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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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ULLB, 3rd Floor
Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

JAN 29 2003

File: EAC 01 088 51948 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Vermont Service Center, reviewed on the beneficiary's motion to reopen, again denied, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected.

The petitioner, a restaurant firm, filed an I-140 petition, through counsel on January 25, 2001, to employ the beneficiary as a cook. As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the immigrant visa petition on December 7, 2001 because the petitioner did not demonstrate that it had the ability to pay the proffered wage at the priority date of the petition, January 2, 1998.

Thereupon, the beneficiary, through counsel on January 10, 2002, submitted the instant motion to reopen. Although it attached documents and a statement of the petitioner, counsel admitted:

> 1. I represent [the beneficiary] in connection with the petition filed by [the petitioner] to classify him as a beneficiary under section 204 (b)(3) of the INA….
>
> Wherefore, beneficiary respectfully submits that the petitioner had the ability to pay the offered wage in the year of the petition and, further, requests that this petition be granted in all respects….

The director concluded that the instant motion met requirements of 8 C.F.R. 103.5 for the proper filing of a motion, reopened the proceedings, determined that the grounds of denial had not been overcome, and, on March 13, 2002, again, denied the petition.

The director erred in concluding that the instant motion complied with 8 C.F.R. 103.5. Counsel admits that the beneficiary filed it and seeks relief. Only an *affected party*, however, may file it.

8 C.F.R. 103.3(a)(1)(iii) excludes the beneficiary:

> (B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

Counsel explicitly named only the beneficiary as the appellant in the appeal (Form I-290B) filed April 12, 2002. The beneficiary is not an *affected party* and is specifically excluded. 8 C.F.R. 103.3(a)(1)(iii)(B).

In particular, only a person or entity entitled to do so may file Form I-290B under 8 CFR 103.3(a)(2)(v):

> *Improperly filed appeal*—(A). *Appeal filed by person or entity not entitled to file it-- (1) Rejection without 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.

Counsel, also, submitted a new Notice of Entry of Appearance of Attorney or Representative (Form G-28) both for the instant motion (dated January 8, 2002) and for the appeal (dated April 9, 2002). Since the beneficiary, alone, signed the Forms G-28, they are not properly executed. Counsel has no authority to offer these documents or to appear for the beneficiary.

8 CFR 103.3(a)(2)(v)(A) explicitly provides,

> *(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.

The beneficiary and counsel improperly filed a motion and an appeal, as neither the petitioner nor any entity with legal standing in the proceedings executed them.

Consequently, the Associate Commissioner must reject the appeal. Notice will be provided to the petitioner and, as a courtesy, to counsel named on Form I-290B.

ORDER: The appeal is rejected.