

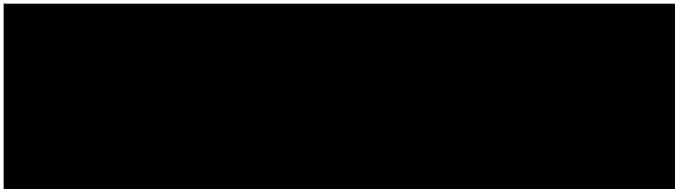
identify... to  
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invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave. N.W., Rm. 3000  
Washington, DC 20529



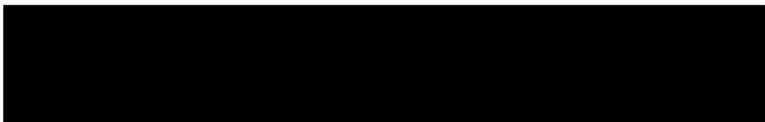
U.S. Citizenship  
and Immigration  
Services

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FILE: LIN 05 202 51725 Office: NEBRASKA SERVICE CENTER Date **MAR 24 2008**

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider its previous decision. The motion will be dismissed.

The petitioner, a provider of therapeutic health care services, filed the H-1B nonimmigrant petition in order to extend the beneficiary's stay and continue his status so that he could continue to work in an occupational therapist specialty-occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on finding (1) that the beneficiary was not eligible, under the American Competitiveness in the Twenty-First Century Act, for an exemption from the six-year limitation on the authorized period of stay in H-1B visa status, because the beneficiary was out of status at the time the petition was filed; and (2) that the record of proceedings lacked sufficient evidence that the beneficiary was certified to work as an occupational therapist.

In the decision that is the subject of this motion the AAO rejected the appeal on the basis that it was filed on behalf of the beneficiary only, and a beneficiary is not authorized to file an appeal. The AAO cited the regulations at 8 C.F.R. §§ 103.2(a)(3) and 103.3(a)(1)(ii)(B). The AAO also noted that the appeal would have been dismissed "even if the correct person had filed the appeal," because the beneficiary was out of status at the time the petition was filed.

On motion, counsel for the petitioner asserts, in part, that a Form G-28 (Notice of Appearance) signed by the petitioner had been filed with Citizenship and Immigration Services (CIS) prior to the AAO decision. Counsel argues, therefore, that the AAO erred in rejecting the appeal as filed by the beneficiary. Counsel also contends that, contrary to the director's decision and the AAO decision's comment about the beneficiary's status, the beneficiary was in status and also possessed the necessary certification at the time the petition was filed.

As discussed below, the AAO will dismiss the motion as it finds that its decision to reject the appeal was a correct application of the relevant regulations to the record of proceedings before the AAO at the time of its decision. Because the appeal was properly rejected, the AAO will not address the other issues raised on motion. They are rendered moot by the AAO's proper rejection of the appeal.

To prevail on an issue that was the basis of an adverse decision, a motion to reopen must state the new facts to be provided in the reopened proceeding, and it must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Generally, the new facts must be material and unavailable previously, and such that they could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3).

To prevail on a motion for reconsideration of an issue upon which an adverse decision was based, the matters filed on 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 CIS 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).

As discussed below, the matters here submitted upon motion do not establish that the AAO erred in rejecting the appeal. The AAO's decision to reject the appeal was a correct application of the relevant regulations to the record of proceedings before the AAO at the time that it issued its decision.

On October 31, 2007, the date that the AAO rendered its decision, the only Form G-28 (Notice of Appearance) executed by the petitioner in the record of proceedings was signed and filed by an attorney who was not a member of the law firm that now represents the petitioner on this motion.

The record reflects that, on September 12, 2006, the director issued his decision to the attorney who had filed the Form G-28 on behalf of the petitioner. The record also reflects that on October 16, 2006, an attorney with the firm that now represents the petitioner filed a Form I-290B (Notice of Appeal). The Form I-290B stated that the attorney was filing the appeal for both the petitioner and the beneficiary. This attorney checked the box at section 2 of the Form I-290B that indicated that she was "sending a brief and/or evidence to the AAO within 30 days." Although the October 13, 2006 cover letter accompanying the Form I-290B stated that a Form G-28 was enclosed, the record reflects that the form was not submitted at that time.

The record further reflects that on November 13, 2006 the attorney that filed the Form I-290B filed a brief, documents in support of the appeal, and a Form G-28. However, the Form G-28 was signed by the beneficiary only.

Upon review of the record as constituted when the AAO rendered its decision to reject the appeal, the AAO finds that the evidence does not support current counsel's assertion that his law firm had filed "a signed G-28 from the petitioning employer." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).<sup>1</sup> The AAO notes that the copy of the Form G-28 that counsel submits on motion was signed by the petitioner and bears a date (October 11, 2006) that is earlier than the October 31, 2007 AAO decision that is subject of this motion. Counsel correctly asserts that the CIS Form I-797C notice of receipt, issued on October 17, 2006, was sent to his office. However, this particular Form I-797C acknowledges receipt of only one form, that is, the notice of appeal. It does not mention or acknowledge receipt of a Form G-28 or any other document other than the notice of appeal. Counsel's assertion to the effect that the Form I-797C and the fact that it was mailed to counsel's law firm are evidence that a Form G-28 signed by the petitioner was submitted with the notice of appeal is not supported by the record. A Form G-28 signed by the petitioner to authorize the appearance of current counsel has not appeared in the record prior to this motion. As stated earlier in this decision, at the time the AAO issued its previous decision the only Form G-28 in the record of proceedings was signed by the beneficiary alone.

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<sup>1</sup> Although not a material factor in the AAO decision on the motion, the AAO notes certain assertions in the Statement of Facts section of the motion's brief that conflict with the documentation of record. According to the Statement of Facts, the petition was initially rejected on May 4, 2005, for overpayment, and was refiled with the correct fee on May 13, 2006 [sic], instead of June 24, 2005 as stated by the director. However, the Form I-129 was signed by the petitioner on May 18, 2005, a date after the filing date asserted by the petitioner.

Because the Form G-28 filed with the appeal had been signed by the beneficiary alone, the AAO's previous decision to reject the appeal and the grounds cited for that rejection were correct.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The motion is dismissed. The previous decision of the AAO, dated October 31, 2007, is affirmed. The petition is denied.