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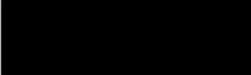


U.S. Citizenship
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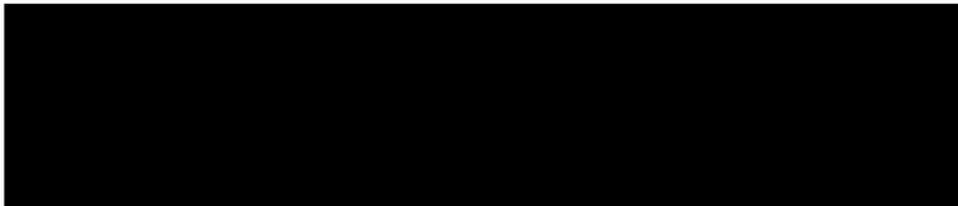
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion was filed 242 days after the AAO's ultimate decision, or approximately seven months late. Accordingly, the motion will be dismissed as untimely filed and for failing to meet applicable requirements. 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(C), and 103.5(a)(4). However, because the petitioner's motion is based on a claim of ineffective assistance of counsel, we will consider the petitioner's assertions regarding this claim.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. On July 17, 2006,¹ the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act) as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has been determined that there are not sufficient U.S. workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of U.S. workers who are similarly employed.

As discussed in the previous decisions, the DOL regulation at 20 C.F.R. § 656.15 sets forth the required contents of Schedule A applications and 20 C.F.R. § 656.10(d)(1) requires the employer to give notice of the filing at the location of the proposed employment and mandates that the employer be able to document that notice was provided. Finally, the regulation at 20 C.F.R. § 656.10(d)(6) specifically provides:

If an application is filed under the Schedule A procedures at § 656.15, or the procedures for shepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

As set forth in the director's March 14, 2007 denial, the director determined that the petitioner failed to submit a valid Prevailing Wage Determination (PWD) that meets the requirements of 20 C.F.R.

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than United States workers. New United States Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Thus, PERM applies to the instant case.

§§ 656.10 and 656.15 and that the petitioner failed to provide evidence of a proper notice of filing an application for permanent employment certification under the regulation at 20 C.F.R. § 656.10(d) because the notice contains a rate of pay lower than the prevailing wage. The director denied the petition accordingly.

On appeal, former counsel for the petitioner, [REDACTED] (the petitioner's former counsel, [REDACTED]), cited the regulation at 20 C.F.R. § 656.40(c) relating to prevailing wage determinations. Placing emphasis on the word "OR" between the phrases "employers must file their applications" and "begin the recruitment required by Sec. 656.17(d) or 656.21 within the validity period specified by the [State Workforce Agency]," counsel argued that the director neglected to recognize that while the validity dates specified on the PWD may in fact be expired on the date of the filing of the immigrant petition, the PWD may still be valid because the recruitment required by the labor certification process was commenced within the validity period of the PWD.³ The petitioner's former counsel also asserted that since the PWD was valid, the notice provided to the bargaining representative was also valid.

² [REDACTED], also assisted the petitioner and the beneficiary with this matter.

³ The regulation at 20 C.F.R. § 656.40 states in relevant part:

- (a) Application process. The employer must request a prevailing wage determination from the [State Workforce Agency (SWA)] having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer....
- (b) Determinations. The SWA determines the prevailing wage as follows:
 - (1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the "prevailing wage" for labor certification purposes. . . .
- (c) Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their application or begin the recruitment required by §§656.17(d) or 656.21 within the validity period specified by the SWA.

The AAO determined that the petitioner failed to submit a valid PWD that meets the requirements of 20 C.F.R. §§ 656.10 and 656.15, that the petitioner failed to provide evidence of a proper notice of filing an application for permanent employment certification to the bargaining representative, and that the notice of filing provided to the bargaining representative does not provide the address of the appropriate Certifying Officer as required by the regulation at 20 C.F.R. § 656.10(d)(3)(iii).⁴

The petitioner's current counsel, (the petitioner's current counsel or [REDACTED], filed the instant motion to reopen on September 29, 2008. On motion, [REDACTED] asserts that the petitioner's former counsel erroneously opined that the PWD that expired on June 30, 2006 remained valid based on the employer's April 16, 2006 notice of filing delivered to the union. He states that the petitioner's former counsel took longer than June 30, 2006 to get the Form I-140 filed and failed to get a new PWD when he filed the petition on July 17, 2006. He notes that the petitioner's former counsel did obtain a new PWD in response to the director's request for evidence (RFE) dated November 15, 2006, but during that time the prevailing wage increased. He noted that the petitioner and the beneficiary failed to notify [REDACTED] that effective May 22, 2006, the beneficiary's wage increased to \$39.22 per hour, and that on July 1, 2006, the beneficiary's wage increased to \$40.80 per hour.⁵ Counsel submits on motion a letter from the petitioner confirming that the notice of filing was given to the union and a letter from the union confirming that it received notice of filing for the petition. He notes that the regulation does not make a copy of the actual transmittal letter the exclusive means of establishing notice of filing. He further asserts that the petition was approvable when filed.

In a supplemental filing dated January 27, 2009, the petitioner's current counsel submits additional documentation to support the motion to reopen based on deficient performance of counsel pursuant to *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009).

⁴ The regulation at 20 C.F.R. § 656.20(d)(3) requires the following:

The notice of the filing of an Application for Permanent Employment Certification must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

The AAO also noted that the record does not contain any letter from the petitioner addressed to the Nurses' Bargaining Union SEIU Local 790 or any evidence showing the notice of filing or a copy of the Application for Permanent Employment Certification form was sent or delivered to the bargaining representative.

⁵ We note that pursuant to a Representation Agreement dated May 12, 2006, between [REDACTED] and the beneficiary, the beneficiary agreed to promptly advise the attorney of any facts relevant to the case, including changes in employment.

