



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

Date **FEB 19 2013** Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:  
[Redacted]

203(b)(1)(B)  
B3

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely. The AAO granted two subsequent motions to reopen/reconsider and twice affirmed its previous decisions. The matter is now before the AAO on a third motion to reopen/reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a community development organization. It seeks to classify the beneficiary as an outstanding professor or researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a professor. The director determined the petitioner had not established that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding researcher or professor and that the petitioner was a qualifying private employer.<sup>1</sup> The AAO rejected the subsequent appeal as untimely filed. The AAO granted a subsequent motion to reopen and affirmed the previous decision of the AAO finding the appeal was properly rejected as untimely as it did not include the proper fee. The AAO granted a second motion to reopen and affirmed its previous decision, finding that the petitioner, through current counsel, did not submit any of the required documentation to support its asserted claim of ineffective assistance of prior counsel. Current counsel has filed a third motion to reopen/reconsider, and has submitted additional documentation regarding ineffective assistance of prior counsel and additional evidence in support of the beneficiary's eligibility pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act).

A motion to reopen must state the new facts to be proven in the reopened proceeding and, when filed, be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet the applicable requirements when filed shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, current counsel does not contest the AAO's finding that the appeal was untimely. Current counsel alleges ineffective assistance of prior counsel in failing to timely file the appeal with the proper fee, and in erroneously failing to submit evidence in support of the beneficiary's eligibility pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act). Upon review, the petitioner has failed to fulfill the prerequisites for allegations of ineffective assistance of counsel. See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Grijalva*, 21 I&N Dec. 472 (B1A 1996); *Matter of Lozada*, 19 I&N Dec. 6 37 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988).

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<sup>1</sup> The director determined that the petitioner failed to submit evidence that the beneficiary satisfied any of the regulatory criteria set forth at 8 C.F.R. § 204.5(i)(3)(i)(A) through (F).

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It is noted that any appeal 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). Each requirement will be examined below.

First, pursuant to *Matter of Lozada*, the claim must be supported by an affidavit of the allegedly aggrieved petitioner 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 petitioner in this regard. *Id.* at 639. Current counsel presents an affidavit of the petitioner on appeal. However, current counsel fails to include the representation agreement between the petitioner and prior counsel. Therefore, the first requirement of *Matter of Lozada* has not been met.

Second, pursuant to *Matter of Lozada*, the petitioner's former counsel must be informed of the allegations leveled against her and be given an opportunity to respond. *Matter of Lozada*, 19 I&N Dec. at 639. This requirement has been met.

Third, pursuant to *Matter of Lozada*, the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of former counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. at 639. The petitioner has provided a copy of a bar complaint filed the New Jersey State Bar Association. This requirement has been met.

As additional evidence in support of a claim of ineffective assistance of counsel, present counsel has submitted additional documentation regarding the beneficiary's eligibility as an outstanding professor pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), which it asserts were erroneously not submitted by prior counsel.<sup>2</sup> The additional evidence,

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<sup>2</sup> The regulation at 8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding professor or researcher must be accompanied by "[e]vidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition." The regulation lists the following six criteria, of which the beneficiary must submit evidence qualifying under at least two.

- (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
- (B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;
- (C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;

pertaining to the regulatory criteria set forth at 8 C.F.R. § 204.5(i)(3)(i)(B), membership in associations, and (F), authorship of scholarly books or articles, is as follows:

- As evidence in support of the beneficiary's eligibility pursuant to the criteria set forth at 8 C.F.R. § 204.5(i)(3)(i)(B), current counsel has submitted a letter from [REDACTED] Executive Director of the [REDACTED] Connecticut. He states that in 1999 the beneficiary was selected to receive a fellowship from [REDACTED] a part of the [REDACTED] a ministry of the [REDACTED] for study and residence at the [REDACTED] Mr. [REDACTED] states he recalls meeting the beneficiary in Kenya before he was selected to receive the fellowship. He states that the beneficiary was selected but was unable to participate in the program. Mr. [REDACTED]'s letter is accompanied by documentary evidence regarding [REDACTED] and a listing of [REDACTED]. Mr. [REDACTED] provides the minimum application requirements and criteria for selection for the [REDACTED] program:

1. Professional-level position and training in Religious Studies, Church History or Oral History;
2. A minimum of seven years instructional or research experience with an established university or graduate school of theology;
3. Experience is (sic) supervising graduate level research project in Africa;
4. Academic administrative experience a plus;
5. Demonstrated record of publications in the field of African religion and/or religious history;
6. Participation (as a presentater (sic)) in international forums on religion or church history.

