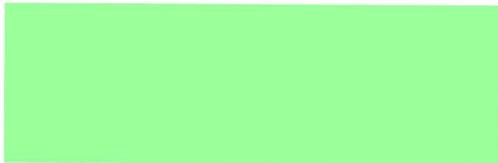


(b)(6)

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

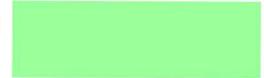


U.S. Citizenship  
and Immigration  
Services

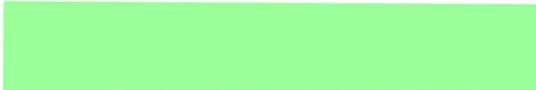


DATE: FEB 28 2014 OFFICE: TEXAS SERVICE CENTER

FILE:

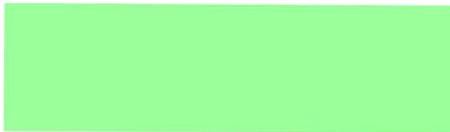


IN RE: Petitioner:  
Beneficiary:



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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition and the matter is again before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner has filed a total of two appeals and four motions with the AAO. Most recently, the AAO granted the petitioner's motion to reopen and reconsider, and reaffirmed the denial of the immigrant petition, in a decision dated August 6, 2013. The matter is once again before the AAO on a combined motion to reopen and reconsider.<sup>1</sup>

The director denied the petition on May 8, 2009 on multiple grounds, concluding that the petitioner failed to establish the following: (1) that the beneficiary is recognized internationally as an outstanding professor or researcher; (2) that the petitioner has offered the beneficiary a tenured or tenure-track teaching position; (3) that the position offered to the beneficiary is in his academic field; and (4) that the petitioner employs at least three persons in a full-time research position.

The petitioner filed its first appeal on June 23, 2009, asserting as its only basis for appeal that "the denial was the result of legal error." The AAO rejected the petitioner's appeal as untimely filed and for not meeting the requirements for a motion to reopen or reconsider.

The petitioner filed its second appeal on March 29, 2010, claiming that the first appeal was timely filed. The AAO treated the second appeal as a motion to reopen, granted the motion, and reaffirmed its previous decision and the denial of the petition, concluding that the petitioner failed to establish that its first appeal was timely filed or met the requirements for a motion.<sup>2</sup>

The petitioner subsequently filed a motion to reopen and reconsider on March 10, 2011, asserting that the denial of the petition was in error as to the director's finding that the petitioner was a private employer, and that the petitioner's former counsel was ineffective. In support of this motion, the petitioner submitted several new arguments and documents pertaining to the beneficiary's eligibility as an outstanding professor. The AAO granted the motion and reaffirmed its previous decision and the denial of the petition, concluding that the petitioner failed to establish a claim of ineffective assistance of counsel, and that the first appeal was timely filed and met the requirements of a motion to reopen or reconsider.

The petitioner filed another motion to reopen or reconsider on June 14, 2012, with which the petitioner submitted new documents to support its claim of ineffective assistance of counsel, including, *inter alia*, an affidavit from the petitioner regarding its claim of ineffective assistance of counsel, the petitioner's complaint to the New Jersey Bar Association which was served upon the former attorney, and documents pertaining to the beneficiary's eligibility as an outstanding professor which the petitioner claimed its

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<sup>1</sup> The petitioner indicated on the instant Form I-290B that it was filing an appeal, but then clarified in the brief that it was filing a motion to reopen and reconsider.

<sup>2</sup> Any second or subsequent appeal would have been rejected as improperly filed because the AAO does not exercise appellate jurisdiction over AAO decisions.

former counsel failed to submit. The AAO granted the motion and reaffirmed its previous decision and the denial of the petition, concluding that the petitioner had not established a claim of ineffective assistance. The AAO also concluded that the petitioner failed to establish that its first appeal was timely filed, or that the AAO abused its discretion by failing to excuse the untimely filing.

The petitioner then filed its third motion to reopen and reconsider on March 18, 2013, claiming that the AAO erred in determining that the petitioner failed to establish a claim of ineffective assistance of counsel. Specifically, the petitioner asserted that the AAO misapplied *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) by requiring the petitioner to submit the representation agreement between the petitioner and prior counsel, when such evidence is not specifically required under *Matter of Lozada*. The petitioner submitted additional documents to support the motion, including an affidavit, its retainer agreements with former counsel, and new documents pertaining to the beneficiary's eligibility as an outstanding professor which the petitioner claimed its former counsel failed to submit. The AAO granted the motion but reaffirmed its previous decision and the denial of the petition. The AAO concluded that the petitioner still failed to establish a claim of ineffective assistance of counsel. In particular, the AAO found the petitioner's affidavit insufficient, as it failed to set forth in detail the agreement that was entered into with former counsel, and what representations former counsel made or did not make to the petitioner with respect to the actions to be taken. The AAO also noted that the retainer agreements themselves did not support the petitioner's claim of ineffective assistance of counsel.

