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



**U.S. Citizenship
and Immigration
Services**



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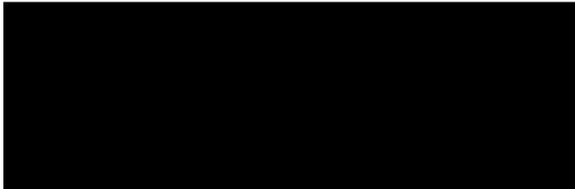
DATE: APR 07 2011 Office: [REDACTED]

FILE: [REDACTED]

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:



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,

Michael Shumway
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, [REDACTED] and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The matter will be returned to the District Director for consideration as a motion to reconsider.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) requires that an affected party file the appeal on the Form I-290B, Notice of Appeal or Motion, with the required fee and submit the complete appeal within 30 days of service of the unfavorable decision. If the decision is 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 District Director issued the decision on August 22, 2008. It is noted that the District Director properly gave notice to the applicant that she had 30 days (33 days if mailed) to file the appeal and informed her that the fee indicated in the Form I-290B instructions was to be submitted with the appeal. The District Director enclosed the instructions with his decision, having crossed out the word “check” under the section entitled “What Is the Filing Fee?” each time it appeared.

On September 23, 2008, counsel submitted the Form I-290B with a personal check for \$585, which the District Director returned on September 26, 2008. The District Director’s notice returning the check was faxed to counsel the same day. On September 29, 2008, counsel submitted a money order in the amount of \$585. Accordingly, the AAO finds United States Citizenship and Immigration Services (USCIS) to have received the applicant’s appeal on September 29, 2008, 38 days after the District Director’s issued his decision, and rejects the appeal as untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. However, 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 the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the untimely appeal meets the requirements of a motion to reconsider. On appeal, counsel has submitted a brief and a copy of a June 17, 2009 decision issued by the AAO that, he contends, establish that USCIS incorrectly found the applicant to have a controlled substance conviction under the Act. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the District Director. *See* 8 C.F.R. § 103.5(a)(1)(ii).


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Therefore, the District Director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the District Director for consideration as a motion to reconsider.