

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

813

[REDACTED]

DATE: **DEC 19 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The petitioner appealed the decision, and the Administrative Appeals Office (AAO) dismissed the appeal on the merits. The petitioner appealed the dismissal of the first appeal. The AAO rejected the second appeal because there is no provision to appeal the dismissal of an appeal. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

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 USCIS 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).

The petitioner filed the Form I-360 petition on June 4, 2010. The director denied the petition on June 2, 2011. The petitioner appealed that decision to the AAO, which dismissed the appeal on December 29, 2011. The petitioner, through counsel, filed an appeal from that decision on February 2, 2012, stating that a “brief and/or additional evidence will be submitted to the AAO within 30 days.” Counsel requested “that this Appeal also be treated as a Motion to Reopen and Reconsider the denial of the visa petition.” The AAO rejected the appeal on April 20, 2012, stating that the filing and accompanying requests were impermissible because the pertinent regulations did not permit the filing of an appeal on an AAO dismissal or the submission of a later supplement to an already-filed motion. The AAO also noted that the filing did not include a newly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, as required by the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a).

The petitioner, through counsel, has now filed a motion to reconsider the AAO’s April 20, 2012 decision. Counsel, on motion, addresses the issue of the missing Form G-28, stating that the proper procedure would have been for the AAO to accept the appeal and request a new Form G-28, as required by the regulations at 8 C.F.R. § 103.2(a)(2)(v)(A)(2)(ii) and (iii). As the AAO explained in its rejection notice, those regulations apply when a Form G-28 is missing from “an otherwise properly filed appeal.” The AAO further observed that, due to numerous other procedural flaws, the submission was “not an otherwise properly filed appeal.”

Counsel observes that he had requested the AAO to consider the filing as an appeal, or, in the alternative, as a motion. The implication is that, because no appeal was permitted, the AAO should have automatically considered the filing as a motion instead. Counsel contends that this arrangement “is specified by Regulation” but does not identify the regulation.

The USCIS regulation at 8 C.F.R. § 103.3(a)(2)(iii) states: “Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action” Instead of forwarding the appeal to the AAO. There is no requirement that the reviewing official must convert a deficient appeal to a motion; rather, the official “may” do so, and even then, only when

“favorable action” is warranted. Even then, in context, the wording of the regulation indicates that the term “reviewing official” refers to an official at the office that first receives the filing, not the AAO.

Counsel claims that there is no mechanism to allow the AAO to reject appeals. Counsel states:

There is no basis in the April 20, 2012 decision for “Rejection” of this reconsideration/appeal. I know of reasons for incorrect fee and for wrong form but not for the issues raised but not as stated in your denial. . . .

It is respectfully suggested that the change as you made requires Rulemaking, with Notice to the public (including the Bar) of the changed rule and procedures. This would justify “Rejection” as an approved disposition, which is now limited to “Affirmance,” “Reversal” and “Remand.” . . . This is not an opposition to the concept of rejection of an appeal for reasons other than [sic] “form” or “fee.” There may be an operational requirement for general “rejection.” However this change, however meritorious, can be accomplished legally only by an amendment to the Regulations.

The regulations at 8 C.F.R. § 103.3 specifically grant the AAO the authority to “reject” an appeal for reasons not related to “‘form’ or ‘fee.’” Specifically, an appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(A)(1). An appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). Thus, the regulations at 8 C.F.R. § 103.3 grant the AAO the express authority to reject appeals.

Counsel acknowledges that the regulations permit the rejection of an appeal filed by a party not entitled to file it, but states that the regulation does not apply here because counsel was clearly acting on the petitioner’s behalf, and therefore entitled to file the appeal. Counsel’s contention rests on the incorrect presumption that the regulations permit rejection of appeals only when filed by unauthorized parties. As explained above, untimely appeals are also subject to rejection, even when filed by the correct party. Furthermore, because the regulations do not exhaustively detail every possible outcome of a given appeal, or every possible reason to reach a given outcome, there is no reasonable basis to conclude that rejection is permissible only under the particular circumstances specified in the regulations at 8 C.F.R. § 103.3(a)(2)(v).

More generally, the regulations at 8 C.F.R. § 103.2(a)(2)(v) do not prescribe any course of action other than “rejection” for an “improperly filed appeal.” The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with these exceptions - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement, and the AAO has jurisdiction to review denials of applications for adjustment of status filed by aliens in U or T

nonimmigrant status. Section 245(l) and (m) of the Act, 8 U.S.C. § 1255(l), (m); 8 C.F.R. §§ 245.23(i), 245.24(f)(2). Accordingly, some types of decisions cannot be appealed. An AAO dismissal of a prior appeal is one such type of decision. Counsel contends, in effect, that the AAO cannot reject an appeal over which it has no jurisdiction, but fails to cite any authority to show what the AAO should do with such an appeal instead of reject it.

The AAO never informed the petitioner that its dismissal order could be appealed, and counsel has not cited any statute, regulation or case law that would permit the petitioner to appeal the dismissal order. Counsel offers no persuasive explanation as to how the AAO's refusal to accept an appeal that it cannot accept "denies procedural due process of law."

Counsel acknowledges that "[a]ttorneys are . . . sometimes rushed or sloppy," and contends that the filing of the appeal instead of a motion amounted to "at most, a clerical error." In the instant case, counsel not only checked an "appeal" box instead of a "motion" box on Form I-290B, but specifically referred to "this Appeal" in the accompanying cover letter. It is evident that counsel, on the petitioner's behalf, intended to file an appeal rather than a motion. It is not a denial of due process for the AAO to treat a self-identified appeal as an appeal. The procedures and requirements for appeals are different from those for motions, and the two types of filings are neither identical nor interchangeable.

Counsel's motion does not establish that the AAO's rejection notice was incorrect based on the evidence of record at the time of that notice. Therefore, the motion does not meet the requirements of the regulation at 8 C.F.R. § 103.5(a)(3). The regulation at 8 C.F.R. § 103.5(a)(4) requires the AAO to dismiss the motion.

ORDER: The motion is dismissed.