The petitioner now files the instant motion to reopen and reconsider. On motion, the petitioner asserts that the AAO erred in finding that the petitioner failed to satisfy the *Lozada* requirements. Alternatively, the petitioner asserts that the AAO should not strictly apply the *Lozada* requirements to the instant case, because the record "clearly demonstrates the legitimacy of the effectiveness claim." The petitioner states, in pertinent part:

While ineffective assistance of counsel claims in appeals or motions are mainly based on *Lozada* requirements, however, federal courts held that the application of those requirements should be flexible. In fact, the courts have held that there is no need to comply with *Lozada* when the record itself demonstrates the legitimacy of the ineffectiveness claim. See *Rodriguez-Lariz*, 282 F.3d 1218, \*22 (9<sup>th</sup> Cir. 2000); *Castillo-Perez*, 212 F.3d 518, 525 (9<sup>th</sup> Cir. 2000); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9<sup>th</sup> Cir. 2000). Moreover, even where the record alone does not establish the claim, the *Lozada* factors are not "rigidly applied." See *Rodriguez-Lariz*, 282 F.3d 1218 at \*22; see also *Ontiveros-Lopez*, 213 F.3d 1121 (9<sup>th</sup> Cir. 1999) (criticizing the BIA for arbitrary application of *Lozada* requirements).

In this case, the prior attorney failed to properly submit the initial application, which resulted in USCIS issuing an RFE, requesting numerous additional documents. The attorney further failed to provide all the requested documents despite the fact that those documents were available. The attorney further failed to file a timely appeal: she failed to submit correct filing fees which resulted in USCIS rejecting the filing, and the

untimely appeal. The record clearly demonstrates the legitimacy of the effectiveness claim.

\* \* \*

The petitioner initially satisfied the requirements under *Lozada* and established that such incompetent action by counsel, in signing and submitting the appeal on the last day of filing, with the incorrect filing fee, is indicative of prior counsel's reckless behavior. The Service's reliance on the date the second retainer agreement was signed to prove that prior counsel was apparently not "inept" is preposterous.

On motion, the petitioner submits another affidavit stating, in pertinent part:

I am writing this letter as it appears that the last denial of [the beneficiary] indicates that we were late in retaining an attorney for the appeal. In fact our organization had utilized an attorney, [REDACTED] New Jersey [REDACTED] to file various applications sponsoring aliens to work for many branches of [the petitioner]. Immediately upon her receipt of the denial of [the beneficiary's] application, the attorney (who was handling all of our immigration matters at the time) should have filed an appeal, and we had in fact given her the authorization to file this appeal.

We distinctly recall authorizing the attorney to appeal the decision and we requested that she send us a second retainer agreement outlining the appeal fees and terms. Unfortunately, the attorney did not send us the second retainer agreement until shortly before the filing deadline date of June 10, [2009]. We returned the retainer agreement to her immediately upon receipt and expected that counsel was aware of the time frame to file the appeal. We would also like to add that counsel had all the necessary paperwork in her possession to begin preparing the appeal upon our verbal authorization, long before the deadline date . . . .

The petitioner also resubmits copies of documents pertaining to the beneficiary's eligibility as an outstanding professor to support the instant motion.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

Upon review of the evidence and for the reasons discussed herein, the AAO finds that the instant motion does not meet the requirements of a motion to reconsider. The petitioner has not established that the AAO erred in determining that the petitioner failed to establish an ineffective assistance of counsel claim.

In order to satisfy the first element under *Matter of Lozada*, the petitioner must submit 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. 19 I&N Dec. at 639. In the AAO decision dated August 6, 2013, the AAO determined that the petitioner failed to meet the first element under *Matter of Lozada*, as the petitioner's affidavit was insufficient. Specifically, the affidavit failed to set forth in any detail the agreement that was entered into with former counsel, Ms. [REDACTED] with respect to the petition, the RFE, and the filing of the first appeal to the AAO. The petitioner's affidavit only stated in conclusory terms that former counsel was ineffective because she had been furnished with particular documents but did not submit them in response to the RFE, and that former counsel was inept by failing to submit the appeal with the proper filing fee within the statutory time. The petitioner's affidavit also failed to explain what representations former counsel did or did not make to the petitioner regarding the petition, the RFE, and the appeal.

