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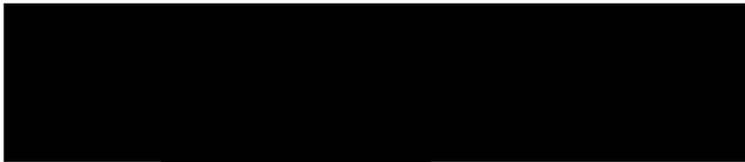
U.S. Department of Homeland Security
20 Mass. Ave. NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

Office: TEXAS SERVICE CENTER

Date: SEP 19 2008

IN RE:



PETITION: Application for Replacement Naturalization/Citizenship Document under Section 338 of the Immigration and Nationality Act, 8 U.S.C. § 1449.

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the waiver application. 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 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 Director issued the decision on April 21, 2008. It is noted that the Director properly notified the petitioner that he had 33 days from the date of the decision to file the appeal. Although the applicant dated the appeal June 15, 2008, it was not received by the Director until June 20, 2008, 60 days after the decision was issued. Accordingly, the appeal was untimely filed.

The AAO acknowledges the applicant's statement that the Director of the Texas Service Center sent him the decision letter on May 20, 2008 and the applicant did not receive it until May 24, 2008. *Statement from the applicant*, dated June 15, 2008. According to the applicant, he made an appointment through INFO PASS on May 28, 2008 with the local USCIS office in Fairfax, Virginia where he was informed that he had until June 26, 2008 to respond. *Id.* The AAO notes that there is nothing in the record to document that the Director's decision was sent on May 20, 2008 or that the applicant received the decision on May 24, 2008. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. 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 meets the requirements of a motion to reopen, as the applicant has submitted an original birth certificate and provided a lengthy explanation as his basis for appeal. 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 reopen and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the Director for treatment as a motion and issuance of a new decision.