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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



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Date: **MAR 12 2012**

Office: TEXAS SERVICE CENTER

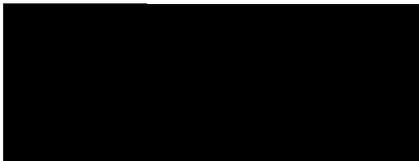
FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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 Director, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen and motion to reconsider. The motion to reopen will be granted. The petition is reopened. Upon review of the matter, the AAO's prior decision is affirmed. The petition remains denied.

The petitioner is a landscaping business. It seeks to employ the beneficiary permanently in the United States as a first line supervisor/landscaping manager. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (priority date – September 19, 2008), approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

Beyond the decision of the director, the AAO further denied the petition on appeal on the ground that the petitioner failed to sufficiently establish that the beneficiary had six months of experience in the proffered position as of the priority date as required by the ETA Form 9089.

The record shows that the motion to reopen is properly filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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).

A motion to reconsider must: (1) 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 [USCIS] policy; and (2) 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 applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In the petitioner's motion to reopen counsel asserts that the petitioner received ineffective assistance of counsel from the petitioner's prior attorney which led to the denial of the Form I-140 petition. In support of that assertion, present counsel submitted documentation showing that the beneficiary filed a complaint with the Office of The Attorney General, State of New York. The complaint is dated October 29, 2010 and states that [REDACTED] (and specifically [REDACTED] lied to the beneficiary about its ability to obtain a visa for the beneficiary. The complaint further states that the beneficiary first heard about action being taken against Mission Hispana when he received a letter in October 2010 from Mission Hispana notifying him that the State of New York and Mission [REDACTED] had entered into an agreement whereby [REDACTED] would stop providing immigration services and would make monetary restitution to eligible clients through the offices of the New York Attorney General. Counsel further states in the motion to reopen that he

was filing a request under the Freedom of Information Act (FOIA) concurrently with the motion for a copy of the record in these proceedings. To date, no FOIA request has been received by USCIS. Counsel stated that new evidence would be presented to overcome the AAO's prior denial. To date, the petitioner has not presented additional new evidence to overcome the AAO's prior denial with reference to the petitioner's ability to pay the proffered wage or with regard to the petitioner's failure to establish that the beneficiary had six months of experience in the proffered position as required by the ETA Form 9089.¹

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).

In this instance the petitioner's motion based on ineffective assistance of counsel does not provide grounds for reversing the AAO's prior decision. The record indicates that the petitioner and beneficiary were represented by attorney [REDACTED] (Form G-28 signed by the petitioner on May 29, 2009 – Appeal to the AAO was filed by attorney [REDACTED] on September 28, 2009),² [REDACTED]. The complaint filed by the beneficiary with the New York Attorney General (no complaint was filed by the petitioner) states that the beneficiary received false information and/or advice from Mission Hispana and specifically [REDACTED] which adversely affected the adjudication of the petitioner's Form I-140 petition. No complaint was made about the representation provided by attorney Victor Pizarro. The record does not establish that either the petitioner or the beneficiary informed any attorney of the allegations being leveled against him or her providing said attorney

¹ On December 19, 2011, over eight months after filing the appeal, the AAO received correspondence from counsel stating that the record was being supplemented with a copy of the petitioner's 2008 federal tax return (Form 1120S, which shows negative income (\$30,505) and negative net current assets (\$75,952)). The submitted tax return was already of record and specifically referenced in the AAO's February 4, 2011 decision denying the Form I-140 petition. The petitioner has, therefore, failed to submit any new evidence in support of its motion to reopen. From counsel's brief, it is apparent that he has the AAO's decision rendered February 4, 2011, which outlines the deficiencies in the petitioner's case.

² The labor certification was filed by an attorney while the Form I-140 was filed by [REDACTED] [REDACTED] submitted a Form G-28 with the filing and signed the Request For Evidence (RFE) response filed on behalf of the petitioner.

with an opportunity to respond. As such, the decision of the AAO remains denied based upon the petitioner's allegations of ineffective assistance of counsel.³

Counsel states in his motion to reopen/reconsider that denial of the petition was "unfair." Counsel's motion stated no additional new facts to be provided in the reopened proceeding supported by affidavits or other documentary evidence with regard to the AAO's decision denying the Form I-140 petition on the grounds that the petitioner failed to establish its ability to pay the proffered wage from the priority date onward. Counsel's supplemental material submitted included only the petitioner's 2008 tax return, already in the record and considered in the AAO's prior decision. Further, counsel does not address how the totality of the circumstances would warrant approval of the petition. As previously stated by the AAO in its February 4, 2011 decision dismissing the petitioner's appeal, the petitioner had negative net current assets in 2008 and also in 2007, the year before the priority date. In 2007 (the year before the priority date) the petitioner's net income was insufficient to pay the proffered wage, and in 2008 the petitioner had a negative net income as well as negative net current assets. The record does not establish that the petitioner paid the beneficiary any wages during any relevant time frame. Further, the record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that it had the continuing ability to pay the proffered wage from the priority date onward. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The AAO also dismissed the petitioner's prior appeal on the grounds that the petitioner failed to establish that the beneficiary had six months of experience in the proffered position as of the priority date as required by the labor certification. Despite being notified of deficiencies in the record in this regard, the petitioner did not send additional experience letters with its motion to reopen/reconsider or its supplemental submission received by USCIS on December 19, 2011 to establish that the beneficiary had six months of experience in the proffered position as required by the ETA Form 9089. For this additional reason, the prior decision of the AAO dismissing the petitioner's appeal will not be disturbed and the petition shall remain denied.

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 granted and the petition is reopened. The previous decision of the AAO dated February 4, 2011 is affirmed. The petition remains denied.

³ The primary basis for the denial is the petitioner's inability to pay the proffered wage based on the petitioner's tax returns, which is unrelated to counsel's effectiveness.