identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

[redacted]

H4

FILE: [redacted] Office: HOUSTON, TX Date: JAN 07 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, Houston, Texas 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 accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a U.S. Citizenship and Immigration Services (USCIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office. 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 record indicates that the field office director issued the decision on March 15, 2010. It is noted that the field office director properly gave notice to the applicant that he had 30 days to file the appeal (33 days if mailed). The applicant incorrectly filed the appeal with the AAO on April 15, 2010. An appeal is not properly filed until the field office receives it. The AAO returned the appeal to the applicant and informed him that he had incorrectly filed the appeal with this office. U.S. Citizenship and Immigration Services (USCIS) received the appeal on April 24, 2010, or 40 days after the decision was issued. Accordingly, the appeal was untimely filed.

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 AAO notes that, while the field office director incorrectly found that the applicant was required to file the Form I-212 in conjunction with an Application for Waiver of Grounds of Inadmissibility (Form I-601) at the U.S. Consulate abroad because the applicant resides in the United States and not abroad, the applicant is ineligible to apply for permission to reapply for admission and will be required to establish that he is applying from outside the United States and has remained outside the United States for a period of ten years prior to such application because he is inadmissible pursuant to

section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having entered the United States without admission after accruing more than one year of unlawful presence in the United States.[1] 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.

[1] *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Gonzales v. DHS*, 239 F.R.D. 620 (W.D. Wash. 2006); and *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007). The record reflects that the applicant accrued unlawful presence in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted, until July 1998, the date on which he departed the United States. While the applicant claims that he subsequently lawfully entered the United States as a legalization applicant in July 1998, the record reflects that, at the time, the applicant was not in possession of valid documentation that would have permitted him to reenter the United States and USCIS records do not reflect that the applicant was admitted or paroled into the United States in 1998. As such, the record reflects that the applicant reentered the United States without being paroled or admitted in July 1998 after accruing more than one year of unlawful presence.