



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 04 2013

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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)

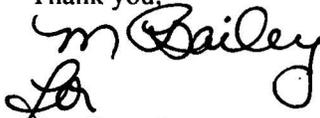
ON BEHALF OF PETITIONER:

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 March 10, 2010, the Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on March 6, 2012, the AAO rejected the appeal. On April 6, 2012, the petitioner filed a joint motion to reopen and reconsider. The joint motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(2), and (a)(4).

On the Form I-129 visa petition, the petitioner describes itself as a kindergarten, preschool day care, and learning center established in 1974. In order to employ the beneficiary in what it designates as a daycare group or head teacher 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 establish that the beneficiary possesses the appropriate license to be immediately eligible to engage in the proposed position and the petitioner had not established the beneficiary to be exempt from the requirement.

Thereafter, an appeal was filed. Notably, the appeal was signed and filed by [REDACTED]. 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 appeal as improperly filed.

The petitioner and its counsel subsequently submitted a Form I-290B. As indicated by the check mark at Box F of Part 2 of the Form I-290B, the petitioner filed a joint motion to reopen and reconsider. The joint motion before the AAO contains: (1) the Form I-290B; (2) the AAO's decision dated March 6, 2012; (3) counsel's brief; (4) affidavit from [REDACTED] Chairman of the petitioning organization; (5) affidavit from the beneficiary; (6) a Job Opportunities Bulletin

¹ Specifically, the AAO noted that [REDACTED] signed the Form G-28 and indicated in Box #4 the following:

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

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 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.

dated March 2012; (7) documentation regarding the beneficiary's credentials along with employment verification letters; and (8) an excerpt from the New York City Health Code. The AAO reviewed the record of proceeding in its entirety before issuing its decision.

On motion, counsel for the petitioner stated the following:

The issue is not disputed that [REDACTED] who represented the petitioner in the I-129 Petition as well as in the I-290B Appeal was not entitled and not authorized to represent the petitioner in the Appeal before the Administrative Appeals Office (AAO) and, likewise, earlier with the Vermont Service Center. Hence, the rejection of the Appeal as improperly filed was deemed proper.

The rejection, however, of the Appeal on technical and procedural grounds result in the petitioner and the beneficiary of having been deprived of their substantial due process and in the interest of justice and fair play, the instant case should be reopened and/or reconsidered.

As noted above, counsel acknowledges that the rejection of the appeal was proper.

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).²

In the instant case, counsel acknowledges that [REDACTED] who represented the petitioner...was not entitled and not authorized to represent the petitioner in the Appeal before the Administrative Appeals Office (AAO)." Counsel further states that "the rejection of the Appeal as improperly filed was deemed proper." As stated above, the AAO only considers complaints based upon ineffective assistance against **accredited** representatives (emphasis added). Therefore, the

² In this case, the petitioner and counsel claim that the petitioner was previously 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).

AAO will not further consider counsel's argument regarding ineffective assistance of an unaccredited representative.

The AAO now turns to the record to determine if the instant joint motion meets the regulatory requirements as a motion to reopen or reconsider.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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).

On motion, the petitioner submits an affidavit from [REDACTED] the chairman of the petitioning organization. [REDACTED] claims that the "new facts being provided in the instant Motion to Reopen consist of certificates of employment of the beneficiary" to establish that she qualifies for the proffered position. In support of this assertion, the petitioner submitted documentation regarding the beneficiary's credentials, including employment verification letters. The letters verify the beneficiary's past employment (from June 19, 2004 to March 18, 2006 and from June 2006 to March 2008). In addition, the petitioner submitted a letter confirming the beneficiary's employment from October 5, 2009 to the present. Upon review of the documentation, the AAO notes that the petitioner failed to establish that the certificates of employment were previously unavailable and could not have been discovered earlier in the proceeding.

Counsel claims that the employment verification letters demonstrate that the beneficiary now fulfills the requirements for the proffered position. However, the AAO notes that the Form I-129 petition was submitted on October 5, 2009. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).⁴

Further, the petitioner asserts that the fact [REDACTED] is "not entitled and not authorized to represent the petitioner in this matter" is a new fact "surfaced/newly discovered by [the petitioner] only when [the petitioner] received the decision." The AAO notes that [REDACTED] indicated on the Form G-28, Notice of Entry of Appearance as Attorney or Representative, that she did not fall within any of the first three categories of representatives authorized to file an appeal on behalf of

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).

⁴ If the petitioner wishes for the additional information regarding the beneficiary's eligibility to be reviewed by the director, it may file a new H-1B petition, with a valid LCA and proper fee(s), to USCIS for consideration.

the petitioner. She marked the box "Other" and wrote a statement indicating that she was a "civic leader" receiving remuneration. The petitioner submitted a Form G-28 (which included [REDACTED] statement) with the Form I-129 and another Form G-28 (again, which included [REDACTED] statement) with the appeal. The forms were signed by the petitioner on September 23, 2009 and on March 16, 2010. There is no indication that the information was not available and could not have been discovered.⁵

Upon review of the submission, USCIS notes that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. There is no indication that the evidence submitted was not available and could not have been discovered or presented in the previous proceeding. Thus, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

The AAO will now consider the petitioner's 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.⁶

⁵ It appears that the petitioner elected not to review the relevant regulations on this matter.

⁶ 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 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.

Although the petitioner has submitted a motion entitled "Motion to Reopen and Reconsider," the petitioner does not submit any document that would meet the requirements of a motion to reconsider. As previously mentioned, counsel acknowledges that the rejection of the appeal was proper. The petitioner does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider.⁷ The petitioner does not argue that the previous decision was based on an incorrect application of law or Service policy. Other than the title of the motion, the petitioner does not assert that a motion to reconsider should be considered as an alternative to the motion to reopen. Therefore, the motion to reconsider must be dismissed.

In addition, the joint motion shall also be dismissed for failing to meet another applicable filing requirement. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

(iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

* * *

(C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the petitioner and counsel failed to comply with the requirements as set by the regulations for properly filing a motion.

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 as stated at 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 to reopen or reconsider 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).

⁷ In the motion brief, counsel claims that "the petitioner and the beneficiary have been deprived of their substantial due process." Counsel provides no further information but apparently is referring to the Due Process Clause of the Fifth Amendment of the United States Constitution, which guarantees minimal requirements of notice and hearing when action by the federal government might deprive one of a significant life, liberty, or property interest. A review of the record and the decision indicates that the statute and regulations have been properly applied in this case. Notably, counsel acknowledges that the rejection of the appeal was proper. Accordingly, the claim is without merit.

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.

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the joint 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 joint motion is dismissed.