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

(b)(6)

[redacted]

DATE: JUN 2 8 2013

OFFICE: CALIFORNIA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)

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 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

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The Administrative Appeals Office withdrew the director's decision and remanded the petition for further action and consideration. The director again denied the petition and certified it to the AAO for review. The AAO will affirm the certified decision.

The petitioner is a church belonging to the [redacted] It seeks to classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a [redacted] Community" from May 1, 2007 to October 28, 2007. In the certified decision, the director determined that the beneficiary is ineligible for the classification sought due to prior violation of status.

The petitioner submits a short statement from counsel in response to the certified decision.

Section 101(a)(15)(R) of the Act pertains to an alien who:

> (i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and
>
> (ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii).

Section 101(a)(27)(C)(ii) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii), pertains to a nonimmigrant who seeks to enter the United States:

> (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
>
> (II) . . . in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or
>
> (III) . . . in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation.

U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 214.2(r)(1) state that, to be approved for temporary admission to the United States, or extension and maintenance of status, for the purpose of conducting the activities of a religious worker for a period not to exceed five years, an alien must:

(i) Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least two years immediately preceding the time of application for admission;

(ii) Be coming to the United States to work at least in a part time position (average of at least 20 hours per week);

(iii) Be coming solely as a minister or to perform a religious vocation or occupation as defined in paragraph (r)(3) of this section (in either a professional or nonprofessional capacity);

(iv) Be coming to or remaining in the United States at the request of the petitioner to work for the petitioner; and

(v) Not work in the United States in any other capacity, except as provided in paragraph (r)(2) of this section.

The petitioner filed the Form I-129 petition on February 24, 2011. The director denied the petition on July 25, 2011, and the petitioner appealed the decision to the AAO. In a decision dated April 9, 2012, the AAO withdrew the stated grounds for denial and remanded the petition for a new decision based on factors that the director had not previously taken into account.

On or about November 8, 2004, the New York had filed a Form I-129 nonimmigrant petition on the beneficiary's behalf. USCIS approved that petition, authorizing the beneficiary to work for the as an R-1 nonimmigrant religious worker until November 10, 2007. The beneficiary had no authorization to work for any other organizational unit of the Prior to November 26, 2008, the USCIS regulation at 8 C.F.R. § 214.2(r)(6) read:

Change of employers. A different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker admitted under this section shall file Form I-129 with the appropriate fee. The petition shall be filed with the Service Center having jurisdiction over the place of employment. The petition must be accompanied by evidence establishing that the alien will continue to qualify as a religious worker under this section. Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The above regulation was in effect when the filed its nonimmigrant petition in 2004. More generally, under the regulation at 8 C.F.R. § 214.1(e) a nonimmigrant may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. The current regulation at 8 C.F.R. § 214.2(r)(13) contains provisions comparable to the former regulation at 8 C.F.R. § 214.2(r)(6), stating that an R-1 nonimmigrant may not

receive compensation for work for any religious organization other than the R-1 petitioner or the alien will be out of status.

On or about May 1, 2007, the beneficiary left to work for the petitioner in Philadelphia. The petitioner filed a Form I-129 nonimmigrant petition on the beneficiary's behalf (with receipt number on October 29, 2007, stating that it sought a change of employer rather than an extension of stay with no change in employment. Thus, the petitioner, in 2007, acknowledged this move as a change of employment.

However, because the beneficiary changed employers before the filing of the October 2007 petition, the beneficiary failed to maintain R-1 nonimmigrant status.

In the present proceeding, the petitioner has attempted to rectify the beneficiary's violation of status by seeking "*nunc pro tunc*" (retroactive) approval of a change of employers effective May 1, 2007.

