

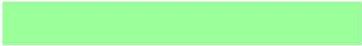


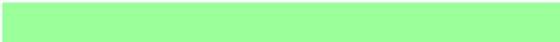
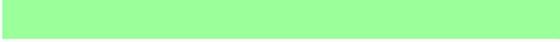
U.S. Citizenship  
and Immigration  
Services

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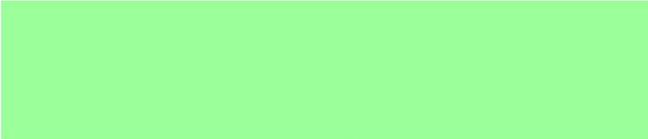
**AUG 02 2013**

DATE: OFFICE: CALIFORNIA SERVICE CENTER 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER IN THE I-129 PROCEEDING:

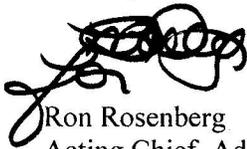


INSTRUCTIONS:

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  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on February 7, 2012. In the Form I-129 visa petition, the petitioner describes itself as a business involved in contracting and managing construction works that was established in 1990. In order to employ the beneficiary in what it designates as a mechanical engineer position, the petitioner seeks to classify him 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).

On November 10, 2012, the director denied the petition, concluding that the petitioner failed to establish eligibility for the benefit sought in accordance with the applicable statutory and regulatory provisions. Prior counsel for the petitioner subsequently filed a Form I-290B, Notice of Appeal or Motion. The matter is now before the AAO on appeal. The appeal will be rejected.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) states that the affected party must submit an appeal on Form I-290B. The term "affected party" is defined as "the person or entity with legal standing in a proceeding. . . . An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter." 8 C.F.R. § 103.3(a)(1)(iii)(B)

In accordance with the regulation at 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B, a "new [Form G-28, Notice of Entry of Appearance as Attorney or Representative] must be filed with an appeal filed with the Administrative Appeals Office." Title 8 C.F.R. § 292.4(a) further requires that the Form G-28 "must be properly completed and signed by the petitioner, applicant, or respondent to authorize representation in order for the appearance to be recognized by DHS [U.S. Department of Homeland Security]." This regulation applies to all appeals filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (Feb. 2, 2010).

Moreover, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2) states, in part, the following:

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.

The record, however, does not contain a **new, properly executed** Form G-28 personally signed by both counsel and by an authorized official of the petitioning entity.

The Form G-28 that was submitted with the I-290B was signed by the beneficiary, not by an affected party.<sup>1</sup> In accordance with 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(iii), the AAO sent the petitioner and counsel a request for evidence (RFE) on June 4, 2013, notifying them that a "new and properly executed Form G-28," signed by counsel and the consenting affected party, must be submitted to the AAO. Counsel responded to the request by submitting a Form G-28 authorizing representation for the "I-129 H-1B" rather than the appeal. The petitioner's representative also provided a notarized letter to "authorize [counsel] to transact/handle [the] I-129 (H1B), Petition for a Nonimmigrant Worker and other immigration matter on behalf of [the petitioner]." Notably, it is not apparent from the documentation submitted that the petitioner is aware that a Form I-290B appeal has been filed.<sup>2</sup>

The regulation at 8 C.F.R. § 103.3(a)(2)(v) states 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 has accepted will not be refunded.

The AAO observes that the only Form G-28 submitted for the Form I-290B in this matter was signed by the beneficiary. The regulations prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a petition; the beneficiary of a visa petition is not a recognized party in such a proceeding. 8 C.F.R. § 103.2(a)(3). The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically states that a beneficiary of a visa petition is not an affected party and does not have any legal standing in a proceeding.<sup>3</sup> As the beneficiary and his representative have no legal standing in this proceeding, counsel for the beneficiary is not authorized to file the appeal on behalf of the petitioner, and it must therefore be rejected as

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<sup>1</sup> The signature that appears in the space for "Signature of Petitioner, Applicant, or Respondent" on the Form G-28 submitted with the Form I-290B matches the beneficiary's signature as it appears in the record of proceeding.

