

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

[REDACTED]

H2

FILE: [REDACTED] Office: KINGSTON, JAMAICA Date: DEC 20 2010

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:

[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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Officer in Charge (OIC), Kingston, Jamaica, denied the applicant's waiver application. 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 for consideration as a motion to reopen.

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 record indicates that the OIC issued the waiver decision on July 23, 2007. It is noted that the officer in charge properly gave notice to the applicant that he had 33 days to file the appeal. Although counsel dated the appeal August 16, 2007, a Fedex International Air Waybill shows that it was not postmarked until October 17, 2007 and was received by the Kingston office on October 19, 2007, 63 days after the decision was issued.

We note that on October 19, 2007 the Kingston office issued a decision on the appeal rejecting it as untimely filed. In a notice to applicant's counsel, dated January 23, 2008 the Kingston office stated that their October 19, 2007 decision was an administrative error, that a determination that an appeal is untimely rests with the AAO, and that the applicant could resubmit his appeal. On March 14, 2008, with a postmark of March 12, 2008, the applicant's appeal was received by the Kingston office, 50 days after the notice to resubmit the appeal was issued. Accordingly, the AAO finds that 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, 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. Counsel has submitted new evidence of hardship with the appeal. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the OIC (now 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 to reopen and render a new decision accordingly.

We note that the record shows that the applicant was convicted in New Jersey in 1987 of two criminal counts related to a controlled substance: possession of a controlled dangerous substance (marijuana) and possession of a controlled dangerous substance with intent to distribute or dispense. Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Although it appears from the record that the amount of marijuana possessed by the applicant did not exceed 30 grams, he appears not to be eligible for a waiver of inadmissibility under 212(h), in that his crimes do not relate "to a single offense of simple possession", but are two criminal offenses related to a controlled substance, one of which involved the intent to distribute a controlled substance rather than simple possession. Therefore, the applicant may also be inadmissible under section 212(a)(2)(C) as a trafficker, and no waiver of this ground of inadmissibility is available.

ORDER: The appeal is rejected. The matter is returned to the field office director for consideration as a motion to reopen.