In its April 2012 remand notice, the AAO stated:

> Generally, *nunc pro tunc* relief is a remedy for administrative or judicial error *by the government* as a means to prevent inequity or injustice. It is not a means for a petitioner, or any related private entity, to correct its own errors or retroactively change disqualifying circumstances of its own making.
>
> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). This provision would, in many contexts, be meaningless if an applicant or petitioner could erase disqualifying circumstances simply by making changes after the fact, and then demanding that USCIS consider those changes to have already been in effect as of the filing date. USCIS and its predecessor, the Immigration and Naturalization Service, have consistently held that the applicant or petitioner must establish eligibility at the time of filing. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).
>
> . . . Counsel, in an introductory brief, referred to the petition as a "request for 'nunc pro tunc' change of employment status." The petitioner filed the Form I-129 petition on February 24, 2011, but on that form, listed "Dates of intended employment" from May 1, 2007 to October 28, 2007.
>
> It is not simply that the dates of intended employment elapsed before the date of adjudication; they elapsed before the date of filing. Counsel did not cite any statute, regulation or case law that would allow a retroactive filing in this manner. Counsel acknowledged that the beneficiary's violation of status disqualified her from various immigration benefits, but declared: "The instant Petition should be treated as having

> been filed on or about May 1, 2007," because the violation was not willful on the beneficiary's part, and because her congregation has come to depend on her services.
>
> The petitioner has failed to establish that USCIS can properly approve a petition filed under these circumstances.

In the certified decision, dated February 7, 2013, the director concluded: "the petitioner is not eligible for the immigration benefits it seeks on this instant petition since the beneficiary had been out-of-status long before this."

In response to the certified decision, counsel states: "the reason for the petition is to facilitate the processing of an Immigrant Petition for Special Immigrant Worker," filed on July 20, 2007 (receipt number [redacted]. The beneficiary is ineligible for special immigrant religious worker status if she lacked lawful status or employment authorization during the two years immediately preceding the filing of the special immigrant petition. *See* 8 C.F.R. §§ 204.5(m)(4) and (11). The stated intention, therefore, is to authorize the beneficiary's 2007 employment after the fact, so that she will no longer have unauthorized employment during the relevant two-year period.

Counsel cites the USCIS regulation at 8 C.F.R. § 214.1(c)(4), which states:

> *Timely filing and maintenance of status.* An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:
>
> (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
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> (ii) The alien has not otherwise violated his or her nonimmigrant status;
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> (iii) The alien remains a bona fide nonimmigrant; and
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> (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

The above regulation applies only to instances in which an alien's nonimmigrant status expired before the filing of an application for extension of stay, and "[t]he alien has not otherwise violated his or her nonimmigrant status." In the present instance, the beneficiary's R-1 nonimmigrant status did not expire owing to the untimely filing of an application for extension of stay. Rather, the beneficiary made an

unauthorized change of employers (which the petitioner, in 2007, acknowledged was a change of employers) several months before her R-1 nonimmigrant status was due to expire, and thereby violated her nonimmigrant status in a manner unrelated to the expiration that status.

Furthermore, the regulation at 8 C.F.R. § 214.2(r)(15) requires an R-1 nonimmigrant to "maintain an intention to depart the United States upon the expiration or termination of R-1 . . . status." Here, the stated purpose of the present petition is to permit the beneficiary to seek permanent resident status, and the requested period of stay expired in 2007. The beneficiary has failed to establish an intention to depart the United States, and therefore it is not evident that the beneficiary remains a *bona fide* nonimmigrant as the regulation at 8 C.F.R. § 214.1(c)(4)(iii) requires.

Counsel stated: "due to poor representation by a prior attorney, the petition was not timely filed. The United States Court of Appeals for the Second Circuit publicly reprimanded Attorney for 'conduct unbecoming a member of the bar.' Attached are copies of the 'Lozada motions,' *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)."

Matter of Lozada states that 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. *Id.* at 639.

The first element of a *Lozada* claim is 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. The petitioner has submitted two affidavits regarding attorney senior pastor of the petitioning church, stated:

> The first attorney I dealt with was I never spoke to her because she was never available, but I spoke with people in her office and corresponded with her via fax. We went back and forth a number of times because the documents sent to our office contained many errors. I remember communication being difficult because of the language barrier. I never understood what I was supposed to provide and what purpose it served.
>
> . . . [In mid-2009, the beneficiary's spouse,] Pastor told me that he was very upset with the representation that he was getting from He spoke with a member of the congregation who was an attorney and they referred the family to [attorney]

