

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
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

tl5

FILE:

[REDACTED]

Office: PROVIDENCE, RI

Date: APR 05 2011

IN RE:

[REDACTED]

APPLICATION: Application for Waiver of Ground of Excludability pursuant to section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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,

Michael Shumway

f. Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Providence, Rhode Island and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed. The matter will be returned to the Field Office Director for consideration as a motion to reopen.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) requires that an affected party file the appeal on the Form I-290B, Notice of Appeal or Motion, with the required fee and submit the complete appeal within 30 days of service of the unfavorable decision. If the decision is 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 June 27, 2008. It is noted that the Field Office Director properly gave notice to the applicant that she had 30 days (33 days if mailed) to file the appeal, but incorrectly informed her that the filing fee for an appeal was \$385. On July 29, 2008, the applicant sought to file an appeal of the Field Office Director's decision with United States Citizenship and Immigration Services (USCIS), submitting a fee of \$385. On July 30, 2008, USCIS returned the \$385, notifying the applicant that the correct fee was \$585 and that the appeal must be filed on the Form I-290B. On August 1, 2008, the applicant submitted the Form I-290B, with a fee of \$585, 35 days after the issuance of the Field Office Director's decision.

While the AAO acknowledges that the applicant's failure to submit the appropriate fee on July 29, 2008 was based on incorrect information provided in the Field Office Director's decision, we also note that she failed to file the appeal on the Form I-290B, as required by regulation. In that the Form I-290B was not received by USCIS until August 1, 2008, the appeal was untimely filed and will be rejected.

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 in the present matter was untimely filed, it 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 the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the untimely appeal meets the requirements of a motion to reopen. On appeal, the applicant has submitted additional evidence, including a medical statement, which indicates she became pregnant subsequent to the denial of her waiver application, and a brief from counsel. The official

having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Field Office Director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, the Field Office Director must consider the untimely appeal as a motion to reopen and render a new decision accordingly.

ORDER: The appeal is rejected. The matter is returned to the Field Office Director for consideration as a motion to reopen.