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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

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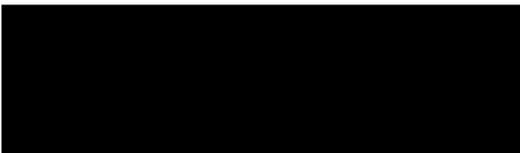
DATE: DEC 05 2011 OFFICE: MEXICO CITY, MEXICO

FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



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 Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City, Mexico, 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 field office director for consideration as a motion.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that an affected party must file a complete appeal within 30 days after service of an unfavorable decision. If the decision is mailed, the 30-day period for submitting an appeal begins three days after it is mailed. 8 C.F.R. § 103.5a(b). The date of filing is the date of actual receipt of the appeal, not the date of mailing. *See* 8 C.F.R. § 103.2(a)(7)(i). Further, pursuant to the regulation at 8 C.F.R. § 103.2(a)(1), every application, petition, appeal, motion, request, or other document submitted on any form must be filed and executed in accordance with the instructions on the form.

Although the record contains a June 1, 2009 fee receipt¹ issued to the applicant by the United States Citizenship and Immigration Services (USCIS) in Mexico City, the Form I-290B, Notice of Appeal or Motion, in the record is dated September 8, 2009 and was not received by USCIS until September 18, 2009, or 149 days after the decision was issued.² Therefore, based on the record, the AAO cannot conclude that a Form I-290B was submitted prior to or at the time the applicant paid the filing fee on June 1, 2009. As the record does not establish that an appeal was properly filed during the 33-day filing period and neither the Act, nor the pertinent regulations grant us the authority to extend this period, we find that the appeal was untimely filed and must be rejected.

However, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) provides that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), 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: (1) 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 USCIS policy; and (2) 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).

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 of the Mexico City, Mexico, Field Office. *See* 8 C.F.R. § 103.5(a)(1)(ii).

In support of the appeal, the applicant has submitted a brief, as well as a mental health evaluation concerning her spouse, supplemented by a mental health treatment plan and progress note. Accordingly, the matter will be returned to the field office director to determine if the late appeal meets the requirements of a motion. If the field office director so determines, the motion shall be granted and a new decision issued.

¹ The record also contains a copy of a May 18, 2009 fee receipt issued by the U.S. Postal Service for a domestic money order in the amount of \$585 to be paid to USCIS.

² A U.S. Postal Service tracking receipt in the record establishes that an item was delivered in Brownsville, Texas on May 20, 2009. However, no evidence in the record identifies the item delivered on that date.

As the record establishes that the appeal was untimely filed, the appeal must be rejected as untimely filed.

ORDER: The appeal is rejected as untimely filed. The matter is returned to the field office director for consideration as a motion.