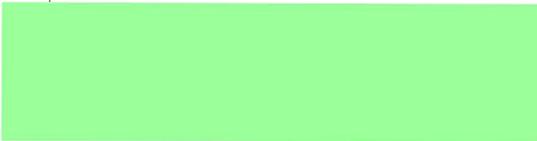
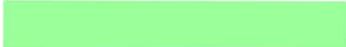




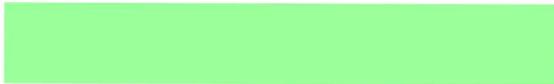
U.S. Citizenship
and Immigration
Services

(b)(6)



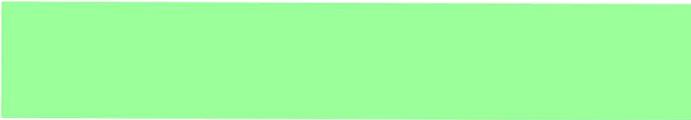
DATE: **JUN 26 2013** OFFICE: CALIFORNIA SERVICE CENTER 

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)

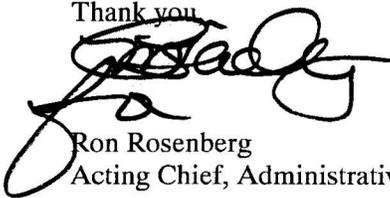
ON BEHALF OF PETITIONER IN THE FORM I-129 PROCEEDING:



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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner submitted a Form I-129, Petition for Nonimmigrant Worker, to the California Service Center on September 28, 2011. In the Form I-129 visa petition, the petitioner describes itself as a clinic engaged in rehabilitation and services established in 2008. In order to employ the beneficiary in what it designates as a medical/clinic director 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).

The director denied the petition on May 23, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Subsequently, a Form I-290B, Notice of Appeal or Motion, signed by alleged counsel was filed on June 22, 2012.

Upon review of the record, as will be discussed in detail below, the AAO concludes that the Form I-290B was improperly filed because the record of proceeding does not contain a new, properly completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative.

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.

Effective March 4, 2010, the regulation at 8 C.F.R. § 292.4(a) requires that a "new [Form G-28] must be filed with an appeal filed with the [AAO]." 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." 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.

While a Form G-28 was submitted with the appeal, the AAO finds that the Form G-28 was not properly completed. Notably, in Part 1, A, the petitioner indicated that the Form G-28 is filed in connection with the Form I-129 petition, not the Form I-290B appeal. Further, the document does not contain a date in Part 1 or in Part 2. Thus, there is no evidence that the form submitted is a new Form G-28 for the Form I-290B appeal.

The AAO observes that not only does the petitioner's signature on the Form G-28 authorize representation by an attorney or accredited representative in specific matters before U.S. Citizenship and Immigration Services (USCIS), it serves as consent to disclose 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). 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.* A 2010 revision to the regulation at 8 C.F.R. § 292.4(a) retains the requirement that a petitioner or applicant sign the Form G-28. 75 Fed. Reg. 5225 (Feb. 2, 2010) (effective March 4, 2010).

The AAO acknowledge that the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2) provides the following with respect to appeals by attorneys without a 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 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 Sec. 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 AAU. The official shall also forward the appeal and the relating record of proceeding to the AAU. 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.

In the instant case, requesting a properly signed and completed Form G-28 in this matter, however, would serve no purpose as the underlying visa petition was not properly filed.

That is, in the instant case, the Form I-129, LCA and supporting documents indicate that [REDACTED] serves as the petitioner's authorized representative in his capacity as president. Here, the underlying H-1B petition was improperly filed because the supporting Labor Condition Application (LCA) was not signed by the petitioner's designated authorized representative. 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).

The regulation at 8 C.F.R. § 103.2(a)(2), which concerns the requirement of a signature on applications and petitions, states the following:

An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

The regulations generally require a handwritten signature unless the petition is filed electronically. It makes no provision for proxy signatures, unless the person is less than 14 years old or mentally incompetent. Further, there is no regulatory provision that waives the signature requirement for a petitioning employer or that permits a petitioning employer to designate an attorney or accredited representative to sign on behalf of the employer.

In the instant case, the Form I-129 petition, LCA, and associated Form G-28, as well as the letter of support identify [REDACTED] as the person designated and authorized by the petitioner to sign on its behalf. However, counsel signed the LCA and a letter of support dated April 9, 2012 on behalf of [REDACTED]. The AAO notes that the signature on the LCA and letter of support differ substantially from the signature of [REDACTED] as signed on other documents submitted as

evidence in support of the instant petition. Further, next to the signatures, it is written "by [counsel]." There is no evidence in the record of proceeding to indicate that the petitioner's authorized representative delegated his signature authority under the exceptions permitted by the regulations.¹

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 Department of Labor 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 the Department of Labor.

It is noted that on the first page of the LCA, the petitioner affirmatively checked the box confirming that that it "understood and agreed" to take the listed actions within the specified times and circumstances. The listed actions are the following:

- Print and sign a hardcopy of the electronically filed and certified LCA;
- Maintain a signed hardcopy of this LCA in my public access files;
- Submit a signed hardcopy of the LCA to the United States Citizenship and Immigration Services (USCIS) in support of the I-129, on the date of the submission of the I-129;
- Provide a signed hardcopy of this LCA to each H-1B nonimmigrant who is employed pursuant to the LCA.

In addition, in the section "Signature Notification and Complaints" (Section N, page 5), the following notice is provided:

The signature and dates signed on this form will not be filled out when electronically submitting to the Department of Labor for processing, but **MUST** be completed when submitted non-electronically. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from the Department of Labor before it can be submitted to USCIS for processing.

¹ A preparer who is not the petitioner cannot attest to the contents of the petition, LCA and supporting evidence. Rather, the preparer may only declare that the information provided is all the information of which he or she has knowledge. Moreover, the AAO notes that the unsupported assertions of an attorney do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, an attorney's unsupported assertions have no evidentiary value even if they are alleged on behalf of the petitioner.

(Emphasis in original.) Furthermore, 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 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. The LCA in the instant case specifically indicates that Cesar C. Javier is the "hiring or designated official" for the petitioner in his capacity as "president." The petitioner filed a copy of the certified, but improperly signed, Form ETA 9035/9035E with USCIS in support of the Form I-129 petition. 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).

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.²

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.³ 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.

² 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 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).

³ 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.