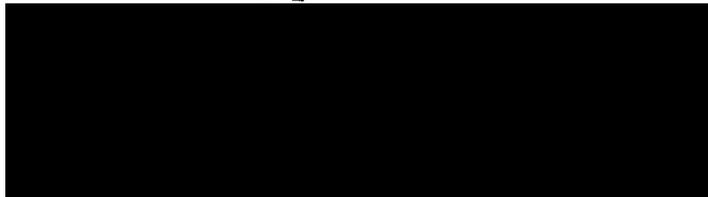


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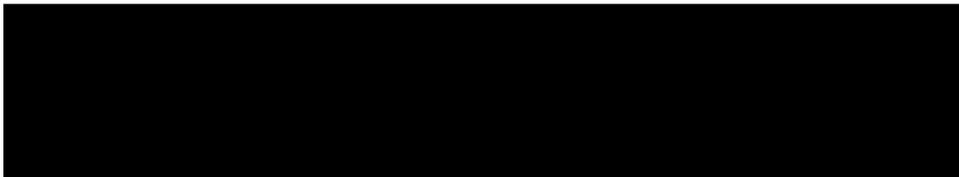
D2

FILE: WAC 04 174 51244 Office: CALIFORNIA SERVICE CENTER Date: NOV 06 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(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, California Service Center, denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) rejected a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a ceramic tile and marble contracting business that seeks to employ the beneficiary as a human resources specialist. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a 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 the basis that the proffered position did not meet the definition of a specialty occupation. The AAO rejected the subsequent appeal pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A).

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(A) stipulates the following:

*(A) Appeal filed by person or entity not entitled to file it – (1) Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service accepted will not be refunded.

*(2) Appeal by attorney or representative without proper Form G-28 – (i) General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

On motion, counsel states that

The Service used a [F]orm G-28 submitted in conjunction with the I-290B in order to deny that the case was properly filed. This G-28 was submitted because the Service was previously given a G-28 showing that this office represented the petitioner, duly signed by the petitioner, but had not submitted a G-28 duly signed by the beneficiary who was also being represented on the I-290B. Said G-28 was required pursuant to the I-290B because it had not been submitted previously. The form states that you must attach a [F]orm G-28 if “*you are an attorney or representative and did not submit such a form before.*” It had only been submitted for the petitioner and not the beneficiary, therefore we were adhering to the recommendation of the form and denied for said adherence.

Counsel’s submission of additional evidence does not satisfy either the requirements of a motion to reopen or a motion to reconsider. 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: (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 Citizenship and Immigration Services (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).

On motion, counsel argues that a Form G-28 was previously signed by the petitioner and submits a Form G-28 signed by the petitioner on May 30, 2006. Counsel’s statement, however, is not persuasive. As previously stated, a motion to reopen must state the new facts that will be proven if the matter is reopened, and must be

supported by affidavits or other documentary evidence. Generally, the new facts must be material and unavailable previously, and could not have been discovered earlier in the proceeding. See 8 C.F.R. § 1003.23(b)(3). Here, no evidence in the motion contains new facts that were not previously available. There is no evidence in the record of a previously filed Form G-28 signed by the petitioner listing counsel as the attorney of record. The Form G-28 submitted by counsel is dated May 30, 2006 and was submitted by counsel in connection with the current motion. The petitioner has not submitted a Form G-28 signed by the petitioner and dated on or before December 20, 2004, when the initial appeal was filed. The petitioner has not established that the AAO's rejection of the appeal was erroneous. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the Administrative Appeals Office is not persuaded by counsel's claims.

The evidence also fails to satisfy the requirements of a motion to reconsider. Although counsel states that the decision to revoke approval of the petition was an incorrect application of the law, he does not support his assertion by providing any evidence that a Form G-28 signed by the petitioner and listing counsel as the attorney of record, was previously filed. The record of proceeding includes a Form G-28 dated May 18, 2004, signed by the petitioner and filed along with the initial Form I-129. However, this Form G-28 lists Dan E. Korenberg as the attorney of record. Pursuant to 8 C.F.R. § 103.3(a)(1)(iii)(B), a beneficiary is not considered an affected party as defined and neither a beneficiary or the beneficiary's attorney have the legal standing to file an appeal. Given that the December 20, 2004 Form I-290B filed by counsel did not include a Form G-28 authorizing his representation by the petitioner, the affected party with legal standing in the proceeding, the appeal was correctly rejected by the AAO as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

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 May 12, 2006, is affirmed. The petition is denied.