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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

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Date: NOV 01 2011 Office: VERMONT SERVICE CENTER FILE:

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The petitioner filed a subsequent appeal. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner is a music school that seeks to employ the beneficiary as a music instructor. The petitioner, therefore, 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 September 18, 2006. On October 16, 2006, counsel for the petitioner filed an appeal seeking review of the director's decision. After reviewing the record, the AAO dismissed the appeal and affirmed the director's denial because the petitioner failed to establish that it is a nonprofit organization or entity related to or affiliated with an institution of higher education as defined under 8 C.F.R. 214.2(h)(19)(iii), and therefore, it does not qualify for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act. The petitioner has now filed a motion seeking to reconsider the AAO's October 29, 2009 decision.

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. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.*

On motion, counsel submits the web printouts of the school, a list of courses offered at the school and a statement from the president of the petitioning school certifying the existence of post-graduate classes and their authenticity. However, the motion to reconsider does not state that the AAO's decision was based on an incorrect application of law or USCIS policy, nor does it contain any evidence or pertinent precedent decisions to support it. More importantly, however, the motion to reconsider fails to establish that the AAO's decision was incorrect based on the evidence of record at the time of that decision.

Specifically, counsel's primary argument on motion is that the petitioner is an institution of higher education and that the beneficiary thereby qualifies as exempt from the H-1B numerical limitations ("H-1B cap") pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5). Counsel asserts that this claim "was never mentioned or requested before," but that "the petitioner has always been an institution of higher learning . . . for 30 years."

First, it must be noted that the petitioner indicated on Form I-129 H-1B Data Collection Supplement that it is not "an institution of higher education as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)." Instead, the petitioner claimed that it was exempt from the H-1B cap based on it being a nonprofit entity related to or affiliation with such an institution. As such, U.S. Citizenship and Immigration Services (USCIS) never addressed, nor was it required to address, the petitioner's claimed eligibility for a benefit it in fact stated it was not eligible for in the prior

proceedings. If the petitioner believes it is now eligible under a different standard, i.e., as an institution of higher education, instead of filing the instant motion, it should have filed a new petition requesting eligibility under that different standard, or it should have simply filed a new petition when a cap number became available.

Second, the record of proceeding still lacks sufficient evidence that the petitioner qualifies as an institution of higher education. For instance, there is no evidence that the petitioner "is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary [of Education] for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time" as required by section 101(a)(5) of the Higher Education Act of 1965, Pub. Law 89-329. 20 U.S.C. § 1001(a)(5). Absent this and other pertinent evidence, it cannot be found that the petitioner qualifies as an institution of higher education.

Third, even if current, sufficient evidence of the petitioner's qualifications as an institution of higher education were submitted on motion, this fact in itself would not be sufficient to grant a motion to reconsider, as it would not have demonstrated that the AAO's decision was incorrect based on the record of proceeding as of the time that decision was issued. Therefore, for the foregoing reasons, the petitioner has failed to establish that it has satisfied the requirements for a motion to reconsider, and the motion must be dismissed for this reason.

Lastly, the motion will also be dismissed for failing to meet another applicable requirement. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Title 8 C.F.R. 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 requirement listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this additional reason.

The instant motion does not meet applicable requirements to be considered as a motion to reconsider. Again, pursuant to 8 C.F.R. § 103.5(a)(4), a motion that does not meet applicable requirements shall be dismissed.

ORDER: The motion is dismissed. The AAO's October 29, 2009 decision is affirmed and the petition remains denied.