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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: FEB 0 9 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The petitioner filed an appeal, which was dismissed by the Acting Chief, Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, and the AAO's previous decision to dismiss the appeal will be affirmed.

The petitioner is a physical therapy placement business. It seeks to permanently employ the beneficiary in the United States as a physical therapist and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification.

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The Director denied the petition on the ground that the minimum educational requirement for the proffered position as specified on the labor certification (ETA Form 9089) was a bachelor's degree in physical therapy, not an advanced degree. As such, the proffered position did not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

On appeal the petitioner's former counsel asserted that he had made a typographical error on the immigrant visa petition (Form I-140), with respect to the "Petition type" in Part 2 of the form, by checking Box "d" instead of Box "e." This error resulted in the inadvertent statement that the proffered position required a professional with an advanced degree instead of a professional with a bachelor's degree (as specified on the labor certification). Counsel attempted to correct this mistake by submitting a new page one of the Form I-140 with box "d" instead of box "e" checked in Part 2.

In dismissing the appeal, the AAO – citing *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988) – stated that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services (USCIS) requirements. The appropriate remedy, the AAO indicated, would be to file another petition.

The motion to reopen and reconsider was filed by a new attorney, whose argument is that the beneficiary should not be penalized for the ineffective assistance received from its previous counsel (who represented both the petitioner and the beneficiary). An affidavit has been submitted from the beneficiary describing his relationship with former counsel and the series of mistakes made by former counsel in handling the instant petition. Counsel asserts that the AAO should accept the "corrected" page one of the Form I-140 so that the beneficiary can retain his original priority date of

June 12, 2006 – the date the Form I-140 was filed with USCIS seeking Schedule A classification. The claim for relief is based on the Board of Immigration Appeals (BIA) decision in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The ruling in *Lozada* states that any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- 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,

- 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

- 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.

In this case the above criteria have not been fulfilled. In the motion to reopen and reconsider, dated August 6, 2009, counsel indicated that a complaint against former counsel was going to be filed the following week with the Grievance Committee for the Second and Eleventh Judicial Districts in Brooklyn, New York. But there has been no further communication from the petitioner or counsel to confirm that this complaint was actually filed. Nor is there any evidence in the record, absent the filing of a complaint, that former counsel has been advised of the charges against him and had the opportunity to respond. Finally, the affidavit submitted with the motion to reopen and reconsider is from the beneficiary, not the petitioner. The beneficiary has no legal standing in this visa petition proceeding. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). The affidavit should have been submitted by the petitioner, which does have standing. *Id.* Thus, the claim of ineffective assistance of counsel is legally defective insofar as it does not satisfy the *Lozado* criteria.

Furthermore, even if the claim of ineffective assistance of counsel did meet the *Lozado* criteria, the AAO could not grant the requested relief. The Form I-140 petition prepared by former counsel was also signed and dated by the petitioner's president, Ashraf Elwaliely, directly below a printed statement that reads, in pertinent part, as follows:

> I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct.

Based on this statement and signature, the AAO concludes that the petitioner's president had ample opportunity to review the contents of the petition, and could have made any corrections he deemed necessary before signing the document and filing it with USCIS. His failure to do so before the petition was filed cannot be remedied at this stage of the proceeding. As previously discussed, case law is clear that a petitioner may not make material changes to a petition at the appeal stage of a visa petition proceeding in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi.*

Accordingly, the AAO's decision to dismiss the appeal is affirmed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.