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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**

#4

[Redacted]

FILE:

[Redacted]

Office: SAN DIEGO, CA

Date:

**MAR 01 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 District Director, San Diego, 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 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 district director issued a decision to deny the second Form I-212 on July 31, 2009 and a decision to deny the first Form I-212 on September 16, 2009.<sup>1</sup> It is noted that the district 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 December 13, 2010, or 453 days after the decision was issued. While counsel contends that the applicant timely filed an appeal on September 2, 2009, the record clearly reflects that USCIS received a Notice of Appeal or Motion (Form I-290B), indicating that the applicant was filing a motion to reopen and a motion to reconsider the decision denying her Application to Register Permanent Residence or Adjust Status (Form I-485). The record does not contain a separate Form I-290B filed in order to appeal the denial of the Form I-212. Accordingly, the appeal was untimely filed.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO or the district 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 district director's

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<sup>1</sup> While counsel indicates that she is appealing the decision issued on July 31, 2009, because a subsequent decision was issued on September 16, 2009, the AAO will count the 33 day time period from September 16, 2009.

decision was based on an incorrect application of law or policy. The AAO notes that, while counsel asserts that the applicant is eligible for permission to reapply for admission because it has been more than ten years since the applicant's last departure and that applying *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), to the applicant's case is impermissibly retroactive, the applicant is ineligible to apply for permission to reapply for admission and will be required to 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.<sup>2</sup> 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.

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<sup>2</sup> 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 (9<sup>th</sup> Cir. 2007). Additionally, retroactivity arguments before the Ninth Circuit in regard to *Gonzales II*, mirror retroactivity arguments already dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 486 F.3d 484 (9<sup>th</sup> Cir. 2010).