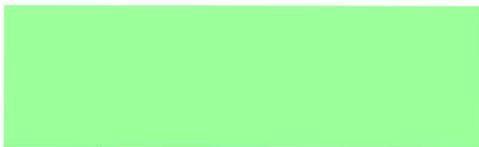


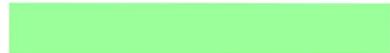


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **NOV 21 2013** OFFICE: VERMONT SERVICE CENTER

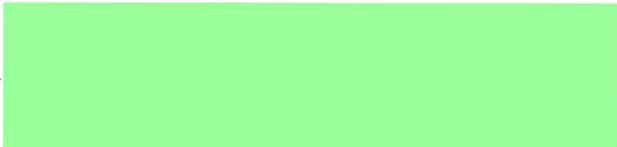


IN RE: Petitioner:
Beneficiary:



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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and 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 and supporting documentation, the petitioner describes itself as an enterprise engaged in the general practice of law that was established in 2004. In order to employ the beneficiary in what it designates as a paralegal of applied science 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 July 19, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the statutory and regulatory provisions. The petitioner submitted an appeal of the denial of the petition. Upon review of the submission, the AAO dismissed the appeal and denied the petition, finding that the H-1B petition was filed after the expiration of the petition it sought to extend.¹ The AAO noted that

¹ An "affected party" means the person or entity with legal standing in a proceeding. 8 C.F.R. § 103.3(1)(iii)(B). It does not include the beneficiary of a visa petition. *Id.* Further, the petitioner (rather than the beneficiary) elects whether or not to file the Form I-129 (which encompasses both the request to extend the petition *and* the request to extend the beneficiary's stay). 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 214.2(h)(14) and (15).

The petitioner initially filed the Form I-129 with U.S. Citizenship and Immigration Services (USCIS) on February 14, 2012. It was rejected as improperly filed on February 16, 2012 (two days later). The petitioner resubmitted the Form I-129 petition to USCIS on April 26, 2012 (70 days after the director rejected the petition). The petitioner stated that "[the petition] was returned due to incorrect fees and our failure to submit the labor certification [Labor Condition Application (LCA)]." The petitioner continued by stating that "the Labor Department initially rejected our application twice because of the error in its database regarding our company EIN number." The petitioner did not provide any documentary evidence in support of its statement.

Title 20 C.F.R. 655.730(b) states the following:

It is the employer's responsibility to ensure ETA [DOL's Employment and Training Administration] receives a complete and accurate LCA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA will process all LCAs sequentially and will usually make a determination to certify or not certify an LCA within seven working days of the date ETA receives the LCA.

As noted above, DOL will usually make a determination on a labor condition application within seven working days. DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act.

this non-discretionary basis for denial of the petition rendered the remaining issues in the proceeding moot.

Thereafter, the petitioner and its counsel filed a second Form I-290B. As indicated by the check mark at box E of Part 2 of the Form I-290B, the petitioner and counsel elected to file a motion to reconsider the decision.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that a motion to reconsider "must be filed within 30 days of the decision that the motion seeks to reconsider." If the decision from which the motion is taken was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the AAO issued the decision on the appeal, from which the instant motion was taken, on April 19, 2013. Thereafter, counsel submitted the Form I-290B motion to reconsider. U.S. Citizenship and Immigration Services (USCIS) conducted a preliminary review and returned the Form I-290B as it was not signed in Part 4.² Counsel resubmitted the Form I-290B and supporting documents to USCIS on Tuesday, June 4, 2013, which is 46 days after the decision was issued.³ Accordingly, the appeal was untimely filed.

Failure to timely file a motion to reopen may be excused, at the discretion of USCIS, where the delay is reasonable and is demonstrated to be beyond the petitioner's control. 8 C.F.R. § 103.5(a)(1)(i). No such discretion may be exercised, however, with regard to a motion to reconsider. Accordingly, the motion to reconsider must be dismissed because it was untimely filed.

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 the following:

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

A review of the Foreign Labor Certification (FLC) Data Center website indicates that DOL made a determination on all of the labor condition applications submitted by the petitioner during 2012 within one to five days. For instance, the petitioner submitted an LCA on February 22, 2012 (six days after the initial H-1B petition was rejected) and received a decision from DOL on February 23, 2012 (the next day). The Foreign Labor Certification Data Center website is accessible on the Internet at <http://www.flcdatacenter.com/CaseH1B.aspx>. The website states that the employer-specific case information that appears on FLCDataCenter.com is provided to DOL by employers who submit foreign labor certification applications.

² A benefit request which is not signed and submitted with the correct fee(s) will be rejected, and will not retain a filing date. 8 C.F.R. § 103.2(a)(7). There is no appeal from such rejection. *Id.*

³ Counsel states that the failure to sign the Form I-290B "was an office error, and I am mortified!" Thus, counsel does not claim that the motion to reconsider was rejected in error.

* * *

(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). Moreover, if the decision has been or is the subject of any judicial proceeding, the petitioner failed to provide any information regarding "the court, nature, date, and status or result of the proceeding" as stipulated in the regulations. Accordingly, the filing does not meet the applicable requirement for motions as stated at 8 C.F.R. §103.5(a)(1)(iii)(C), and must also be dismissed for this reason.

In the instant case, the motion to reconsider does not meet the applicable filing requirements. Accordingly, it must be dismissed.

ORDER: The motion is dismissed.