



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 06 2013** OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(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
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on motion. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner has previously filed a total of two appeals and three motions with the Administrative Appeals Office (AAO). Most recently, the AAO granted the petitioner's motion to reopen and reconsider, and reaffirmed the denial of the immigrant petition, in a decision dated February 19, 2013. The matter is once again before the AAO on a combined motion to reopen and reconsider.

The director denied the petition on May 8, 2009 on multiple grounds, concluding that the petitioner failed to establish the following: (1) that the beneficiary is recognized internationally as an outstanding professor or researcher; (2) that the petitioner has offered the beneficiary a tenured or tenure-track teaching position; (3) that the position offered to the beneficiary is in his academic field; and (4) that the petitioner employs at least three persons in a full-time research position.

The petitioner filed its first appeal on June 23, 2009, asserting as its only basis for appeal that "the denial was the result of legal error." The AAO rejected the petitioner's appeal as untimely filed and for not meeting the requirements for a motion to reopen or reconsider.

The petitioner filed its second appeal on March 29, 2010, claiming that the first appeal was timely filed. The AAO treated the second appeal as a motion to reopen, granted the motion, and reaffirmed its previous decision and the denial of the petition, concluding that the petitioner failed to establish that its first appeal was timely filed or met the requirements for a motion.¹

The petitioner subsequently filed a motion to reopen and reconsider on March 10, 2011, asserting that the denial of the petition was in error as to the director's finding that the petitioner was a private employer, and that the petitioner's former counsel was ineffective. In support of this motion, the petitioner submitted several new arguments and documents pertaining to the beneficiary's eligibility as an outstanding professor. The AAO granted the motion and reaffirmed its previous decision and the denial of the petition, concluding that the petitioner failed to establish a claim of ineffective assistance of counsel, and that the first appeal was timely filed and met the requirements of a motion to reopen or reconsider.

The petitioner then filed another motion to reopen or reconsider on June 14, 2012, with which the petitioner submitted new documents to support its claims of ineffective assistance of counsel, including, *inter alia*, an affidavit from the petitioner explaining its claim of ineffective assistance of counsel, the petitioner's complaint to the New Jersey Bar Association which was served upon

¹ Any second or subsequent appeal would have been rejected as improperly filed because the AAO does not exercise appellate jurisdiction over AAO decisions.

the former attorney, and documents pertaining to the beneficiary's eligibility as an outstanding professor which the petitioner claimed its former counsel failed to submit. The AAO granted the motion and reaffirmed its previous decision and the denial of the petition, concluding that the petitioner still failed to establish a claim of ineffective assistance of counsel because the petitioner failed to submit the representation agreement between the petitioner and prior counsel. The AAO also concluded that the petitioner failed to establish that its first appeal was timely filed, and that the AAO abused its discretion in determining that the petitioner should not be excused from its untimely filing.

The petitioner now files the instant motion to reopen and reconsider on March 18, 2013, claiming that the AAO erred in determining that the petitioner failed to establish a claim of ineffective assistance of counsel. Specifically, the petitioner asserts that the AAO misapplied *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) by requiring the petitioner to submit the representation agreement between the petitioner and prior counsel, when such evidence is not specifically required under *Matter of Lozada*. The petitioner also submits additional arguments regarding the merits of the beneficiary's eligibility as an outstanding professor. In support of the instant motion, the petitioner submits for the first time the retainer agreements between the petitioner and its former counsel, as well as new documents pertaining to the beneficiary's eligibility as an outstanding professor which the petitioner claimed its former counsel failed to submit.

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 evidence that was not available and could not have been discovered or presented in the previous proceeding.²

Furthermore, 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

The AAO finds that the instant motion meets the requirements of a motion to reconsider. The petitioner has established that the AAO erred in specifically requiring the representation agreement between the petitioner and its former counsel as required evidence under *Matter of Lozada*. In order to satisfy the first element under *Matter of Lozada*, the petitioner must submit an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into

² 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).

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. *Id.* at 639. *Matter of Lozada* does not require the actual representation agreement between the petitioner and its former counsel.³

The motion also meets the requirements of a motion to reopen. The petitioner has submitted new evidence containing new facts, to wit: the retainer agreements between the petitioner and its former counsel. The retainer agreements could not have been presented in prior proceedings because they are not required evidence and the petitioner was not previously put on notice to submit these particular documents. However, the AAO finds that the new documents pertaining to the beneficiary's eligibility as an outstanding professor submitted with the instant motion do not contain any facts that could be considered "new." The petitioner failed to explain why such documentation was not available and could not have been discovered or presented in prior proceedings, particularly since the petitioner has made the same assertions of ineffective assistance of counsel in its two prior motions. Therefore, the new documents pertaining to the beneficiary's eligibility as an outstanding professor will not be considered or discussed further.

