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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

H4

[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date:

(A73 393 086 RELATES)

FEB 02 2011

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:

[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, San Francisco, California 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 field office director issued the decision on May 29, 2009. It is noted that the field office director properly gave notice to the applicant that she had 30 days to file the appeal (33 days if mailed). U.S. Citizenship and Immigration Services (USCIS) received the appeal on February 19, 2010, or 266 days after the decision was issued. Accordingly, the appeal was untimely filed. While counsel contends that the concept of "equitable tolling" should apply to the applicant's case, she is entitled to file a *writ of habeas corpus* and that the AAO should accept the untimely appeal, as discussed below, the AAO does not have authority to extend the time limit for filing an appeal. Moreover, as discussed below, the applicant's case does not refer to a unique or undisputed area of law which would warrant a motion to reopen *sua sponte*.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO or the field office 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 field office director's decision was based on an incorrect application of law or policy. The applicant is inadmissible under section 212(a)(9)(C)(i) of the Act and is ineligible to apply for permission to reapply for admission until she can establish that she is applying from outside the United States and has remained outside the United States for a period of ten years prior to such application.[1]

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[1] *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); *Gonzales v. DHS*, 239 F.R.D. 620 (W.D. Wash. 2006); *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Furthermore, in *Morales-Izquierdo v. Department of Homeland*

Additionally, U.S. Immigration and Customs Enforcement (USICE) may reinstate the applicant's prior removal order under section 241(a)(5) of the Act, at any time.[2] Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*).

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

ORDER: The appeal is rejected.

Security, 600 F.3d 1076 (9th Cir. 2010), the Ninth Circuit held that applicants, even those eligible for adjustment of status under section 245(i) of the Act, are bound by *Gonzales II*, that *Gonzales II* is not impermissibly retroactive, and that a Form I-212 waiver cannot cure inadmissibility under section 212(a)(9)(C) of the Act until an applicant, while residing outside the United States, applies for and receives advance permission, but only after ten years have elapsed since the applicant's last departure from the United States. *Morales-Izquierdo* at 1, 12.

[2] *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S. Ct. 2422 (U.S. 2006); *Perez-Gonzalez v. Ashcroft*, 379 F. 3d 783 (9th Cir. 2004).