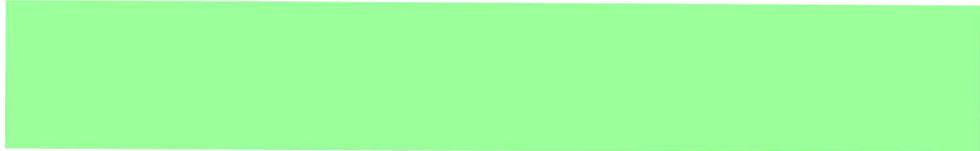




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 02 2014** OFFICE: VERMONT 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)

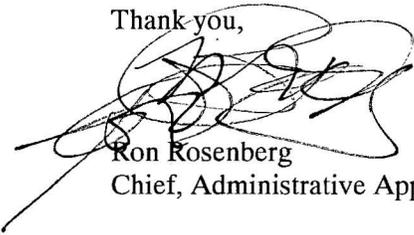
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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.

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 rejected the appeal. The petitioner filed a joint motion to reopen and reconsider, which the AAO subsequently dismissed. Thereafter, the petitioner filed a motion to reconsider the AAO's decision, which was dismissed. The matter is again before the AAO on a second appeal. The appeal will be rejected.

In 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).

On March 10, 2010, 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, on March 23, 2010, an appeal was filed. Notably, the appeal was signed and submitted by [REDACTED]. The AAO determined that Mr. [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 The AAO rejected the appeal on March 6, 2012. On April 4, 2012, the petitioner filed a joint motion to reopen and reconsider. The AAO dismissed the motion on February 4, 2013. Subsequently, on March 6, 2013, the petitioner filed a motion to reconsider the AAO's decision. The AAO dismissed the motion on June 28, 2013.

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

I am a civic leader of a [REDACTED] community org. in [REDACTED] NY, 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 remunerations.

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 in § 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.

On August 7, 2013, counsel for the petitioner submitted a fourth Form I-290B, Notice of Appeal or Motion, and checked box "B" to indicate that he was filing an appeal. Specifically, box "B" states, "I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days."² In Part 3 of the Form I-290B, counsel states the following:

- 1) The Administrative Appeals Office erred in its conclusion that the Petitioner has not sustained the burden of proof under 291 of the Act, 8 USC 13C1
- 2) The Administrative Appeals Office erred in that the Motion to Reconsider subject of this Appeal did not meet the requirements under 8 C.F.R. 103.5 (a) (3).
- 3) The Administrative Appeals Office erred in dismissing the previous Motion to Reconsider.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested to the Secretary through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception, i.e., petitions for approval of schools to accept foreign students are now the responsibility of Immigration and Customs Enforcement (ICE). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv); and 8 C.F.R. § 214.3.

While the AAO has appellate jurisdiction over Form I-129 nonimmigrant petitions, the AAO has no jurisdiction over the petitioner's instant submission (dated August 7, 2013). A decision made as a result of a motion may be applied to the AAO only if the original decision was appealable to the AAO. *See* 8 C.F.R. § 103.5(a)(6). The petitioner had the option of submitting a motion to reconsider or a motion to reopen. That is, the matter could have only be brought before the AAO again upon the proper filing of a motion to reopen or a motion to reconsider pursuant to the regulation at 8 C.F.R. § 103.5. The petitioner did not file a motion, but rather filed an appeal. Accordingly, the appeal must be rejected for lack of jurisdiction.

Further, the appeal must also be rejected as untimely filed. In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must file the appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). A benefit request is considered received by U.S. Citizenship and Immigration Services (USCIS) as of the actual date of receipt at the location designated for filing such a request. 8 C.F.R. § 103.2(a)(7)(i).

² It must be noted for the record that counsel has not submitted a brief and/or additional evidence within the allotted timeframe (or thereafter).

The record indicates that the AAO issued the prior decision on Friday, June 28, 2013. The Form I-290B is dated July 25, 2013, however, the appeal was not received by USCIS until Wednesday, August 7, 2013, which is 40 days after the AAO's decision was issued. Accordingly, the appeal was untimely filed. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

Further, the AAO observes that even if the instant submission had been filed as a motion to reconsider and/or a motion to reopen, the motion would nonetheless have been dismissed.

More specifically, 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 a 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.³

Upon review of the submission, the AAO observes that counsel has not submitted any document that would meet the requirements of a motion to reconsider. Counsel claims that the AAO "erred" but does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. Moreover, counsel has not established that the prior decision was incorrect based on the evidence of record that was before the AAO at the time of its decision. The AAO has provided the petitioner and its counsel with a

³ 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 benefit request or other document submitted to DHS [U.S. Department of Homeland Security] must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

detailed statement regarding the dismissal of the prior motion. The AAO's conclusions were in accordance with the applicable statutory and regulatory provisions. Accordingly, counsel's claim is without merit and the petitioner and its counsel have not met the requirements of a motion to reconsider.

Additionally, the AAO observes that even if the instant submission had been filed as a motion to reopen, the motion would nonetheless have been dismissed. 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.⁴

Upon review of the submission, the AAO observes that the petitioner and counsel have not provided any "new facts" and that the instant submission does not contain any "new" evidence. As previously mentioned, counsel claims that the AAO "erred"; however, counsel has not provided any new facts or evidence to support reopening the proceeding. The submission does not meet the requirements of a motion to reopen.

The AAO notes that motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110.

Moreover, the AAO notes that the petitioner failed to comply with the regulatory filing requirements for motions at 8 C.F.R. § 103.5(a)(1), which 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 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.

⁴ 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).

§ 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.

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, even if the instant appeal had been filed as a motion (which it was not), the filing does not meet the applicable requirement for motions as stated at 8 C.F.R. §103.5(a)(1)(iii)(C), and would also be dismissed for this reason.

Here the petitioner submitted an appeal of the decision to the AAO. The appeal, however, must be rejected for the reasons discussed above.

ORDER: The appeal is rejected.