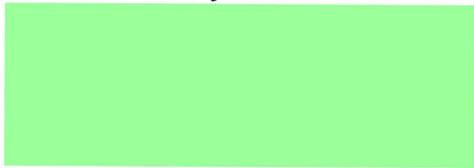




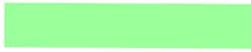
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **APR 01 2013**

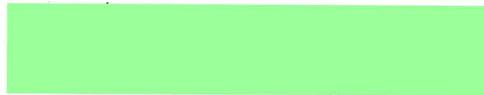
Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

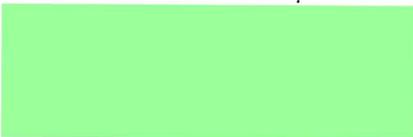
Petitioner:

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 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: On December 6, 2010, the Director of the Vermont Service Center denied the nonimmigrant visa petition. On December 20, 2010, the petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on July 27, 2012, the AAO rejected the appeal. On August 10, 2012, the petitioner filed a combined motion to reopen and reconsider the AAO's decision. However, the petitioner erroneously submitted that motion directly to the AAO; therefore, the AAO returned that motion to the petitioner on August 13, 2012. The petitioner subsequently refiled that motion with the Vermont Service Center on August 28, 2012. The combined motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C) and 103.5(a)(2)-(4). The prior decision of the AAO will be affirmed. The director's denial of the petition will not be disturbed.

The Form I-129 visa petition states that the petitioner is a "Kindergarten & Preschool Day Care & Learning Center." To employ the beneficiary in what it designates as a "Day Care Group or Head Teacher" position, the petitioner endeavors to classify her 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, finding, *inter alia*, that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position and failed to demonstrate that the beneficiary is qualified to work in a specialty occupation position. On appeal, the petitioner asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

As indicated above, the petitioner appealed the director's December 6, 2010 decision. Notably, the appeal was signed and filed by [REDACTED]. Noting that the appeal was not filed with a new Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative as required by the regulation at 8 C.F.R. § 292.4(a), the AAO faxed a request for a new Form G-28 to [REDACTED]. No response was received within the allotted time. In its decision, the AAO determined that [REDACTED] did not fall within any of the categories of representatives authorized under the regulations to file an appeal on behalf of the petitioner.¹ Thus, the AAO rejected the

¹ Specifically, the AAO noted that [REDACTED] previously submitted a signed Form G-28 with the Form I-129 and indicated the following in Box #4 of the Form G-28:

I am a civic leader and a [REDACTED] helping members and their respective employers on immigration, labor certification & citizenship issues. I appear in this case at employee's and employer's specific request with but token remunerations.

The AAO noted that the regulation at 8 C.F.R. § 103.2(a)(3) specified that a petitioner may be represented "by an attorney in the United States, as defined under 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter." The AAO further observed that 8 C.F.R. § 292.1(a)(3) permits reputable individuals appearing without direct or indirect remuneration to represent a petitioner in certain circumstances. The AAO also noted that an accredited representative is defined in 8 C.F.R. § 292.1(a)(4) as a representative of an

appeal as improperly filed. The AAO rejected that appeal pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1), finding that the appeal was filed by a person whom the petitioner had not demonstrated was entitled to file it. The petitioner moved to reopen and reconsider the AAO's decision. That combined motion was initially returned as filed improperly with the AAO.² It was subsequently refiled with the service center on August 28, 2012.

The regulation at 8 C.F.R. § 103.5(a)(2) 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." Based on 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.³ 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).

In this matter, the decision from which the motion is taken is the July 27, 2012 decision of the AAO finding that the December 20, 2010 appeal was filed by a person not permitted to do so, specifically, [REDACTED]. It is that finding that the petitioner must overcome on the present motion.

On motion, the petitioner submits a letter from its new counsel, [REDACTED]. [REDACTED] states in his letter that [REDACTED] was in the Philippines when the AAO's July 10, 2012 fax requesting a new Form G-28 was sent, and that [REDACTED] first saw the fax . . . on the evening of July 23rd, 2012." [REDACTED] also claims the following additional reasons for the "delay": (1) [REDACTED] fax machine was broken; and (2) [REDACTED] is "78 years old and is not in good health and was suffering from jetlag."

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. The new facts must

organization described in 8 C.F.R. § 292.2, which, in turn, states that only nonprofit religious, charitable, social service, or similar organizations recognized by the Board of Immigration Appeals may be so classified. In this case, the AAO found that [REDACTED] did not fall within any of the categories of representatives authorized to file an appeal on behalf of the petitioner.

² The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(E) states, "[A motion shall be] [s]ubmitted to the office maintaining the record upon which the unfavorable decision was made [(in this case the Vermont Service Center)] for forwarding to the official having jurisdiction [(in this case the AAO)]. The July 27, 2012 decision of the AAO noted that a motion to reopen or to reconsider that decision must be filed in accordance with the requirements at 8 C.F.R. § 103.5, and emphasized, in bold face type, "**Do not file any motion directly with the AAO.**" The petitioner's attempt to file this motion directly with the AAO does not establish a receipt date. Therefore, the receipt date for the instant motion is the day it was received at the Vermont Service Center, i.e., August 28, 2012.

³ 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).

be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3). Here, no evidence in the motion contains new facts that were previously unavailable or facts that are material to the proceeding; thus, there is no basis for the AAO to reopen the proceeding. In other words, no new evidence was submitted that is relevant to the AAO's finding that [REDACTED] did not fall within any of the categories of representatives authorized to file an appeal on behalf of the petitioner. The motion to reopen will therefore be dismissed.

It is noted that counsel acknowledges that [REDACTED] who filed the petitioner's appeal, is not an attorney or an accredited representative. In a statement submitted with the motion, [REDACTED] appears to imply that his *new* entry of appearance with the motion cures the defect of the appeal being filed by someone not entitled to file it. The AAO does not dispute that [REDACTED] would have been permitted to file the appeal if he had then represented the petitioner. However, it does not appear that he represented the petitioner then and did not, in fact, file that appeal. Even if [REDACTED] had submitted a Form G-28 signed by himself and the petitioner in response to the AAO's faxed request, such a submission would not cure the defect of the appeal being filed by [REDACTED]

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. *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.

As will now be discussed, the motion fails to satisfy the requirements for a motion to reconsider a decision.

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.⁴

⁴ The provision at 8 C.F.R. § 103.5(a)(3) states:

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

The petitioner is now represented by counsel. Although counsel checked box F of Part 2 of the Form I-290B indicating that the petitioner elected to file both a motion to reopen and a motion to reconsider, counsel has not claimed that any pertinent precedent decisions establish that the decision was based on an incorrect application of law or USCIS policy based on the evidence of record at the time of the initial decision.

As counsel and the petitioner have failed to both (1) state the reasons for reconsideration that are "supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy," and (2) establish that the initial decision of the AAO "was incorrect based on the evidence of record at the time of [that decision]," the instant submission does not meet the requirements for a motion to reconsider contained in 8 C.F.R. § 103.5(a)(3). Accordingly, it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

Finally, the motion shall also be dismissed for failing to meet another applicable filing requirement. 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 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 at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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 proceeding will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.

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.