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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
and Immigration
Services**

H2

FILE:

Office: PHILADELPHIA, PA
[consolidated therein]

Date: NOV 30 2009

IN RE:

Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink that appears to read "Michael Shumway" but is signed as "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Acting District Director, Philadelphia, Pennsylvania, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). A subsequent appeal was rejected as untimely by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be rejected as untimely filed and the previous decisions of the Acting District Director and the AAO will be affirmed. The application for waiver of grounds of inadmissibility is denied.

In order to properly file a motion to reopen or reconsider, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party must file the motion to reopen or reconsider within 30 days of service of the unfavorable decision. If the decision was mailed, the motion to reopen or reconsider 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 Acting District Director issued the decision on December 11, 2001. It is noted that the Acting District Director properly gave notice to the applicant that he had 33 days to file his appeal. On January 17, 2002, the applicant, through counsel, submitted an appeal to the AAO. On February 2, 2007, the AAO rejected the applicant's appeal as untimely. On March 5, 2007, the applicant submitted his motion to reopen or reconsider to the AAO, which the AAO returned to the applicant. The AAO notes that its decision clearly stated that all documents were returned to the office that originally decided the applicant's case and any further inquiry must be made to that office, which in this case is the Philadelphia, Pennsylvania District Office. *See* 8 C.F.R. § 103.5(a)(iii)(E). Although the applicant dated the motion to reopen or reconsider February 12, 2007, the Acting District Director received it on March 12, 2007, 38 days after the decision was issued. Accordingly, the motion to reopen or reconsider was untimely filed.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing a motion to reopen or reconsider. The regulation at 8 C.F.R. § 103.5(a)(1)(i) states that an untimely motion to reopen or reconsider may be accepted in the discretion of the USCIS where it is demonstrated that the delay was reasonable and was beyond the control of the applicant. With his motion to reopen or reconsider, the applicant, through counsel, submitted a copy of an envelope dated December 26, 2001, claiming that the Acting District Director did not actually mail the Form I-601 decision until December 26, 2001; therefore, his appeal to the AAO was timely. However, the AAO notes that the envelope submitted by counsel is not addressed to any party and it could have contained any sort of correspondence; therefore, the envelope does not establish that the Acting District Director mailed his decision on December 26, 2001.

The AAO notes that on June 16, 1988, the applicant's naturalized United States citizen sister filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On February 22, 1989, the Center Director, Vermont Service Center, denied the applicant's Form I-130 and it was not reopened; therefore, there is no underlying petition to support the applicant's Form I-601.

The filing of a Form I-601 waiver application is predicated on the necessity to demonstrate admissibility, which in this case is a requirement for adjustment to permanent resident status under

section 245 of the Act. Although USCIS allows for the simultaneous filing of Forms I-130 and I-485, the applicant's eligibility to apply for adjustment to permanent resident status is dependent on approval of the Form I-130 petition filed by his sister.

The purpose of the Form I-130 petition is to establish for immigration purposes the validity of the familial relationship between the applicant and his sister. In the absence of an approved I-130 petition, the applicant is not entitled to apply for adjustment of status, and his application for adjustment cannot be approved regardless of whether he is admissible or, if not, whether a waiver is available for any ground of inadmissibility. Furthermore, a determination that the applicant has demonstrated extreme hardship to his lawful permanent resident mother and thus qualifies for a waiver of inadmissibility will be rendered moot if, in the subsequent adjudication of the Form I-130, it is determined that the applicant cannot establish the claimed relationship. The AAO notes that the applicant's sister may now, if she chooses to do so, file a new Form I-130 on the applicant's behalf.

As the motion to reopen or reconsider was untimely filed, the motion to reopen or reconsider must be rejected.

ORDER: The motion to reopen or reconsider is rejected.