> After several attorneys, numerous requests for additional information, and denials, I met with who requested 1) we file a complaint with the disciplinary committee against 2) we have [the beneficiary] return the salary, benefits, and expenses we covered from May to October of 2007 (The money was returned to the who, I believe, subsequently paid her), 3) we appeal all the denials.
>
> formulated his plan with the family and I provided whatever documentation they requested. . . .
>
> We now understand that we have improperly filed petitions based on poor advice from our prior attorneys. All of the communication about these petitions did not always arrive at the church in a timely manner.

does not describe the agreement between the petitioner and , or what representations did or did not make concerning that agreement. Instead, she provides a rough chronology of events beginning in late 2007, by which time the beneficiary's disqualifying change of employment had already occurred. affidavit does not meet the *Lozada* test. General complaints about poor legal representation cannot suffice in this regard.

An affidavit jointly signed by the beneficiary and her spouse reads, in part:

> In May of 2007, I . . . was scheduled to be deployed to work for the [petitioner]. . . . Around the same time, the [petitioner] began the process of filing an I-360, Special Immigrant Religious Worker petition on [my] behalf. We hired Esq. to represent us.
>
> We told that we were moving to Philadelphia and wanted to proceed in a lawful manner. We asked if we needed to file an R-1 with [the petitioning church]? We were advised to just file the I-360. She told us that we didn't need to file anything other than the I-360. . . . She said, "You will get Green Cards within six months . . . before your current R-1 expires." . . .
>
> We were not advised to file an R-1 transfer for our visas to the [petitioning church] or that we were not allowed to work at [the petitioning church] because the was the only body authorized to be our employer.
>
> In the meantime, RFE had been issued for the I-360 in September 2007. . . .
>
> eventually advised us to file an R-1 with [the petitioning church]. It was filed [on the beneficiary's behalf] on October 29, 2007 . . . [and] approved by the USCIS on November 17, 2008. . . .

> In December 2007, the I-360 was denied. . . .
>
> We were advised to file an appeal. Again, never informed us that by going to work for [the petitioner] before our R-1s were transferred to them would cause a break in the "2 years of continuous employment" required for approval of the Special Immigrant I-360.
>
> . . . We know that due to advising us improperly, the I-360 petition was denied by the USCIS.
>
> In June 2009, USCIS mailed a letter to office. The letter said our family had to apply for adjustment of status before September 2009. The letter expressly warned that if we did not apply we would be out of status. kept the Letter in our file and did not tell us. . . . [A]t the end of November 2009 . . . we found the letter and made a copy. We contacted her at a later date to see what else we could do. She said we weren't going to be able to get green cards and she couldn't help us anymore. Again, did not act in our best interests.

The beneficiary provided more detail than did, but did not indicate the extent of involvement beyond general advice on how to proceed. As noted previously, the petitioner acknowledged as early as 2007 that the move from to the petitioner in Philadelphia was a "change of employer."

OPPORTUNITY TO RESPOND

The second element of the *Lozada* test is that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond. The record contains a copy of a letter addressed to referring to the "attached Affidavits" and stating: "Our Clients are alleging that you and your Office provided ineffective assistance that has in turn seriously and irreparably jeopardized their case." The letters are dated May 8, 2012, nine months before the certified decision. The record contains no response from

The petitioner has satisfied this element of the *Lozada* test.

COMPLAINT

The third and final element of a *Lozada* claim is 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. The petitioner has submitted evidence that the United States Court of Appeals, Second Circuit, publicly reprimanded on November 22, 2011 for negligence, failure to exhaust administrative remedies, and other instances of "conduct unbecoming a member of the bar." Although duly noted, this evidence does not relate to conduct in the present proceeding.

The requirement that disciplinary authorities be notified of breaches of professional conduct . . . serves to deter meritless claims of ineffective representation. *Matter of Lozada*, 19 I&N Dec. 639. discipline on unrelated grounds, before the petitioner made its *Lozada* claim, does not relieve the petitioner of the obligation to meet this element of the *Lozada* test. The petitioner has not presented a complete *Lozada* claim.

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. The petitioner has not established that the beneficiary is entitled to retroactive classification, years after the fact, to nullify a disqualifying violation of status. The AAO will therefore affirm the director's decision.

ORDER: The director's decision of February 7, 2013 is affirmed. The petition remains denied.