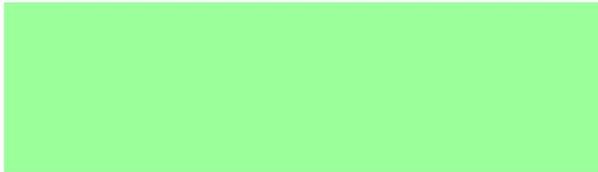


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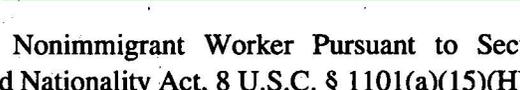
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

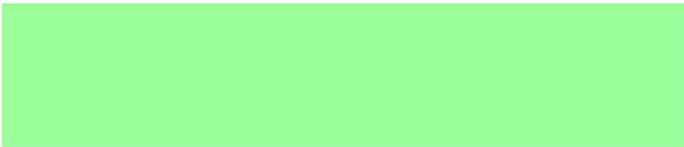


DATE: **FEB 26 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. An appeal was submitted, and the Administrative Appeals Office (AAO) rejected the appeal. The matter is again before the AAO on a motion to reconsider. The motion to reconsider will be dismissed.

The director denied the nonimmigrant visa petition on October 24, 2011. Subsequently, an appeal was filed, but the AAO rejected the appeal finding that it was not properly filed. Specifically, the AAO observed that counsel for the beneficiary filed the appeal with a Notice of the Entry of Appearance as Attorney or Accredited Representative (Form G-28) filed for and signed by the beneficiary, not by an authorized representative of the petitioner.¹ The AAO noted that USCIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a petition and that the beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). The AAO further noted that the regulations at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically state that a beneficiary of a visa petition is not an affected party and does not have any legal standing in a proceeding. The AAO concluded that, as the beneficiary and his representative have no legal standing in the proceeding, counsel for the beneficiary is not authorized to file the appeal on behalf of the petitioner, and rejected the appeal as improperly filed under 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

Counsel now submits a motion to reconsider accompanied by a new Form G-28 for the petitioner. On motion, counsel claims that the AAO erred by failing to "give notice of the improper Form G-28" pursuant to 8 C.F.R. § 103.3(a)(2)(v)(2). Counsel contends that "documents in the appellate record leave no doubt that [the petitioner] was filing the appeal," and "at minimum, it is clear that [counsel] filed an appeal on behalf of [the petitioner] without a proper Form G-28."

As a preliminary matter, the AAO finds that the instant motion must be dismissed as it was not filed by an affected party. The regulations at 8 C.F.R. § 103.5(a)(1)(i) provides that "when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision." The instant motion was filed by the petitioner and its counsel as established by the new Form G-28 and Form I-290B. For purposes of 8 C.F.R. § 103.5, the regulations at 8 C.F.R. § 103.3(a)(1)(iii)(B) define the affected party as a person or entity with legal standing in a proceeding. However, the AAO finds that the petitioner does not have legal standing in the instant motion. The motion at hand is based on the rejected appeal, which was

¹ In the rejection, the AAO noted that, while the beneficiary was listed as one of the petitioner's corporate officers according to information provided on the website of the Florida Department of State Division of Corporations available at <http://ccfcorp.dos.state.fl.us/corinam.html> (last visited February 20, 2013), there was no evidence in the record that the beneficiary was legally authorized to sign as a representative on behalf of the petitioner with regard to the appeal before the AAO. The AAO specifically noted that the Form G-28 submitted by counsel clearly limits his representation/appearance to the beneficiary, and nowhere on the form is it indicated that the beneficiary is acting on behalf of the petitioner.

On motion, counsel asserts in a cover letter that "[e]ven though the beneficiary was an officer of [the petitioner], the AAO held that he executed the Form G-28 in his personal capacity." Contrary to counsel's assertion on motion, the AAO further observes that Part B of the aforementioned Form G-28 lists the beneficiary's name, A-number, and the box for the applicant is checked off, which indicates that he signed the Form G-28 in his personal capacity.

improperly filed by the beneficiary and his counsel. The petitioner was not a party to the appeal; it therefore does not have legal standing to file a motion on an appeal that it did not file.