Because the instant motion meets the requirements of a motion to reopen and reconsider, the AAO will grant the motion. Upon review of the record and for the reasons discussed herein, the AAO will affirm its previous decision and the denial of the petition.

The AAO finds that the petitioner has failed to establish a claim of ineffective assistance of counsel. As stated above, in order to establish a claim of ineffective assistance of counsel under *Matter of Lozada*, the petitioner must submit 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. *Id.* A thorough review of the petitioner's affidavit reflects that it fails to set forth in detail the agreement that was entered into with former counsel, [REDACTED], and what representations former counsel made or did not make to the petitioner with respect to the actions to be taken. The petitioner's affidavit states, in pertinent part:

In regard to one such alien, [the beneficiary], [REDACTED] was hired in 2007 to prepare and file an I-140 Petition to classify the Beneficiary as Outstanding Researcher/Professor; to review documentation furnished to the attorney and submit them promptly to the Service; to respond to any Request for Evidence received by the attorney; and to promptly file any appeal by paying the proper filing fee . . .

Counsel failed to effectively pursue the employer's interests by conducting herself in a negligent and grossly incompetent manner. Among the areas of ineffective counsel were two categories to establish evidence of international recognition which the

³ While the actual representation agreement between the petitioner and its former counsel is not *required* evidence under *Matter of Lozada*, it is nevertheless valuable as corroborating evidence.

attorney was furnished but which she did not submit in response to Request for Evidence in October 2008 . . .

That Attorney was further inept in failing to perfect Appeal by failing to submit the Appeal with proper filing Fee within the statutory time thereby causing the Appeal to be rejected

The petitioner's affidavit does not provide any detail on the agreement that it entered into with former counsel regarding what actions she would or would not take with respect to the petition, the RFE, and the filing of the first appeal to the AAO. The petitioner's affidavit only states in conclusory terms that former counsel was ineffective because she was furnished particular documents but did not submit them in response to the RFE, and that former counsel was inept by failing to submit the appeal with the proper filing fee within the statutory time. The petitioner's affidavit also fails to explain what representations counsel did or did not make to the petitioner regarding the petition, the RFE, and the appeal.

With particular respect to the petitioner's claim that [REDACTED] was ineffective by failing to submit the appeal with the proper filing fee within the statutory time, the AAO notes for the record that the petitioner entered into two retainer agreements with [REDACTED] one on May 7, 2007 that was specifically limited to the petitioner's "EB-1 application for adjustment of status for [the beneficiary]," and one on June 10, 2009 that was specifically limited to the following purpose: "Prepare and file appeal of denial of I-140 for [the beneficiary]." Notably, both retainer agreements contain the following clause: "If the USCIS or the Immigration Court rules against client, the firm will make a new decision as to whether to represent client in an appeal to the Administrative Appeals Unit (AAU) or the Board of Immigration Review (hereinafter 'BIA'). The firm reserves the right to end its representation at this point."

Considering that the first retainer agreement's scope did not include the filing of an appeal, that the first retainer specifically advised the petitioner that [REDACTED] would make a new decision as to whether to represent the petitioner in an appeal to the AAO, and that the petitioner and [REDACTED] did not enter into the second retainer agreement for the specific purpose of filing an appeal until June 10, 2009, the record is unclear what obligation [REDACTED] had, if any, with regards to properly and timely filing an appeal. Here, the date that the petitioner entered into its second retainer for the specific purpose of filing the appeal is significant. The petitioner did not sign the second retainer until June 10, 2009, which was 33 days from May 8, 2009, or the last day in which the petitioner could have timely filed the appeal. The fact that the petitioner did not sign the retainer agreement with [REDACTED] until the last possible day to file the appeal undermines the petitioner's claim that [REDACTED] was "inept" by failing to file a timely appeal. Again, the petitioner has not provided any explanation as to what specific agreement it and [REDACTED] entered into with respect to whether an appeal would be filed, what actions would be taken with respect to the appeal, and what representations [REDACTED] made or did not make to the petitioner with regards to filing the appeal. Without such explanation, and considering the above, the petitioner has failed to establish its claim of ineffective assistance of counsel.

The AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts or documented sufficient reasons, supported by pertinent precedent decisions, to warrant the re-opening or reconsideration of the AAO's prior decision. In the current proceeding, counsel has not contested the AAO's finding that the first appeal was untimely filed, nor has counsel provided any explanation for the deficiencies in the record other than claiming that they were caused by ineffective assistance of counsel.

As the petitioner has not established an ineffective assistance of counsel claim, the AAO concurs with its prior decision that the appeal was untimely filed, and that the untimely appeal did not meet the requirements of a motion to reopen or reconsider when filed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The AAO's decision dated February 19, 2013 is reaffirmed. The petition remains denied.