U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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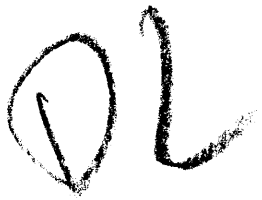

APR 05 2007

[redacted]

FILE: WAC 04 211 51812 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner provides fundraising products and services to school and youth organizations, and seeks to employ the beneficiary as a technical support manager. It endeavors 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 the ground that the proffered position is not a specialty occupation. The AAO summarily dismissed the petitioner's appeal on December 13, 2005 because the petitioner failed to identify specifically any erroneous conclusion of law or statement of fact for the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v).

The regulation at 8 C.F.R § 103.5 provides in pertinent part that "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." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion the petitioner states that its appeal was summarily dismissed by the AAO because prior counsel failed to submit a brief in support of the appeal within 30 days of the appeal as counsel indicated that he would on the Form I-290B. The petitioner further states that its prior counsel did not respond to the AAO's faxed request for a brief prior to the dismissal of the appeal, and that prior counsel did not notify it of the AAO request for a brief or the fact that a brief had not been filed in support of the appeal. The petitioner states on motion that the appeal was dismissed due to ineffective assistance of counsel, and submits evidence that it filed a complaint on December 23, 2005 against its prior attorney for ineffective assistance of counsel with the State Bar of California. The petitioner also submitted a brief and additional evidence in support of its appeal on December 16, 2005.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner did file a complaint with the State Bar of California against its prior attorney for ineffective assistance of counsel. The petitioner's claim for relief in this in this proceeding for ineffective assistance of counsel is not, however, supported by an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard. Nor does the record establish that the petitioner's prior attorney whose integrity or competence is being impugned has been informed of the allegations leveled against him and be given an opportunity to respond. As such, the petitioner's motion to reopen may not be sustained based on the petitioner's claim of ineffective counsel.

The motion to reopen is supported by documentary evidence, but does not state new facts to be proved in a reopened proceeding. The petitioner's brief and supporting evidence seeks to establish that the director's determination was in error and that the proffered position is a specialty occupation. The petitioner did not, however, state new facts to be proved in the reopened proceeding that were unavailable and could not have reasonably been discovered or presented in the previous proceeding. All evidence submitted on appeal and referred to by counsel was available to the petitioner during the prior proceeding and does not, therefore, constitute new facts to be proved in a reopened proceeding.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO dated December 13, 2005 is affirmed. The petition is denied.