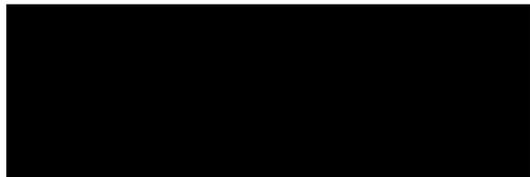


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prevent clearly unwarranted
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC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



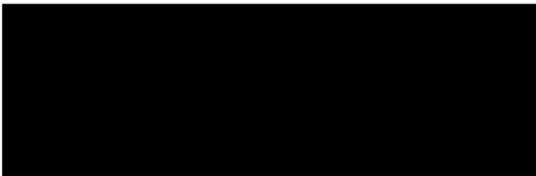
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Date: Office: ACCRA, GHANA FILE: 
IN RE: JUL 12 2011 Applicant: 

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.

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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Accra, Ghana, denied the waiver application. The matter 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 to reopen.

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 field office director issued the decision on July 9, 2009. It is noted that the field office director properly gave notice to the applicant that he had 33 days to file the appeal. The field office director informed the applicant that “[t]he fee noted in the instructions to [Form I-290B] must be attached to the appeal.” The field office director further stated that “**Personal checks are not accepted. Fee must be paid in person at the US Consulate in US Dollars or the local currency equivalent only.**”

Counsel for the applicant has demonstrated that the field office director first received the appeal on August 11, 2009, 33 days after the date of the field office director’s decision. However, the applicant submitted the filing fee in the form of a personal check, contrary to the field office director’s instructions.

On August 13, 2009, the field office director sent correspondence to the applicant notifying him of the improper form of payment, and inviting him to submit an acceptable form of payment so that the appeal could potentially be treated as a motion. As of September 29, 2009, the field office director had not received a response from the applicant, and he issued a letter rejecting the appeal as untimely filed. On or about October 13, 2009, the applicant provided a proper form of payment and it was accepted by the field office director, 96 days after the field office director’s decision. The appeal was forwarded to the AAO.

Counsel asserts that the appeal should be treated as timely filed, as it was received on the 33rd day after the field office director’s decision. The record shows that the Form I-290B was received on October 11, 2009, the 33rd day, yet with an unacceptable form of payment. Thus, the appeal was not properly filed on the 33rd day.

Counsel asserts that the field office director did not use an effective method to communicate the improper form of payment to the applicant, as notice was sent from Ghana to counsel in the United States by regular mail, and the correspondence took four weeks to arrive. However, the field office director had already clearly communicated to the applicant that a personal check was not an acceptable form of payment for the appeal, in bold face, underlined type on the first page of his decision. The field office director’s October 13, 2009 correspondence to the applicant was a courtesy to notify him that proper payment would still be accepted in order to consider the late

appeal as a motion. Assuming, [REDACTED] that the field office director had at his disposal a faster means of mailing correspondence to the applicant, even next-day service would have resulted in the applicant receiving the correspondence after 33 days had passed. The field office director did not cause the applicant's delay in submitting a proper form of payment.

Counsel asserts that the field office director's October 13, 2009 correspondence indicated that the proper fee could be paid in person by visiting the U.S. Embassy in Ghana. Counsel explains that the applicant traveled from his village to Accra, Ghana, a 24-hour journey, to pay the fee in person, yet he was denied entry and not permitted to pay the fee. The AAO acknowledges the effort the applicant made to travel to pay the fee in person. However, counsel's statement reflects that the applicant attempted to pay the fee in person after the field office director's October 13, 2009 correspondence. Accordingly, the applicant's efforts occurred after 33 days had passed, and paying the fee in person would not have remedied the fact 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. 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 reopen, as the applicant has presented new evidence including a statement from his wife dated after the field office director's decision. 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.