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
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H4

FILE: [redacted] Office: SAN DIEGO, CA Date: MAR 10 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: Self-represented

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 the decision to deny the Form I-212 on September 1, 2010.[1] It is noted that the district director properly gave notice to the applicant that he had 30 days to file the appeal (33 days if mailed) with the district office. The applicant incorrectly filed the appeal with the AAO on September 30, 2010. An appeal is not properly filed until the district 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 October 12, 2010, or 41 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 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 the applicant does not set forth any new facts or establish that the district director's decision was based on an incorrect application of law or policy. The AAO notes that, while the applicant asserts that he is eligible for permission to reapply for admission and he is eligible for a waiver of grounds of inadmissibility, the record clearly reflects that the applicant is

[1] The applicant checked the "filing motion" box on the Form I-290B, but later indicated in the body of his statements that he was filing an appeal.

inadmissible under the provisions of sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) and 1182(a)(2)(C), and no waiver is available. The indictments to which the applicant pled guilty clearly reflect that there is sufficient evidence to reasonably believe that the applicant has been involved in illicit trafficking of a controlled substance and the applicant has been convicted of more than simple possession of less than 30 grams of marijuana and more than one violation related to a controlled substance.[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.

[2] On May 15, 1996, the applicant pled guilty to and was convicted of possession for sale of a controlled substance, cocaine, in violation of section 11351 of the California Health and Safety Code (CHSC) and was sentenced to 2 years in jail. On September 24, 2002, the applicant pled guilty to and was convicted of possession for sale of a controlled substance, cocaine, in violation of section 11351 of the CHSC and was sentenced to 3 years in jail.