



1 **DISCUSSION**

2 It is too late for petitioner to appeal the order in this matter. Rule 4(a) of the Federal  
3 Rules of Appellate Procedure requires that a notice of appeal “be filed with the clerk of the  
4 district court within 30 days after the entry of the judgment or order appealed from.” Fed. R.  
5 App. P. 4(a)(1). Relief from the deadline for filing the notice of appeal may be obtained in the  
6 district court under Rule (a)(5) (motion for extension of time to file notice) or Rule 4(a)(6)  
7 (motion to reopen time to file appeal). Rule (a)(5) allows a party to move for an extension of  
8 time if the party so moves within thirty days of the expiration of the time to file the notice and  
9 shows excusable neglect or good cause. See Fed. R. App. P. (a)(5). Here, petitioner failed  
10 to file a request for an extension within the required time.

11 Even if the court liberally construed petitioner’s notice of appeal as a motion for an  
12 extension of time to file an appeal, such a request is untimely. The time to appeal provided in  
13 Rule 4(a) of the Rules of Appellate Procedure, with exceptions not applicable here, is thirty days  
14 from entry of judgment. Rule (a)(5)(A)(i), quoted above, provides that a motion for an extension  
15 of time to appeal must be filed “no later than 30 days after the time prescribed by this Rule 4(a)  
16 expires.” So, a motion for an extension of time to appeal must be filed no later than sixty days  
17 from the date of entry of the order. In this case the order was entered on September 11, 2008,  
18 and the motion for an extension of time to appeal was not filed until June 26, 2009. “The  
19 procedures set forth in rule 4 are strictly construed; there is no exception for prisoners  
20 proceeding pro se or for habeas corpus actions.” Malone v. Avenenti, 850 F.2d 569, 572 (9th  
21 Cir. 1988). And this court has no discretion to extend the time beyond that allowed by Rule  
22 (a)(5). See Vahan v. Shalala, 30 F.3d 102, 103 (9th Cir. 1994). That is, this court does not have  
23 the power to extend the time to ask for an extension of time to appeal, even if petitioner were to  
24 ask for such an extension. Petitioner’s motion for an extension of time to appeal was not filed  
25 within the time allowed by the rule and thus must be denied.

26 Under Rule 4(a)(6), the district court may reopen the time to file an appeal for a period of  
27 14 days after the date when its order to reopen is entered, but only if all of the following  
28 conditions are satisfied:

1 (A) the motion is filed within 180 days after the judgment or order is entered or within 7  
2 days after the moving party receives notice of the entry, whichever is earlier;

3 (B) the court finds that the moving party was entitled to notice of the entry of the  
4 judgment or order sought to be appealed but did not receive the notice from the district court  
5 or any party within 21 days after entry; and

6 (C) the court finds that no party would be prejudiced.

7 See Fed. R. App. P. 4(a)(6). This restriction applies irrespective of whether the party seeking to  
8 appeal has counsel. See Clark v. Lavallie, 204 F.3d 1038, 1041 (10th Cir. 2000) (rejecting pro  
9 se prisoner's motion filed more than 180 days after entry of judgment). Even if the court  
10 construed petitioner's June 26, 2009 notice of appeal as a motion to reopen the time for filing a  
11 notice of appeal, petitioner has failed to establish that he failed to file a motion within 7 days of  
12 receiving notice of the entry, see Fed. R. App. P. 4(a)(6)(A), or that he was entitled to receive  
13 notice of the entry of judgment and did not receive it as required under Rule 4(a)(6)(B). Thus,  
14 petitioner is not entitled to relief from the deadline for filing a notice of appeal.

15 Accordingly, the court concludes that petitioner's request for a certificate of appealability  
16 is untimely.

17 **CONCLUSION**

18 Petitioner's request for a certificate of appealability is DENIED.

19 IT IS SO ORDERED.

20 DATED: 8/5/09

  
RONALD M. WHYTE  
United States District Judge