitioner must establish that the beneficiary is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or that the beneficiary's sole or surviving parent is incapable of providing proper care and has in writing

irrevocably released him for emigration and adoption. Counsel and the petitioner appear to concede that the beneficiary does not qualify as an orphan under the first half of this definition. However, neither the correspondence from the consulate nor the decision of the director contained any analysis of whether the beneficiary qualifies as an orphan under the second half of this definition: whether he has a sole or surviving parent who is incapable of providing proper care, and who has in writing irrevocably released the child for emigration and adoption,¹ and counsel notes this failure to address the second half of the definition of an “orphan.” Counsel’s submission, therefore, qualifies as a motion to reconsider.

Here, the untimely appeal appears to meet the requirements of a motion to reconsider. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the field office director for consideration as a motion to reconsider and the issuance of a new decision.

¹ Whether the beneficiary has been abandoned by both of his birth parents has no relevance under the second half of the definition, as counsel correctly notes.