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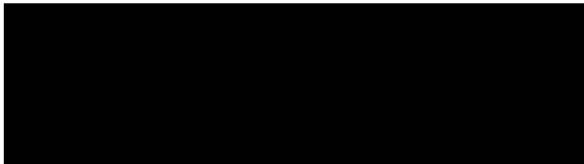


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2008

IN RE: [Redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

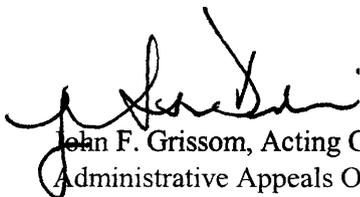
ON BEHALF OF APPLICANT:



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


Joan F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). 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 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 February 12, 2007. It is noted that the director properly gave notice to the applicant that she had 30 days to file the appeal (33 days if mailed). Counsel incorrectly filed the appeal with the AAO. An appeal is not properly filed until the service center receives it. On March 13, 2007, the AAO returned the appeal to counsel and informed her that she had incorrectly filed the appeal with this office. U.S. Citizenship and Immigration Services (USCIS) received the appeal on March 28, 2007, or 44 days after the decision was issued. In a separate letter accompanying the Form I-290B, counsel states that she misread the instructions as to where to file the Form I-290B. Accordingly, the appeal was untimely filed.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO or the director 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 does not meet the requirements of a motion to reopen or a motion to reconsider because counsel does not set forth any new facts or establish that the director's decision was based on an incorrect application of law or policy. The AAO notes that, while counsel asserts that the director erred in failing to apply *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and circumvented Ninth Circuit Court of Appeals case law by requiring the denial of the Form I-212 because it was filed prior to the passing of ten years since the applicant's departure, the director's decision reflects that the director adjudicated the applicant's Form I-212 despite the fact that ten years had not passed since her departure from the United States and found that the applicant did not warrant a favorable exercise of discretion. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).



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As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

ORDER: The appeal is rejected.