Further, in the AAO decision August 6, 2013, the AAO noted that the retainer agreements themselves did not clearly support the petitioner's claim of ineffective assistance of counsel.<sup>3</sup> The AAO observed that the first retainer's scope did not include the filing of the appeal, and that the second retainer, which was entered into for the specific purpose of filing an appeal, was signed on June 10, 2009, the last day in which the petitioner could have timely filed an appeal. The AAO then concluded that without any explanation as to what specific agreement the petitioner had entered into with Ms. [REDACTED] with respect to the appeal, including what actions to take with respect to the appeal and what representations Ms. [REDACTED] made or did not make to the petitioner with regards to filing the appeal, the petitioner failed to establish its claim of ineffective assistance of counsel.

In the instant motion, the petitioner first asserts that its affidavit satisfied the requirements under *Matter of Lozada*, and that the affidavit "[set] forth in detail, the agreement that was entered into with the prior counsel with respect to the specific actions to be taken on the Beneficiary's behalf, and explaining in detail how she failed to comply with the agreement." However, other than this assertion, the petitioner failed to explain how its affidavit was sufficient. Another review of the petitioner's original affidavit reflects that it failed to set forth in any detail what agreement was entered into with former counsel, and what representations former counsel made or did not make to the petitioner with respect to the actions to be taken. The petitioner's initial affidavit stated, in pertinent part:

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<sup>3</sup> Although not noted in the AAO decision August 6, 2013, the AAO now notes that the first retainer was signed by Msgr. [REDACTED] (founder and CEO of the petitioner) as "the client," and by [REDACTED] (the petitioner), on behalf of "the firm." The second retainer is signed only by Msgr. [REDACTED] as "the client." None of the retainer agreements bear an appropriate signature by an authorized representative of "the firm." Both retainer agreements specify that "the firm" refers to [REDACTED], which is the law firm of former counsel. In light of the above, the validity of the retainer agreements is in question.

In regard to one such alien, [the beneficiary], Ms. [REDACTED] was hired in 2007 to prepare and file an I-140 Petition to classify the Beneficiary as Outstanding Researcher/Professor; to review documentation furnished to the attorney and submit them promptly to the Service; to respond to any Request for Evidence received by the attorney; and to promptly file any appeal by paying the proper filing fee . . . .

Counsel failed to effectively pursue the employer's interests by conducting herself in a negligent and grossly incompetent manner. Among the areas of ineffective counsel were two categories to establish evidence of international recognition which the attorney was furnished but which she did not submit in response to Request for Evidence in October 2008 . . . .

That Attorney was further inept in failing to perfect Appeal by failing to submit the Appeal with proper filing Fee within the statutory time thereby causing the Appeal to be rejected . . . .

At most, the petitioner's affidavit set forth general allegations against Ms. [REDACTED] without identifying the specific factual basis for these allegations. For example, the petitioner asserts that Ms. [REDACTED] "was further inept in failing to perfect Appeal by failing to submit the Appeal with proper filing Fee within the statutory time thereby causing the Appeal to be rejected." However, the petitioner did not identify what actual agreement, if any, was entered into with former counsel with respect to the appeal, and what representations former counsel made or did not make to the petitioner with respect to the appeal. Merely alleging that former counsel was hired to file an appeal, and that she was inept by failing to perfect an appeal, without any further explanation and detail, is insufficient to satisfy the first element under *Matter of Lozada*.

On motion, the petitioner asserts that the AAO is emphasizing "form over substance." However, this is not merely a futile exercise in "form over substance." In *Matter of Lozada*, the Board of Immigration Appeals (BIA) explained the necessity of a detailed affidavit in evaluating claims of ineffective assistance of counsel:

A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. In the case before us, that affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this regard . . . .

The high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board. Where essential information is lacking, it is impossible to evaluate the substance of such claim. In the instant case, for-example, the respondent has not alleged, let alone established, that former counsel ever agreed to prepare a brief on appeal or was engaged to undertake the task.

*Id.* at 639.

Here, the petitioner's affidavit lacked essential information, thus rendering it impossible for the AAO to evaluate the substance of the petitioner's claim of ineffective assistance of counsel. Without specific factual information as to the actual agreements and representations former counsel made or did not make with respect to the appeal, the AAO is precluded from determining what obligation Ms. [REDACTED] had, if any, with regards to properly and timely filing an appeal. Overall, the petitioner has failed to establish that the AAO erred in finding its affidavit insufficient under the *Lozada* requirements.

