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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
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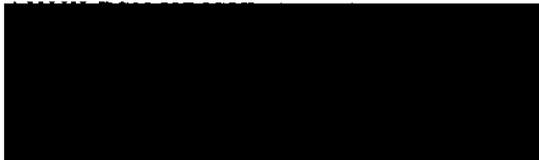
DATE: **JUL 25 2011** OFFICE: VERMONT SERVICE CENTER

FILE:

IN RE:

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

ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal and then dismissed a subsequent motion to reopen and reconsider. The matter is again before the AAO on a second motion to reopen and reconsider. The motion to reopen and reconsider will be granted. The petition will remain denied.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition on February 26, 2008 on the basis of his determination that the petitioner had failed to demonstrate: (1) that his former spouse subjected him to battery or extreme cruelty during their marriage; and (2) that he married his former spouse in good faith. On May 15, 2009, we summarily dismissed counsel's subsequent appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v) because he failed to specifically identify any erroneous conclusion of law or statement of fact made by the director, or to specifically address the inconsistencies and discrepancies the director identified in his decision. On August 4, 2010, we dismissed counsel's motion to reopen and reconsider as untimely filed pursuant to 8 C.F.R. § 103.5(a)(1)(i).

Counsel filed the instant motion to reopen and reconsider on September 7, 2010, and submitted a memorandum of law, a statement from the petitioner, and copies of previously-submitted documentation. Counsel's submission meets the requirements for a motion to reopen at 8 C.F.R. §103.5(a)(2). It also meets the requirements for a motion to reconsider at 8 C.F.R. § 103.5(a)(3). Accordingly, we will reopen and reconsider our August 4, 2010 decision dismissing the prior motion as untimely filed.

As indicated, our August 4, 2010 decision involved counsel's motion to reopen and reconsider our earlier, May 15, 2009 decision. Although we had notified counsel and the petitioner in our earlier decision that any motion had to be filed within 30 days of the issuance of that decision,¹ counsel did not properly file his motion until June 29, 2009, 45 days after the decision was issued. Accordingly, his motion was untimely filed, and we dismissed the motion on that basis.

Counsel argues in the instant motion that his first motion was in fact filed in timely fashion. Although we stated in the cover letter to our May 15, 2009 decision that "[a]ll motions must be submitted to the office that originally decided your case," in this case the Vermont Service Center, counsel nonetheless mailed his motion to the AAO, and it was rejected. Counsel argues that because he mailed his motion to the AAO within the 33-day timeframe prescribed by 8 C.F.R. §§ 103.5(a)(1)(i), 103.5a(b), we should consider it to have been timely filed regardless of the fact that it was not properly filed at the Vermont Service Center within the 33-day timeframe.

Counsel's analysis is not supported by the regulations. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) states, in pertinent part, the following:

¹ The regulation at 8 C.F.R. § 103.5a(b) allows for an additional three days during which to file a motion if the decision that the petitioner seeks to have reopened or reconsidered was mailed.



Filing requirements—A motion shall be submitted on Form I-290B and must be accompanied by a brief. It must be:

* * *

- (D) Addressed to the official having jurisdiction; and
- (E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

The regulation at 8 C.F.R. § 103.2(a)(7) specifically states that rejected applications and petitions will not retain a filing date. As such, the fact that the AAO received counsel’s motion on June 17, 2009 is not relevant: because it was rejected, it did not retain a filing date of June 17, 2009. Again, the petition was not properly filed at the Vermont Service Center until June 29, 2009. As that date fell outside the timeframe prescribed by the regulations at 8 C.F.R. §§ 103.5(a)(1)(i), 103.5a(b), counsel’s motion was not timely filed.

Counsel also cites 8 C.F.R. § 103.3(a)(2)(v)(B)(2) which states, in pertinent part, the following:

If an untimely appeal meets the requirements of a motion . . . the appeal must be treated as a motion, and a decision must be made on the merits of the case.

According to counsel, “even if our [first motion] is deemed untimely filed, it may be considered a motion” and we should adjudicate the motion on its merits. Counsel’s proposition is not supported by the regulation he cites. First, the regulation he cites pertains to appeals, not motions. Furthermore, counsel’s interpretation of 8 C.F.R. § 103.3(a)(2)(v)(B)(2) would essentially mandate that any untimely motion be considered on its merits and would render the filing deadline for motions contained at 8 C.F.R. § 103.5(a)(1)(i) meaningless.

Nor are we persuaded by the petitioner’s assertion made in his September 1, 2010 statement submitted on motion that the failure to file the motion timely should be excused because it was reasonable and beyond his control.² However, even if we assume, *arguendo*, that the failure to file the first motion within the timeframe prescribed by 8 C.F.R. §§ 103.5(a)(1)(i), 103.5a(b) was beyond the control of the petitioner, the record does not demonstrate that the delay was reasonable. We specifically instructed counsel and the petitioner in our May 15, 2009 decision that “[a]ll motions must be submitted to the office that originally decided your case,” in this case the Vermont Service Center. However, despite this clear instruction, counsel opted to mail his motion to the AAO in Washington, DC, and that decision was not reasonable.

² Although the regulation at 8 C.F.R. § 103.5(a)(1)(i) mandates that any motion be filed within 30 days of the decision the motion seeks to reopen or reconsider, it also grants U.S. Citizenship and Immigration Services discretion to excuse an untimely filed motion to reopen if it has been shown that the delay was reasonable and beyond the control of the petitioner.



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The assertions of counsel and the petitioner on motion fail to establish that our August 4, 2010 decision was issued in error.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. The prior decision of the AAO will be affirmed.

ORDER: The August 4, 2010 decision of the Administrative Appeals Office is affirmed. The appeal remains dismissed and the petition remains denied.