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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

H5

FILE: [redacted] Office: LOS ANGELES, CA Date: JAN 28 2011

IN RE: Applicant: [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 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

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. An appeal was subsequently rejected by the Administrative Appeals Office (AAO) as untimely filed. The matter is now before the AAO on a motion to reconsider. The motion will be denied, and the decision to reject the appeal will be affirmed.

The record reflects that the applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact to procure admission to the United States. The applicant is the spouse of a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The District Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated January 4, 2006.

The AAO rejected a subsequent appeal as untimely filed. *Decision of the Chief, Administrative Appeals Office*, dated June 26, 2008. On the present motion, counsel asserts that the appeal was untimely filed due to erroneous instructions from the District Director. *Brief from Counsel*, dated July 28, 2008.

The regulation at 8 C.F.R. § 103.5(a) states, in pertinent part:

> (a) Motions to reopen or reconsider
>
> (1) (i) . . . Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. . . .
>
> (2) Requirements for motion to reopen. 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. . . .
>
> (3) Requirements for motion to reconsider. 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.

> (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

Counsel has not provided any new evidence to meet the requirements of a motion to reopen. Counsel asserts that the AAO's decision was based on an incorrect application of United States Citizenship and Immigration Services (USCIS) policy. However, this assertion is not demonstrated by the record. The record shows that the District Director properly informed the applicant that an appeal must be made to the AAO with a filing fee of $385.00.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a) provides, in pertinent part:

> (2) AAO appeals in other than special agricultural worker and legalization cases--
>
> (i) Filing appeal. The affected party shall file an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by § 103.7 of this part. The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

The fee schedule as of the date of the applicant's appeal reflects that the fee for filing an I-290B was $385.00, as correctly noted in the District Director's decision. *See* 8 C.F.R. § 103.7. The record reflects that counsel failed to file the Form I-290B as delineated by 8 C.F.R. § 103.3(a)(2)(i). Instead, counsel filed a Form EOIR-29, which is a Notice of Appeal to the Board of Immigration Appeals (BIA), with the $385.00 filing fee. The EOIR-29 was rejected because the filing fee for that application at the time of its submission was $110.00. Thus, the instruction for the applicant to file the appropriate fee for the EOIR-29 was correct for that form, and the "error" which counsel attributes to USCIS was caused by counsel himself when he filed an appeal to the BIA rather than to the AAO.

The director correctly notified the applicant that an appeal was to be made to the AAO. The regulations at 8 C.F.R. § 103.3(a)(2)(i) clearly state that an appeal to the AAO shall be filed on a Form I-290B. Counsel failed to comply with this regulation and instead filed a Form EOIR-29. Accordingly, the appeal was improperly filed either as an appeal to the BIA (improper fee) or as an appeal to the AAO (improper form), and it was not error for USCIS to reject it on the basis that the applicant had submitted the improper fee for the form submitted. In addition, the subsequent rejection by the AAO for untimeliness was also correct.

In conclusion, the applicant's motion does not meet the requirements of a motion to reconsider because the applicant failed to demonstrate that the AAO's decision was based on an incorrect application of law or USCIS policy. The motion to reconsider is denied, and the decision to reject the appeal stands.

ORDER: The motion is denied, and the decision to reject the appeal is affirmed.