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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**

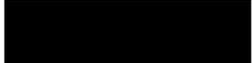
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DATE: **DEC 19 2011**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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 employment-based immigrant visa petition on June 10, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on April 22, 2010. The matter is now before the AAO on a motion to reopen. The motion to reopen will be dismissed as untimely filed.

In order to properly file a motion to reopen, the affected party or the attorney or representative of record must file the motion within 30 days of service of the unfavorable decision unless the filing party demonstrates that the delay was reasonable and was beyond their control. If the decision was mailed, the motion must be filed within 33 days. See 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. See 8 C.F.R. § 103.2(a)(7)(i). 8 C.F.R. § 103.5(a)(4) provides that, "A motion that does not meet applicable requirements shall be dismissed."

The record indicates that the AAO issued the appellate decision on April 22, 2010. It is noted that the AAO properly gave notice to the petitioner that it had 30 days to file the motion. Although counsel dated the Form I-290B May 21, 2010, it was not received until May 26, 2010, or 34 days after the decision was issued. The filing party provided no explanation for the late filing and made no assertion that the delay was reasonable and beyond the affected party's control. Accordingly, the motion was untimely filed.

Notwithstanding the motion's untimeliness, the petitioner also claims ineffective assistance of counsel related to her former attorney. When a motion to reopen is based on a claim of ineffective assistance of counsel, it requires the alien claiming such ineffectiveness to comply with the requirements set forth by the BIA in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The *Lozada* decision requires the submission of:

1. An affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in that regard;
2. Proof that the alien notified former counsel of the allegations in the ineffective assistance of counsel claim and allowed counsel an opportunity to respond; and
3. If a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien has filed a complaint with the disciplinary authority regarding counsel's conduct or, if a complaint was not filed, an explanation for not doing so.

Matter of Lozada, 19 I&N at 639.

On motion, the petitioner provides current counsel's brief, a statement from the petitioner, a copy of the Form I-140, Immigrant Petition for Alien Worker denial, the Form I-797C, Notice of Action receipt notices related to the Form I-140, the Form I-485, Application to Register Permanent Residence or Adjust Status, and a copy of the AAO's appeal decision.

The petitioner has failed to establish she met *Matter of Lozada's* first requirement noted above. Her affidavit dated May 21, 2010, indicates that her former attorney "must have reviewed" her documents and that he "must have known" that she was qualified for the classification as a competitor and not as an instructor. However, she does not state that she specifically requested her former attorney to file her petition as a taekwondo competitor. The record lacks evidence that the petitioner and former counsel engaged in a detailed agreement in reference to what action former counsel should take and how he failed to uphold his portion of the agreement. As a result, the petitioner has failed to comply with *Matter of Lozada's* first requirement.

The petitioner has failed to comply with *Matter of Lozada's* second requirement. Page five of current counsel's brief asserts that the petitioner has complied with this requirement. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner provides no evidence that her former counsel has been put on notice of her claims. She did not even address this requirement within her affidavit. Consequently, the petitioner has failed to establish that she complied with *Matter of Lozada's* second requirement.

It is not apparent that the petitioner has complied with *Matter of Lozada's* third requirement; her reasons for not filing a complaint with the disciplinary authority are insufficient. The petitioner provides the following reasoning for not filing a complaint with the disciplinary authority regarding her former counsel's conduct, "I do not wish to file an ethics complaint against [the petitioner's previous counsel] because I do not have the resources, money and level of education to complaint [sic] against him." The petitioner need not engage in any legal maneuvering or possess a certain level of education to send a letter to the state bar. It is current counsel's responsibility to inform the petitioner of any legal requirements related to her case. Current counsel acknowledges the petitioner's reasoning for not filing a complaint within his brief, and he should have also notified the petitioner of the simple steps needed to meet *Lozada's* third requirement. Therefore, the petitioner has failed to comply with *Matter of Lozada's* third requirement.

Finally, it is not clear that the outcome would have been any different if the original petition listed the petitioner as a competitor rather than an instructor. In fact, the AAO's decision dated April 22, 2010, addresses this scenario by stating, "even if the petitioner established her eligibility to continue to work in the United States as a competitor, the documentation submitted by the petitioner fails to establish eligibility for this criterion as a taekwondo competitor." The AAO's decision continues by discussing why the petitioner did not meet any of the criteria, even as a competitor. Moreover, while current counsel faults prior counsel for failing to provide translations, he offers none on motion to rectify this shortcoming. Accordingly, even if not dismissed as untimely, the petitioner has not complied with *Matter of Lozada* or demonstrated any prejudice based upon the actions of her former counsel.

As the motion was untimely filed, it must be dismissed.

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ORDER: The motion to reopen is dismissed. The decision of the AAO dated April 22, 2010, is affirmed, and the petition remains denied.