

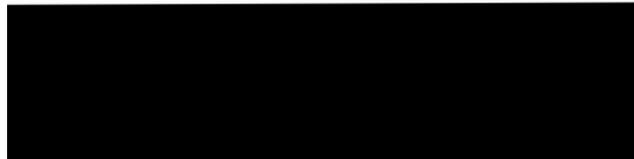
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: MOSCOW, RUSSIA

Date:

JAN - 2 2009

IN RE:



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

ON BEHALF OF APPLICANT:

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

A handwritten signature in cursive script, appearing to read "John F. Grisson".

John F. Grisson, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Moscow, Russia. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The AAO will return the matter to the director for consideration as a motion to reopen and the issuance of a new decision.

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 officer in charge issued the decision on February 9, 2006. It is noted that, although the director properly gave notice to the applicant that he had 33 days to file the appeal with U.S. Citizenship and Immigration Services (USCIS) office in Moscow, the applicant filed directly with the AAO. The AAO returned the appeal to the applicant on March 6, 2006. The applicant's subsequent submission of the appeal to the USCIS office in Moscow was returned on July 7, 2006 as it was accompanied by an incorrect fee. Therefore, the appeal was not properly filed with CIS until July 31, 2006, 172 days after the decision was issued. Accordingly, the appeal was untimely filed.

Although the AAO notes that the letter that accompanied the July 7, 2006 return of the appeal gives the applicant an additional 35 days to submit the appeal with the correct fee, 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, 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).

On appeal, the applicant's spouse submits a declaration that states that she has given birth to a daughter and would like the decision of the Officer in Charge to be reconsidered on appeal as her daughter needs her father to help her in life. *Spouse's Declaration*, dated June 20, 2006.

Here, the untimely appeal meets the requirements of a motion to reopen. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case

the officer in charge. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the officer in charge 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 officer in charge for consideration as a motion to reopen and the issuance of a new decision.