



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: FEB 01 2013

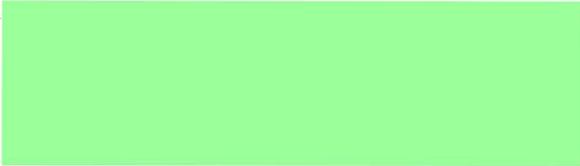
OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 15, 2009, the service center director denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on December 1, 2011, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a financial investment management company established in 2007. In order to employ the beneficiary in what it designates as a senior bio market engineer position, the petitioner seeks 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 that the petitioner failed to provide requested evidence, which precluded a material line of inquiry. Furthermore, the director noted that there were discrepancies in the petitioner's submissions that were not satisfactorily explained. The director provided a detailed analysis and specifically cited the deficiencies in the evidence in the course of the denial. The AAO summarily dismissed the subsequently filed appeal, finding that neither the Form I-290B (Notice of Appeal or Motion) nor the brief and other submissions on appeal specifically identified any errors on the part of the director.

The matter is once again before the AAO on a motion to reconsider. As indicated by the check mark at box E of Part 2 of the Form I-290B, counsel for the petitioner elected to file a motion to reconsider.

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.<sup>1</sup>

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<sup>1</sup> The provision at 8 C.F.R. § 103.5(a)(3) states the following:

*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 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 petitioner acknowledges that it timely received the RFE. Specifically, the record of proceeding indicates that the RFE was sent to the petitioner at the address listed by the petitioner on the Form I-129 petition. In a letter dated October 19, 2009, the petitioner's owner stated, "We received A request for Evidence notice dated on Setp 8, 2009 in connection with the above-captioned H-1B, The following represents our response to each issue highlighted in the notice:" (Errors in the original.) The letter was signed by the owner of the petitioning company.

The AAO notes that with the RFE, the director put the petitioner on notice that additional evidence was required and the petitioner was given a reasonable opportunity to provide it for the record before the petition was adjudicated. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to fully address and/or submit the requested evidence. Instead, in response to the RFE, the petitioner simply stated that several of the documents were "not available." The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* Where a record does not exist, the petitioner must submit an original written statement from the relevant government or other authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). When responding to the RFE, the petitioner did not provide a valid reason for failing to submit all of the requested information nor did the petitioner submit secondary evidence.

After the petition was denied, the petitioner submitted an appeal. With the appeal, the petitioner attempted to respond to the director's RFE by submitting additional information. With regard to the information and evidence that was encompassed in the RFE but only submitted on appeal, the AAO notes that 8 C.F.R. §§ 103.2(b)(8) precludes consideration of evidence requested by the director, but not submitted within the time allotted by an RFE. Evidence requested in an RFE but not included in the petitioner's RFE response will not be considered if later submitted. *See* 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). *See also Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner wishes for the additional information requested in the RFE but submitted for the first time on appeal to be reviewed by the director, it may file a new H-1B petition with a valid LCA and proper fee, to USCIS for consideration.

On motion, counsel acknowledges that the requested evidence was not timely submitted in response to the RFE and claims that the "RFE-requested evidences (sic) were properly submitted with the

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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.

previous appeal." Counsel continues by stating that "any failure to submit the requested evidences with the time allotted by the RFE has been explained."

In addition, the petitioner and its current counsel make assertions regarding the ineffective assistance of the petitioner's prior unlicensed attorney or unaccredited representative. The petitioner claims that the "RFE was handled by a non-attorney" and that the "RFE was not handled well by the non-attorney and the documents were not correctly submitted." However, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1; *see also Hernandez v. Mukasey*, 524 F.3d 1014 (9th Cir. 2008) ("non-attorney immigration consultants simply lack the expertise and legal and professional duties to their clients that are the necessary preconditions for ineffective assistance of counsel claims"). The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).<sup>2</sup>

The petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. *See* 8 C.F.R. § 103.2(b)(1). In the RFE, the director notified the petitioner that basic information about the business operations and the proposed employment was required. The petitioner failed to provide sufficient documentation to establish eligibility for the benefit sought.

The petitioner and counsel do not cite a statutory or regulatory authority, case law, or precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. Moreover, the petitioner and counsel do not assert that the decision was incorrect based on the evidence of record at the time of the initial decision. In short, the petitioner has not submitted any document that would meet the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

Moreover, the motion will 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

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<sup>2</sup> In this case, the petitioner claims that it was assisted by an **unlicensed attorney or unaccredited representative**. Thus, the petitioner is not entitled to make a claim of ineffective assistance of legal counsel. Notably, a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond; and (3) that the appeal reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

any judicial proceeding." In this matter, the submission constituting 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 does 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.

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. Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decision of the AAO will not be disturbed.

**ORDER:** The motion is dismissed. The previous decision of the AAO, dated December 1, 2011, shall not be disturbed. The petition remains denied.