Further, the AAO finds that it does not have jurisdiction over a motion to reconsider filed on a rejected appeal. The regulation at 8 C.F.R. § 103.5(a)(1)(ii) provides that the "official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." In this case, the appeal was rejected on December 5, 2012, as improperly filed without considering the merits of the appeal; accordingly, "the latest decision" in this matter is the decision dated October 24, 2011, not the rejection notice. Thus, the AAO is not "the official who made the latest decision in the proceeding," and does not have jurisdiction under 8 C.F.R. § 103.5(a)(1)(ii).

However, even assuming *arguendo*, that (1) the petitioner is the affected party that filed the motion to reconsider and (2) the rejection dated December 5, 2012, is "the latest decision in the proceeding," the AAO finds that it did not err in rejecting the appeal.

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 and must establish that the contested decision was incorrect based on the evidence of record at the time of that decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, counsel claims that pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(2), "if favorable or unfavorable action is warranted with respect to an 'otherwise properly filed appeal,' the reviewing official 'shall ask the attorney or representative to submit Form G-28 to the official office within 15 days of the request.'" Counsel asserts that the "reviewing official never made this request in direct contradiction to the regulations."

Upon review of the record, the AAO finds that it was not required to request Form G-28 because the rejected appeal was filed by an attorney with a properly executed Form G-28; thus, 8 C.F.R. § 103.3(a)(2)(v)(A)(2) is not applicable to the case at hand.

The AAO notes that 8 C.F.R. § 103.3(a)(2)(v)(A), which discusses "appeal filed by persons or entity not entitled to file it," is divided into two sections; namely (1) "Rejection without refund of filing fee," and (2) "appeal by attorney or representative without proper Form G-28."

Specifically, 8 C.F.R. § 103.3(a)(2)(v)(A) provides (emphasis added):

(v) Improperly filed appeal-

(A) Appeal filed by persons or entity not entitled to file it-

(1) Rejection without a 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.

(2) *Appeal by attorney or representative without proper Form G-28-*

(i) *General.* 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. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

(ii) *When favorable action is warranted.* If the reviewing official decides favorable action is warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 to the official's office within 15 days of the request. If Form G-28 is not submitted within the time allowed, the official may, on his or her own motion, under §103.5(a)(5)(i) of this part, make a new decision favorable to the affected party without notifying the attorney or representative.

(iii) *When favorable action not warranted.* If the reviewing official decides favorable action is not warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 directly to the AAO. The official shall also forward the appeal and the relating record of proceeding to the AAO. The appeal may be considered properly filed as of its original filing date if the attorney or representative submits a properly executed Form G-28 entitling that person to file the appeal.

The fact that the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A), is divided into two parts suggests that there are two scenarios where the appeal is filed by a person or entity not entitled to file it: (1) where the appeal is filed by a person not entitled to file it, i.e., as in the instant case, when the appeal is filed by or on behalf of the beneficiary of a visa petition who is not a recognized party in the proceeding; or (2) when the appeal is filed without a properly executed Form G-28, i.e., when a new Form G-28 is not filed with the appeal. *See also* 8 C.F.R. § 292.4(a) (requiring a new Form G-28 be submitted with an appeal filed with the AAO).

In the instant case, the AAO notes that a new, properly executed Form G-28 was submitted with the appeal; therefore, 8 C.F.R. § 103.3(a)(2)(v)(A)(2), is not applicable to the case. Instead, the AAO rejected the appeal as improperly filed under 8 C.F.R. § 103.3(a)(2)(v)(A)(1), which applies to an "appeal filed by a person or entity not entitled to file." Under 8 C.F.R. § 103.3(a)(2)(v)(A)(1), the AAO was not required to request a Form G-28. Therefore, the AAO did not err in rejecting the appeal as improperly filed based on the evidence of record at the time of that decision.

Furthermore, the AAO notes that the submission does not satisfy the requirements of a motion to reconsider. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states in pertinent part 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. Accordingly, the motion must be dismissed for this reason also.

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 to reconsider does not meet the applicable filing requirements, it must be dismissed.

ORDER: The motion is dismissed.