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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 Services

[redacted]

F1

FILE: [redacted] Office: WASHINGTON, DC Date: FEB 08 2011

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:

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 field office director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative, and 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 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 field office director denied the petition on August 6, 2009, and properly gave notice to the petitioner that he had 33 days during which to file the appeal. However, U.S. Citizenship and Immigration Services (USCIS) did not properly receive the petitioner's appeal until September 9, 2009, 34 days after the decision was issued.[1] Accordingly, the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day 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 at 8 C.F.R. § 103.5(a)(2) or (3), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

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. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* 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).

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[1] On appeal, counsel states that his assistant attempted to timely file the appeal at the Washington Field Office on September 8, 2009, which was 33 days after the adverse decision was issued, but that the assistant arrived after the cashier had closed for the day. Counsel states that although his assistant was able to obtain a date stamp on his cover letter, because his appellate submission contained a filing fee the security officers would not allow his assistant to leave it. The appeal was filed, with fee, on the following day, September 9, 2009, 34 days after the adverse decision was issued. Counsel argues that although his assistant arrived at the field office after the cashier was closed, the appeal was still timely filed on September 8, 2009: "[t]hat the filing fee was not included with the appeal does not make the appeal untimely." However, counsel cites no authority for his argument. To the contrary, the regulation at 8 C.F.R. § 103.2(a)(1) states that forms "must be filed with the appropriate filing fee," and 8 C.F.R. § 103.2(a)(7)(i) states that an application or petition "shall be stamped to show the time and date of actual receipt," and that the application or petitioner "shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached." The "required filing fee" described at 8 C.F.R. § 103.2(a)(7)(i) was not attached on September 8, 2009 and, as such, the appeal was not properly filed at that point. It was not properly filed until the following day, September 9, 2009. Nor are we persuaded by counsel's arguments that the Washington Field Office was discriminating against petitioners electing to pay filing fees in person and that it did not allow the petitioner a full 33 days during which to file an appeal because its cashier closed before his assistant arrived. Counsel cites no authority in support of either argument.

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