U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BANGKOK, THAILAND Date: FEB 28 2011

IN RE: Applicant: [redacted]

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility 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,

for
Perry Rhew
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 as untimely filed. The AAO will return the matter to the District Director for consideration as a motion to reconsider.

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 September 15, 2008. The District Director properly gave notice to the applicant that he had 30 days (33 days if the notice was received by mail) to file an appeal. The applicant initially filed an appeal on October 17, 2008 directly with the AAO. Counsel states that the Department of Homeland Security (DHS) in Bangkok, Thailand instructed her to submit the Form I-1290B, Notice of Appeal or Motion to the AAO. *Attorney's Brief*, dated November 12, 2008. On October 17, 2008 the AAO returned the Form I-290B and filing fee to counsel for incorrect filing location. On October 21, 2008 the applicant, through counsel, properly filed an appeal with the fee with the District Director, Bangkok, Thailand, 36 days after the decision was issued. The AAO observes that the decision issued by the District Director on September 15, 2008 was accompanied by instructions regarding the proper filing of an appeal and fee. These instructions specifically stated that the appeal must be filed with the USCIS office that made the unfavorable decision and should not be sent directly to the AAO. As such, the AAO finds that the appeal was untimely filed.

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. 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, as counsel has submitted a brief asserting that USCIS erred in failing to adequately consider evidence of extreme hardship to the applicant's parents, including evidence of their medical conditions. 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 District 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 District Director for treatment as a motion and issuance of a new decision.