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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**



H5

FILE: [REDACTED] Office: BANGKOK Date: DEC 07 2010

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF PETITIONER:



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.

Thank you,

Perry Rhev
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Bangkok, Thailand, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

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 after 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 district director issued the decision on August 18, 2008. It is noted that the director properly gave notice to the applicant that he had 33 days to file the appeal with the office that issued the decision. The applicant erroneously submitted the appeal directly to the AAO, and it was returned to the applicant with instruction to submit in directly to the office that issued the decision. The applicant resubmitted the application to the United States Citizenship and Immigration Services (USCIS) office in Bangkok, Thailand and it was received on September 30, 2008. The District Director returned the money order submitted by counsel and instructed him to submit the filing fee with a different money order. The proper filing fee was received by the District Director on October 24, 2008. It is not clear from the record whether the applicant was given specific instructions on the type of money order required for payment of the filing fee, but the applicant was instructed to submit the appeal to the office that issued the decision. An appeal is not considered properly filed until it is received by the proper office, and the USCIS Office in Bangkok did not receive the appeal until September 30, 2008. Accordingly, the appeal was untimely filed. The director erroneously annotated the appeal as timely and forwarded the matter to the AAO.

Neither the Act nor the pertinent regulations grant the AAO 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 meets the requirements of a motion to reconsider. Counsel asserts that the finding that the applicant had not established that her husband's medical condition would result in extreme hardship was based on an incorrect application of law. Counsel further states that the evidence submitted with the waiver application established that his ailments require assistance from his spouse and the hardships he would experience in her absence are beyond the common results of inadmissibility. The official having jurisdiction over a motion is the official who made the last

decision in the proceeding, in this case the district director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the director must consider the untimely appeal as a motion to reconsider and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the director for consideration as a motion to reconsider.