



U.S. Citizenship
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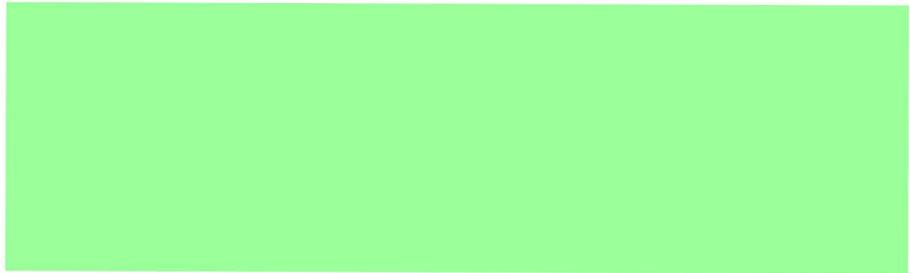
(b)(6)



DATE: JAN 02 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiaries:



PETITION: Petition for a Commonwealth of the Northern Mariana Islands (CNMI) Only Nonimmigrant Transitional Worker Classification Pursuant to 48 U.S.C. § 1806(d)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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DISCUSSION: The service center director denied the petition. The petitioner submitted an appeal, and the Administrative Appeals Office (AAO) summarily dismissed the appeal. The matter is again before the AAO on a motion to reopen and motion to reconsider. The joint motion will be dismissed.

The petitioner submitted a Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW) to the California Service Center on December 2, 2011. On the Form I-129CW petition, the petitioner describes itself as an enterprise engaged in air conditioning, refrigeration, general construction, retail, import/export, restaurant, and marine industrial general services that was established in 2003. In order to employ the beneficiaries in various positions (air-conditioning technician, cook, accountant, and mechanic) the petitioner seeks to classify them as CNMI-Only Nonimmigrant Transitional Workers (CW-1) pursuant to 48 U.S.C. § 1806(d).

The director denied the petition on February 13, 2013, finding that the petitioner failed to properly file the Form I-129CW for multiple beneficiaries. Specifically, the director noted that to include more than one worker on the same I-129CW petition, all workers must be in the same "occupational category." A petition for multiple beneficiaries is properly filed only when each worker included on the petition (1) has the same occupational category, (2) for the same period of time, and (3) will work in the same location.¹ See 8 C.F.R. § 214.2(w)(9).

Thereafter, the petitioner submitted a Notice of Appeal or Motion (Form I-290B) and checked Box A in Part 2 of the form to indicate that it was filing an appeal and that a brief and/or additional evidence was attached. On appeal, the petitioner claimed that it "made an honest mistake in including the beneficiaries in a single petition," and that it "admits in good faith that the initial Form I-129CW petition was improperly filed as the 7 beneficiaries were mistakenly included/lumped together in one petition only."

The AAO reviewed the submission and found (1) that the petitioner's statement on appeal did not identify any errors in the director's decision, and (2) that the petitioner acknowledged that it did not properly file the petition in accordance with the applicable regulatory provisions. Accordingly, the AAO summarily dismissed the appeal on August 6, 2013.

Subsequently, the petitioner submitted another Form I-290B. The petitioner marked box F in Part 2 of the form to indicate that it was filing a motion to reopen and a motion to reconsider the decision. In Part 3 of the Form I-290B, the petitioner stated the following:

¹ The instructions for the Form I-129CW also indicate that multiple beneficiaries who will seek admission in CW-1 classification may be included in the same petition provided they will: (1) all be working in the same occupation; (2) all employed for the same period of time; (3) all be employed in the same location; and (4) all requesting the same action in Part 2 of the Form I-129CW.

1. The USCIS erred in certifying this matter to the AAO.² The[y] erred in adjudicating this matter as an appeal when there are clear grounds for the USCIS Director to reopen or reconsider his decision dated February 13, 2013 decision.
2. The AAO erred in its August 6, 2013 decision treating Petitioner's Form I-290B as an appeal.
3. The AAO also erred in its decision because the USCIS Director failed to make a specific determination that no grounds exists warranting reopening or reconsideration of its decision dated February 13, 2013.
4. Clear grounds exists warranting reopening or reconsideration of the decision of the USCIS Director dated February 13, 2013 based on USCIS' existing practice and policy of allowing Petitioner the opportunity to correct the error.

As a preliminary matter, the AAO notes that 8 C.F.R. § 103.3(a)(2) states the following:

- (i) Filing appeal. The affected party must submit an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by §103.7 of this part. The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions within 30 days after service of the decision.
- (ii) Reviewing official. The official who made the unfavorable decision being appealed shall review the appeal unless the affected party moves to a new jurisdiction. In that instance, the official who has jurisdiction over such a proceeding in that geographic location shall review it.
- (iii) Favorable action instead of forwarding the appeal to [AAO]. The reviewing official shall decide whether or not favorable action is warranted. 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. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under §103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal.
- (iv) Forwarding the appeal to [AAO]. If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the related record of proceeding to the [AAO] in Washington, DC.

² Contrary to the petitioner's statement, the director did not certify the decision to the AAO. *See generally* 8 C.F.R. § 103.4.

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Here, prior to forwarding the appeal ([REDACTED]) to the AAO, the service center director reviewed the submission and determined that favorable action was not warranted. As the director declined to treat the appeal as a motion, the director then forwarded the matter to the AAO. The director was not required under the regulations to issue another decision to the petitioner. Rather, as noted *supra*, in such instances, the director is simply required to forward the appeal and the related record of proceeding to the AAO.

