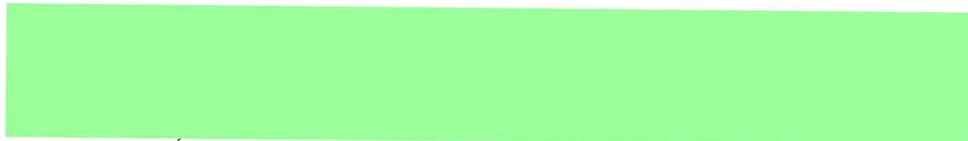




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 28 2013

OFFICE: VERMONT SERVICE CENTER

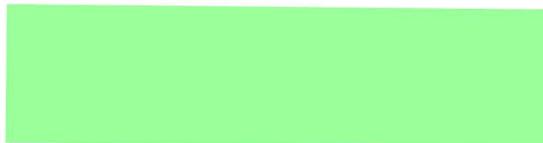
FILE: [REDACTED]

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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, which the AAO subsequently dismissed. The matter is again before the AAO on a motion to reconsider.

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 joint motion to reopen and reconsider. On motion, counsel stated that "the rejection of the [a]ppel as improperly filed was deemed proper." However, counsel claimed that rejection based on "technical and procedural grounds result in the petitioner and the beneficiary of having been deprived of their substantial due process," and that the

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 Filipino community org. in [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.

case should be reopened and reconsidered "in the interest of justice and fair play."²

On February 4, 2013, the AAO dismissed the joint motion. The AAO noted that counsel acknowledged that the rejection of the appeal was proper, and that no remedy is available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake the representations on its behalf. Further, in reviewing the motion, the AAO found that the petitioner failed to provide new facts or state any reasons for reconsideration that would meet the requirements of a motion to reopen or a motion to reconsider.

On March 6, 2013, the petitioner filed the instant motion to reconsider with supporting documentation. The AAO reviewed the record of proceeding in its entirety before issuing its decision.

The provision at 8 C.F.R. § 103.5(a)(3) states the following³:

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

² In the decision dated February 4, 2013, the AAO addressed counsel's claim as follows:

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.

³ 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 :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Further, the regulations at 8 C.F.R. §103.5(a)(1)(i) provide 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." In this case, the prior decision at issue is the AAO's decision dated February 4, 2013. However, in the instant motion, counsel focuses its discussion on the director's original decision dated March 10, 2010 stating "[w]e assert that this original decision of the VSC Director is in error," "[h]ence, this instant Motion to Reconsider." Counsel states that "grounds for eligibility have never been addressed, which should have been, as the central issue/core of all these Appeal and Motion to Reopen/Reconsider, relate to eligibility."

However, as mentioned above, the AAO notes that the prior decision according to 8 C.F.R. §103.5(a)(1)(i) for which this instant motion to reconsider has been filed, is the AAO's decision dated February 4, 2013, and the issue here is whether the AAO's decision dated February 4, 2013 is correct. As discussed earlier, the AAO dismissed the joint motion to reopen and reconsider on February 4, 2013, finding that the petitioner failed to meet the requirements of a motion to reopen or reconsider. Specifically, the AAO found that counsel and the petitioner did not provide new, material facts or evidence that was not available and could not have been discovered or presented in the previous proceeding. The AAO also found that counsel did not state any reasons for reconsideration in support of that motion to reconsider since counsel acknowledged that the rejection was proper.

In the instant motion, counsel discusses the director's original decision, which is not relevant to this proceeding. However, counsel also refers to the section of the AAO's decision which states that "there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake the presentation on its behalf." Counsel states that "while the petitioner indeed assumes the risk as the AAO asserts," the petitioner's "assumption of risk does not imply that all the documents submitted cannot be considered at all for adjudication," "but that the evidence on the record must still be considered for adjudication, more specifically, as to whether the petition meets the filing requirements."

The AAO disagrees. As previously noted, the appeal was correctly rejected as improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1). As a consequence of the rejection, the AAO never had jurisdiction over this matter and, therefore, when the appeal was rejected, the documents submitted with the appeal were also rejected, resulting in no evidence on record pertinent to the rejected appeal to reconsider for adjudication. Moreover, as the rejection was proper, a fact to which counsel concedes, the prior decision to dismiss the first motion was also not in error, and counsel has not cited to any law or provided any pertinent precedent decisions to establish otherwise. Therefore, the AAO finds that this motion to reconsider does not meet the requirements under 8 C.F.R. §103.5(a)(3). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed.

Moreover, 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).

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 motion to reconsider will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.