

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

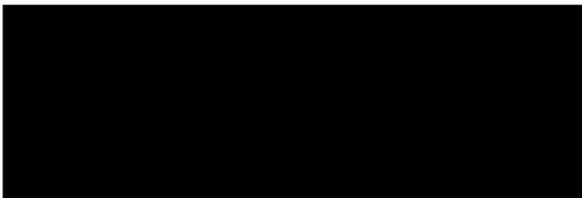
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2



FILE: WAC 02 182 52328 Office: CALIFORNIA SERVICE CENTER Date: MAR 04 2009

IN RE: Petitioner:
Beneficiary:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: On August 3, 2002, the Director of the California Service Center denied the nonimmigrant visa petition. On August 30, 2002, the petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on December 17, 2003, the AAO rejected the appeal as improperly filed, because it was filed on behalf of the beneficiary, an unaffected party under the law. Counsel to the petitioner filed a Motion to Reopen or Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5, which the AAO dismissed on March 18, 2005. On April 15, 2005, counsel to the petitioner filed a Motion to Reconsider that decision in accordance with 8 C.F.R. § 103.5. The Motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C) and 103.5(a)(4).

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as an H-1B 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 based his denial of the petition upon his finding that the petitioner failed to establish that the proffered position is a specialty occupation. Rejecting the appeal on the basis that it had been filed on the behalf of the petition's beneficiary, the AAO's March 18, 2005 decision stated:

The Form G-28, Entry of Appearance as Attorney or Representative, submitted in conjunction with the Form I-290B, indicates that the beneficiary retained counsel to file the appeal. Citizenship and Immigration Services (CIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on the beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). As the appeal was not properly filed, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

On motion, counsel acknowledges that the appeal was filed with a single Form G-28, which was signed by the beneficiary and not the petitioner. Counsel now submits a Form G-28 that was signed by the petitioner on September 25, 1992, and counsel states that "the Petitioner's representative, [REDACTED] [the petitioner's president], was on leave for his wedding and honeymoon during the compilation of the Appeal and the Appellate Brief."

On motion, counsel focuses upon the regulatory provisions about untimely appeals at 8 C.F.R. § 103.3(a)(2)(v), which reads:

(v) Improperly filed appeal —

(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 has 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.

(ii) **When favorable action warranted.** If the reviewing official decides favorable action is warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 to the official's office within 15 days of the request. If Form G-28 is not submitted within the time allowed, the official may, on his or her own motion, under Sec. 103.5(a)(5)(i) of this part, make a new decision favorable to the affected party without notifying the attorney or representative.

(iii) **When favorable action not warranted.** If the reviewing official decides favorable action is not warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 directly to the AAU. The official shall also forward the appeal and the relating record of proceeding to the AAU. The appeal may be considered properly filed as of its original filing date if the attorney or representative submits a properly executed Form G-28 entitling that person to file the appeal.

Counsel contends that, when, as here, an attorney for a petitioner files an appeal with a Form G-28 signed by the beneficiary, 8 C.F.R. §§ 103.3(a)(2)(v)(A)(2)(1) and (a)(2)(v)(A)(2), read together and properly construed, require U.S. Citizenship and Immigration Services (USCIS) to request the attorney to provide a Form G-28 signed by the petitioner, and to allow him 15 days to do so.

Counsel provides no authority to support his interpretation that an appeal filed by an attorney on behalf of a beneficiary that is accompanied by a properly executed Form G-28 signed by the beneficiary and the attorney is an “otherwise properly filed appeal” within the meaning of 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(ii). Further, counsel’s interpretation fails in light of these two unambiguous provisions cited in the AAO’s decision: 8 C.F.R. § 103.3(a)(2)(v)(A)(1), which states that an appeal filed by a person or entity not entitled to file it must be rejected (rather than treated as “otherwise properly filed”); and 8 C.F.R. § 103.3 (a)(1)(iii)(B), which indicates that a beneficiary has no legal standing and is not entitled to file an appeal. These provisions establish that, as in the present proceeding, an attorney’s filing of a completed Form I-290B and a properly executed Form G-28, indicating that the attorney is filing on behalf of the beneficiary, clearly constitutes an appeal; but one for which rejection is mandated under 8 C.F.R. § 103.3(a)(2)(v)(A)(1), and therefore not one that is “otherwise properly filed.”

Also, counsel provides no authority for his assertion that a fully executed Form G-28 that includes the signature of the person or entity that the form identifies as the client, the signature of the attorney

filing the appeal, and all of the material information requested on the form is not a "proper Form G-28." Likewise, there is no merit to counsel's assertion, without statutory or regulatory support, that the petitioner merits relief due to its president's absence during the period for filing the appeal.

The AAO will not reconsider its latest decision on its own motion, as that decision was correct. There is no basis for this alternative mode of relief requested by counsel.

The AAO will dismiss the motion for failure to meet the applicable requirements for motions to reconsider set forth in 8 C.F.R. § 103.5(a)(3). This regulation states, in pertinent part, that "[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." In this matter, counsel fails to cite to any precedent decisions that indicate that the AAO's upholding of its rejection of the appeal was an incorrect application of law or USCIS policy. As such, the Motion does not meet the applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).¹

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 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 motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). 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, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion 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).

Motions for the reopening or reconsideration 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. *See 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." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

¹ As indicated above, counsel clearly identifies the instant Motion as a motion to reconsider. However, to the extent the Motion could be construed to be a motion to reopen, it is noted that the Motion also does not meet the applicable requirements in 8 C.F.R. § 103.5(a)(2). This regulation states in pertinent part that "[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." In this matter, the petitioner offers no new evidence. This is an insufficient basis under the regulations to grant a motion to reopen.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The Motion to Reconsider is dismissed. The petition is denied.