The AAO will now consider the petitioner's motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or 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. See 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.³

The purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. See *Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. See *Matter of O-S-G-*, 24 I&N

³ The provision at 8 C.F.R. § 103.5(a)(3) states the following:

Requirements for motion to reconsider. 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.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In the instant case, the petitioner claims that the previous submission should have been treated as a motion to reopen and/or reconsider instead of an appeal. The petitioner states that "even if [the] Petitioner may have checked Box A for appeal in part 2 of the Form I-290B, it must still be considered as a motion to reopen or reconsider if the grounds relied upon in the Form I-290B are relevant to the issue of reopening or reconsidering the decision."⁴

The petitioner recognizes, however, that the previously submitted Form I-290B was marked as an appeal.⁵ The AAO also notes that in the section entitled "Part 3. Basis for the Appeal or Motion," the petitioner began its discussion with "Appeal," and then stated that it "would like to appeal the case"

A petitioner must establish that it is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. *Id.* The petitioner had the burden to properly complete the Form I-290B to indicate its requested action.⁶ Part 2 of the Form I-290B states "Information About the Appeal or Motion (Check one box below that best describes your request." The petitioner selected box A, which indicates, "I am filing an appeal." USCIS is not required to "guess" or assume that the petitioner wished to request a different action other than that designated in Part 2. Further, it must be noted that the petitioner improperly submitted the form directly to the

⁴ As noted above, the director reviewed the appeal and determined that it did not warrant favorable action.

⁵ As previously mentioned, the petitioner acknowledges that it did not properly file the Form I-129CW petition in accordance with the applicable regulatory provisions. For instance, the petitioner stated that "[it] admits in good faith that the initial Form I-129CW petition was improperly filed as the [seven] beneficiaries were mistakenly included/lumped together in one petition only." The petitioner concluded that it "does not dispute that there was a mistake on its part by lumping the named beneficiaries in one I-129CW petition only."

⁶ The petitioner claims that it intended for the previously submitted Form I-290B to be filed as a motion. The AAO notes that a motion will be dismissed for failing to meet the applicable filing requirements. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the prior Form I-290B submission does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Further, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, even if the petitioner had indicated that it was filing a motion (which it did not), the submission would not have met the applicable filing requirement listed at 8 C.F.R. §103.5(a)(1)(iii)(C).

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AAO, where it was rejected and returned to the petitioner. Thus, the petitioner had a second opportunity to review the submission prior to filing it with USCIS.

Upon review, the petitioner does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the prior decision was based on an incorrect application of law or USCIS policy.⁷ Moreover, the petitioner has not established that the decision was incorrect based on the evidence of record at the time of the decision. In short, the petitioner has not submitted any document that would meet the requirements of a motion to reconsider.

A review of the record and the prior decision indicates that the AAO properly applied the statute and regulations to the petitioner's case. The AAO provided the petitioner with a detailed statement regarding the deficiencies in the appeal. The decision was the proper result under the applicable statutory and regulatory provisions. Based upon a complete review, the motion to reconsider must be dismissed.

The AAO will now consider the petitioner's motion to open. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based upon the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.⁸ The new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

⁷ The petitioner claims that "[i]t has been the USCIS' current practice and policy of allowing Petitioners the opportunity to correct a mere administrative errors [sic] in any petition." The petitioner failed, however, to provide or identify any official USCIS policy memorandum to support its claim that the basis for the denial of the instant petition would constitute "a mere administrative error." Further, the regulation at 8 C.F.R. § 214.2(w)(9) specifies that a petitioning employer may include more than one beneficiary in a CW-1 petition if the beneficiaries will be working in the *same occupational category*, for the same period of time, and in the same location (emphasis added). USCIS does not have the discretion to disregard regulations, even if it would benefit a petitioner. *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (C.A.D.C. 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

In the brief submitted with the joint motion, the petitioner states that it is "requesting that it be allowed to file separate petitions for each job category." It must be noted that the petitioner may, of course, file new CW-1 petitions with the required supporting documentation and fees for USCIS to consider. However, the AAO will not speculate as to whether or not the petitioner would establish eligibility for the benefit sought with such filings (in accordance with the applicable statutory and regulatory provisions) as such submissions are purely speculative and are not presently before the AAO.

⁸ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

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In this matter, the motion consists of the Form I-290B along with (1) a brief signed by the petitioner's owner; (2) a statement signed by the petitioner's owner; and (3) a copy of the AAO's previous decision. The petitioner's owner states "that it was a mistake on [his] part to include beneficiaries belonging to different job categories in on I-129CW petition" and that when filing the prior Form I-290B, he "mistakenly checked Box A corresponding to 'appeal' in Part 2 of the form." Furthermore, he acknowledges that the Form I-290B was sent to the AAO. Upon review of the submission, the AAO notes that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. Thus, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

In the brief submitted with the joint motion, the petitioner "requests a stay of the execution of the August 6, 2013 decision of the AAO or any of its consequential results pending the determination of this motion and also pending the taking and disposition of any appeal that may be taken from such determination, if such becomes appropriate." The regulations state that unless USCIS directs otherwise, the filing of a motion to reopen or reconsider or of a subsequent application or petition does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv). Here, the petitioner's request to stay the execution of any decision (or extend a previously set departure date) has not been granted by USCIS.

ORDER: The joint motion to reopen and reconsider is dismissed.