Alternatively, the petitioner asserts on motion that the application of the *Lozada* requirements should be flexible, and that there is no need to comply with *Lozada* when the record itself demonstrates the legitimacy of the ineffectiveness claim. The petitioner cites to *Rodriguez-Lariz*, 282 F.3d 1218 (9<sup>th</sup> Cir. 2000); *Castillo-Perez*, 212 F.3d 518 (9<sup>th</sup> Cir. 2000); *Escobar-Grijalva v. INS*, 206 F.3d 1331 (9<sup>th</sup> Cir. 2000); and *Ontiveros-Lopez*, 213 F.3 1121 (9<sup>th</sup> Cir. 1999) to support this assertion.

However, the petitioner cites only to cases arising out of the 9<sup>th</sup> Circuit, which have no binding precedential authority over the instant case. The AAO is not required to accept determinations by one circuit court of appeals as binding throughout the United States. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989); *cf. Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). In contrast, the precedent decisions of the Board of Immigration Appeals (BIA), which decided *Matter of Lozada*, are binding on all USCIS employees and officers in the administration of the immigration laws. 8 C.F.R. § 1003.1(g); 8 C.F.R. § 103.3(c). *See also Matter of Assaad*, 23 I&N Dec. 553, 559 (BIA 2003) (reaffirming the application of *Matter of Lozada* in claims of ineffective assistance of counsel. In a footnote, the BIA acknowledged that some courts have taken a "broad" view of the *Lozada* requirements, but stated that that "[w]e will apply such circuit law as is appropriate in each circuit").

The AAO finds the above-cited 9<sup>th</sup> Circuit cases unpersuasive to support the petitioner's proposition that the AAO could or should waive compliance with the *Lozada* requirements in the instant case. In the above 9<sup>th</sup> Circuit cases, the court explained that the *Lozada* factors are "intended to ensure both that an adequate factual record exists for an ineffectiveness complaint and that the complaint is a legitimate and substantial one." *Rodriguez-Lariz* 282 F.3d at 1226-7; *Castillo-Perez*, 212 F.3d at 526; *Escobar-Grijalva*, 206 F.3d at 1335 (waiving strict compliance with the *Lozada* factors when the facts are plain on the face of the administrative record); *Ontiveros-Lopez*, 213 F.3d at 1139 (remanding case back to the BIA to develop the record of proceeding). Here, there is not an adequate factual record for the AAO to assess the legitimacy and substance of the petitioner's ineffectiveness complaint, especially where the petitioner's affidavit lacked essential information regarding the agreements and representations former counsel made or did not make to the petitioner with respect to the appeal and where the administrative record does not plainly demonstrate the legitimacy of the petitioner's claim of ineffective assistance of counsel.

Contrary to the petitioner's claims, the administrative record does not "clearly demonstrates the legitimacy of the effectiveness claim." Again, the AAO emphasizes that the record is unclear as to what obligation Ms. [REDACTED] had, if any, with regards to properly and timely filing the appeal, particularly considering the scope and effective dates of the first and second retainer agreements. On motion, the

petitioner asserts that the AAO's reliance on the date of signature of the second retainer agreement was "preposterous," but failed to further explain this assertion or support it by any pertinent precedent decisions. 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. Comm'r 1972)).

For the foregoing reasons, the petitioner failed to establish that the AAO erred in determining that the petitioner failed to establish an ineffective assistance of counsel claim. The petitioner's motion fails to meet the requirements of a motion to reconsider pursuant to 8 C.F.R. § 103.5(a)(3).

Finally, the petitioner's motion does not meet the requirements of a motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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." Based on the plain meaning of "new," a new fact is evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>4</sup>

With the instant motion, the petitioner submits another affidavit regarding its claim of ineffective assistance of counsel, as well as copies of previously submitted documents regarding the beneficiary's eligibility as an outstanding professor. However, the petitioner's newly submitted affidavit and supporting documentation do not contain any facts that could be considered "new." The petitioner failed to explain why such documentation was not available and could not have been discovered or presented in prior proceedings, particularly since the petitioner has made the same assertions of ineffective assistance of counsel in its three prior motions.

With particular respect to the petitioner's latest affidavit, the petitioner does not attest to any facts that could be considered "new." As stated *supra*, a "new" fact is evidence that was not available and could not have been discovered or presented in the previous proceeding. The petitioner's latest affidavit seeks to provide more details regarding its prior agreement with former counsel with respect to the untimely appeal filed in 1999. The latest affidavit does not offer any new facts that were not available and could not have been discovered or presented in the previous proceeding.

For the foregoing reasons, the petitioner's motion fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2).

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 prior decision. In the current proceeding, the petitioner has not established that the AAO committed errors of law or policy in its August 6, 2013

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<sup>4</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984) (emphasis in original).

decision, nor has the petitioner provided any new facts. Therefore, the petitioner's instant motion does not meet the requirements of a motion to reopen and reconsider. The motion will be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The motion to reopen and reconsider is dismissed. The petition remains denied.