A review of the requirements for the [REDACTED] program reveals that such requirements are not "outstanding achievements" in the field, and do not constitute qualifying evidence that meets the plain language requirements of this criterion, set forth at 8 C.F.R. § 204.5(i)(3)(i)(B).

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(D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;

(E) Evidence of the alien's original scientific or scholarly research contributions to the academic field;  
or

(F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

<sup>3</sup>Current counsel also submits two additional documents: a copy of a Research Proposal and a print-out of information regarding the [REDACTED]. The documents do not mention the beneficiary, and current counsel provides no information that would serve to link the documentation to the beneficiary. Therefore these documents will not be considered.

- As evidence in support of the beneficiary's eligibility pursuant to the criteria set forth at 8 C.F.R. § 204.5(i)(3)(i)(F), current counsel has submitted articles written by the beneficiary in 2003 and 2006, respectively, which have previously been submitted into the record. Current counsel has also submitted a copy of portions of a book published by the beneficiary in 2009, also previously submitted into the record. Counsel has further submitted evidence that the beneficiary's book is listed as reference material in syllabi of classes at two colleges in 2010 and 2011, respectively<sup>4</sup>, as well as in the undated syllabus of a class from the petitioning organization.<sup>5</sup> As stated in our previous decision regarding evidence of the beneficiary's book, and its use as classroom reference material, this evidence is not relevant to the issue of the beneficiary's eligibility for the benefit sought, since the book was published after October 11, 2007, the date of filing the employment-based immigrant visa petition, and cannot be considered evidence of the beneficiary's eligibility after that date. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).<sup>6</sup> Current counsel also submitted on appeal documentary evidence that the journal which published the beneficiary's articles, [REDACTED] has an international circulation constituting qualifying evidence that meets the plain language requirements of this criterion, set forth at 8 C.F.R. § 204.5(i)(3)(i). Regardless, the record fails to establish that the beneficiary's articles have garnered any citations or other response in the academic field that would set the beneficiary apart in the academic community through eminence and distinction based on international recognition, the purpose of the regulatory criteria. 56 Fed. Reg. at 30705. Indeed, the record lacks evidence that members of the academic field outside of the beneficiary's immediate circle of colleagues are even aware of his work. The record does not establish the beneficiary as one who is internationally recognized as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

As stated above, 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 decision issued on May 14, 2012. In the current proceeding, counsel has not fully addressed the deficiencies in the record, which are the grounds stated for dismissal of the appeal, nor does the evidence submitted with the motion overcome them.

In this case, we concur with our prior decision that the appeal was untimely, and the untimely appeal did not meet the requirements of a motion to reopen or a motion to reconsider when it was filed. As the petitioner has not established an ineffective assistance of counsel claim, the AAO cannot find that we abused our discretion in determining that the petitioner should not be

<sup>4</sup> The AAO notes that one of the syllabi is from [REDACTED], where, according to the beneficiary's curriculum vitae, he was employed in an administrative capacity from May 1994 to July 2003.

<sup>5</sup> A review of the record reveals that this may be the class described in the petitioner's job offer to the beneficiary.

<sup>6</sup> Mr. [REDACTED] also mentions that several colleges' syllabi have referenced the applicant's book, although he does not state the basis for his knowledge of this fact.

excused for its failure to file the appeal within the period allowed. Therefore, our prior decision will be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The AAO's decision of May 14, 2012 is affirmed. The petition will remain denied.