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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

PUBLIC COPY



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FILE: [REDACTED]

Office: VERMONT SERVICE CENTER Date:

JAN 04 2011

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Status as Permanent Resident Pursuant to Section 13 of the Act of September 11, 1957, 8 U.S.C. § 1255b.

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, St. Albans, Vermont, denied the Application to Register Permanent Residence or Adjust Status (Form I-485), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed and the matter remanded to treat the appeal as a motion to reconsider.

The applicant is a national of Kenya who is seeking to adjust her status to that of lawful permanent resident under section 13 of the Act of 1957 ("Section 13"), Pub. L. No. 85-316, 71 Stat. 642, as modified, 95 Stat. 1611, 8 U.S.C. § 1255b, as an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(A)(i). The field office director denied the application for adjustment of status after determining that the applicant had failed to demonstrate that compelling reasons prevent her return to Kenya and had failed to establish why her adjustment of status would be in the national interest of the United States.

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an appeal received in a U.S. Citizenship and Immigration Services (USCIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office. 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 record indicates that the director issued her decision on February 22, 2010. According to the date stamp on the Form I-290B Notice of Appeal or Motion, it was received by USCIS on June 16, 2010, or more than 33 days after the decision was issued. Accordingly, the appeal was untimely filed.

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. The regulation at 8 C.F.R. § 103.5(a)(3) requires that 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 USCIS policy.

Review of the record indicates that the appeal meets the requirements of a motion to reconsider because the director made an error in notifying the applicant that she could not appeal the adverse decision to the AAO. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the

responsibility of Immigration and Customs Enforcement.

The AAO has jurisdiction to review denials of applications for adjustment of status filed by aliens seeking the bona fide marriage exemption, aliens in U or T nonimmigrant status, and aliens seeking to adjust their status under Section 13. Section 245(e), (l) and (m) of the Act, 8 U.S.C. § 1255(e), (l), (m); 8 C.F.R. §§ 245.1(c)(8)(viii), 245.23(i), 245.24(f)(2), and 245.3. Accordingly, as the director erroneously informed the applicant that she did not have any appeal rights, her late appeal meets the requirements of a motion to reconsider, and we are returning this matter for the director to review the evidence submitted on appeal and to enter a new decision into the record. As always, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is rejected as untimely filed and the matter remanded to the director to treat as a motion to reconsider, which if adverse to the applicant, shall be certified to the AAO for review pursuant to 8 C.F.R. § 103.4(a).