<sup>2</sup> Not only does the petitioner's signature on the Form G-28 authorize representation by an attorney or accredited representative in matters before USCIS, it serves as a consent to disclosure of information covered under the Privacy Act of 1974. The Immigration and Naturalization Service (legacy INS) first implemented the requirement that a petitioner or applicant sign the Form G-28 in the final rule "Changes in Processing Procedures for Certain Applications and Petitions for Immigration Benefits" 59 Fed. Reg. 1455 (Jan. 11, 1994). In response to several commenters who suggested that the attorney need be the only signatory on the Form G-28, the agency explained that other commenters had properly noted that capture of the petitioner's signature on the Form G-28 "would address potential Privacy Act concerns." *Id.* at 1455. The agency emphasized that the "petitioner must sign the Form G-28 to definitively indicate to the Service that he or she has authorized the person to represent him or her in the proceeding." *Id.*

<sup>3</sup> The rejection of the appeal does not prohibit the petitioner from filing a new Form I-129 H-1B petition, with a valid LCA and proper fee, to USCIS for consideration.

improperly filed. 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(1); 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(i).

Moreover, in accordance with 8 C.F.R. § 103.2(a)(1), every benefit request or other document submitted to U.S. Citizenship and Immigration Services (USCIS) must be executed and filed in accordance with the form instructions, and any such instructions are incorporated into the regulations. The instructions to Form I-290B state that a beneficiary or a beneficiary's attorney or representative may not file an appeal or motion. Furthermore, the instructions indicate that a Form G-28 must be attached if the Form I-290B is signed by a legal representative. The petitioner's "attorney or representative must submit a Form G-28 with the appeal or motion." Additionally, the instructions further state that "[i]f the appeal or motion is filed by an attorney or representative without a properly executed Form G-28, it will be dismissed or rejected." The appeal was not been filed by the petitioner, or by any entity with legal standing in the proceeding. Therefore, the appeal was not been properly filed, and must be rejected.

The AAO also notes that the underlying petition was not properly filed. The AAO observes that the Labor Condition Application (LCA) submitted in support of the Form I-129 petition was signed by the beneficiary, not the petitioner's authorized representative. The regulation generally requires a handwritten signature. 8 C.F.R. § 103.2(a)(2). It makes no provision for proxy signatures, unless the person is less than 14 years old or mentally incompetent. *Id.* There is no evidence in the record of proceeding to indicate that the petitioner's authorized official delegated his signature authority under the exceptions permitted by the regulation. Thus, even if the Form I-290B had been properly filed, which it was not, there would be no valid proceeding upon which to base an appeal.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. . . .

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

Thus, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Id.* A visa petition may not be approved at a future date after the petitioner or beneficiary becomes

eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

A Form I-129 petition for an H-1B visa must be supported by a valid LCA, certified prior to the filing of the Form I-129. The regulation at 20 C.F.R. § 655.705(c) states, in pertinent part, the following:

- (1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. . . . The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

\* \* \*

- (3) The employer then may submit a copy of the certified, signed LCA to DHS with a completed petition (Form I-129) requesting H-1B classification.

Furthermore, the regulation at 20 C.F.R. § 655.730(c), in pertinent part, states the following:

- (3) Signed Originals, Public Access, and Use of Certified LCAs. . . . For H-1B visas only, the employer must submit a copy of the signed, certified Form ETA 9035 or ETA 9035E to the U.S. Citizenship and Immigration Services (USCIS, formerly INS) in support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2).

As noted in the U.S. Department of Labor (DOL) regulations cited above, 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), states that the petitioner will provide "[a] statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay."

Based on DOL and DHS regulations, the petitioner must submit a copy of the signed, certified Form ETA 9035 or ETA 9035E to USCIS. In the instant case, the authorized official of the petitioner has not signed and dated the LCA's Declaration of Employer (section K), as that section requires in order to obtain (1) the petitioner's attestation that the statements in the LCA are true and correct,

that the petitioner "agree[s] to comply with the [LCA] Statements as set forth in the Labor Condition Application - General Instructions Form ETA 9035CP and with the DOL regulations (20 CFR part 655, Subparts H and I)," and (2) the petitioner's agreement to make the LCA, its supporting documentation, and other records available to DOL. The LCA in the instant case specifically indicates that [REDACTED] is the "hiring or designated official" for the petitioner in his capacity as "general manager." However, the LCA is signed by "[the beneficiary] for H. [REDACTED]." The petitioner submitted the certified Form ETA 9035/9035E to USCIS in support of the Form I-129 petition; however, it was not personally signed by the petitioner's hiring or designated official. Thus, the petitioner failed to comply with the regulatory requirements for H-1B visa classification as set forth at 8 C.F.R. § 103.2(a)(2), 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), 20 C.F.R. § 655.730(c)(3).<sup>4</sup>

The signature requirement holds petitioners accountable for their responsibilities under the H-1B program. To be valid, 28 U.S.C. § 1746 requires that declarations be "subscribed" by the declarant "as true under penalty of perjury." In pertinent part, 18 U.S.C. § 1621, which governs liability for perjury under federal law, mandates that: "Whoever in any declaration under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true is guilty of perjury."

The probative force of a declaration subscribed under penalty of perjury derives from the signature of the declarant; one may not sign a declaration "for" another. Without the authorized official's actual signature as the declarant, the declaration is completely robbed of evidentiary force. *See In re Rivera*, 342 B.R. 435, 459 (D. N.J. 2006); *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D.Cal.) (not selected for publication).

The AAO notes that the integrity of the immigration process depends on the petitioner's authorized official signing the immigration forms. Allowing someone other than the petitioner's authorized official to sign the LCA on behalf of the petitioner would leave the immigration system open to fraudulent filings.<sup>5</sup>

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<sup>4</sup> The AAO notes that in the AAO's RFE, issued to the petitioner on June 4, 2013, the petitioner was provided with the opportunity to clarify who signed the various forms contained the record of proceeding. Specifically, the petitioner's authorized representative was asked to provide a sworn statement detailing the forms that he personally signed ([REDACTED] should detail which (if any) of the forms and documents that were submitted to USCIS in connection with the H-1B petition . . . and appeal. . . he personally signed"). Furthermore the request specifically asked the petitioner to "provide a sworn statement from any other individual(s) who signed forms and documents on behalf of the petitioner, which are contained in the record of proceeding." In the submission provided in response to the AAO's RFE, the petitioner declined to fully address this issue. Thus, the petitioner has failed to establish that its authorized representative personally signed the forms and documents submitted in connection with the H-1B petition and appeal (aside from the Form G-28 dated June 27, 2013).

<sup>5</sup> The AAO notes prior examples where individuals have been convicted of various charges, including money laundering and immigration fraud, after signing immigration forms of which the petitioner had no

Although the director reviewed the petition based on its merits, the AAO notes that the petition was improperly filed, and thus should have been rejected by the director at the time of filing pursuant. See 8 C.F.R. § 103.2(a)(7). The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Thus, while the director did not reject the petition, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Accordingly, the AAO finds that the instant petition should have been rejected because the petitioner failed to properly file the petition and LCA.

As discussed, the AAO finds the appeal has not been properly filed. Moreover, the underlying petition also was not properly filed. Thus, further action on the petition cannot be pursued.<sup>6</sup> If the petitioner wishes to pursue H-1B classification for the beneficiary, it may file a new, properly executed Form I-129 and LCA accompanied by the required filing fee(s) and supporting evidence for consideration by USCIS.

**ORDER:** The appeal is rejected.

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knowledge. *United States v. O'Connor*, 158 F.Supp.2d 697, 710 (E.D. Va. 2001); *United States v. Kooritzky*, Case No. 1:02CR00502 (E.D. Va. December 11, 2002).

<sup>6</sup> The appeal must be rejected, thus rendering the remaining issues in this proceeding moot. Accordingly, the AAO does not need to examine the director's basis for denial of the petition.