On motion, the petitioner submits the following documents: a letter dated August 21, 2008, from [REDACTED] of the petitioner; a letter dated May 26, 2006 from [REDACTED] stating that the petitioner's notice of filing was provided to the Nurses Bargaining Union SEIU Local 790 on April 16, 2006; the petitioner's Notice of Filing of Application for Alien Employment Certification under U.S. Department of Labor Schedule A, Group I dated April 16, 2006 (April 16, 2006 notice); a letter dated July 28, 2008, from [REDACTED] Worksite Organizer for Local Union SEIU 1021 in San Francisco, California; a letter dated September 22, 2008 from the beneficiary; City of San Francisco Classification, Compensation and Collective Bargaining Agreement pay scale from July 1, 2005 to April 3, 2010; the beneficiary's paystubs issued by the petitioner from February 11, 2006 to July 22, 2008; a copy of a memorandum dated March 24, 2006 from [REDACTED], Executive Administrator for the petitioner; a copy of a memorandum dated March 24, 2006 from [REDACTED], Executive Administrator for the petitioner; a memorandum dated March 10, 2006 from [REDACTED] Director of Human Resources for the petitioner; a copy of a PWD issued by the Employment Development Department (EDD), State of California, on February 2, 2006 (CA February 2, 2006 PWD); a copy of a PWD issued by the EDD on July 25, 2006 (CA July 25, 2006 PWD); a statement of the beneficiary dated December 8, 2008; a Representation Agreement dated May 12, 2006, between [REDACTED] and the beneficiary; a copy of an e-mail message sent by [REDACTED] to the petitioner's former counsel on July 21, 2008; e-mail correspondence dated July 24, 2008 from the petitioner's former counsel to [REDACTED]; a copy of a complaint filed with the California State Bar by the beneficiary against [REDACTED]; and an opinion letter dated January 26, 2009 from [REDACTED]

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen a proceeding before USCIS must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the control of the petitioner. Three days are added to the permissible period when the notice of the decision is by mail. 8 C.F.R. § 103.5a(b). In the instant case, the petitioner seeks to reopen the AAO's decision dated January 31, 2008. The petitioner filed the instant motion to reopen on September 29, 2008, or 242 days after the date of the AAO's decision. On motion, the petitioner, [REDACTED], did not address the delay in filing the motion. Instead, the petitioner's current counsel submitted a letter from the beneficiary detailing his reasons why the motion was untimely filed. By regulation, *the petitioner* must demonstrate that the delay in filing was reasonable and was beyond *its* control.⁶ Instead, the

⁶ We note that the regulation at 8 C.F.R. § 204.5(c) states:

Filing petition. Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act.

beneficiary has attempted to demonstrate why the delay in filing was beyond his control.⁷ Because the petitioner has not demonstrated that the delay was reasonable and was beyond its control, the motion was untimely filed. As the motion was untimely filed, the motion must be dismissed. 8 C.F.R. § 103.5(a)(4).

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists filing requirements for motions. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Once again, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

However, because the petitioner's motion is based on a claim of deficient performance of counsel, the AAO will consider the petitioner's assertions regarding this claim.

On January 7, 2009, the United States Attorney General (AG) published a decision finding that persons in removal proceedings have no right under the U.S. Constitution to be represented by an attorney. *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009). *Matter of Compean* overruled *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)⁸ and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), which held that the right to counsel was a matter of due process. *Matter of Compean* provides a framework for what is deemed "deficient performance of counsel" and sets out three substantive standards for consideration in assessing a motion to reopen based on deficient performance of counsel: (1) former counsel's failings must be "egregious." It is not sufficient to demonstrate that the lawyer made "an ordinary mistake." There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;"⁹ (2) the motion to reopen must be filed within the applicable time limit, unless the petitioner can prove it exercised due diligence in

⁷ Although the beneficiary asserts in a statement dated December 8, 2008 submitted on motion that "the employer has not really understood the fine points of the problem and has had to depend on me to seek resolution," the record does not indicate that the petitioner has given the beneficiary authority to act as its agent or representative in these proceedings. The petitioner is the affected party with standing to file a motion to reopen these proceedings. See 8 C.F.R. §103.5.

⁸ Under *Matter of Lozada*, 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.

⁹ *Matter of Compean*, 24 I&N Dec. at 732.

discovering and seeking to cure the alleged deficient performance;¹⁰ and (3) the petitioner must establish prejudice arising from the lawyer's errors, which means showing that "but for" the lawyer's deficient performance, "it is more likely than not that the [petitioner] would have been entitled to the ultimate relief [it] was seeking."¹¹ Where the petitioner seeks discretionary relief, it must also present evidence that would have led to a favorable exercise of discretion.¹² The AG determined that the substantive standards are to be applied regardless of when the motion was filed. Thus, the substantive standards for consideration in assessing a motion to reopen based on deficient performance of counsel articulated in *Matter of Compean* apply to the instant motion.

The AG in *Matter of Compean* also articulates mandatory documentary filing requirements.¹³ First, the petitioner must provide a detailed affidavit setting forth the facts that form the basis of the deficient performance of counsel claim, explaining specifically what the lawyer did or did not do and why the petitioner was harmed. *Id.* at 735. Additionally, the petitioner must attach five specific sets of documents to support the claim, including: (1) a copy of the representation agreement with the former lawyer;¹⁴ (2) a copy of a letter to the former lawyer setting forth the deficient performance and response, if any;¹⁵ (3) a completed and signed complaint addressed to the appropriate State bar or disciplinary authorities;¹⁶ (4) if the petitioner's claim is that the former lawyer failed to submit something, the petitioner must attach it to the motion;¹⁷ and (5) a statement signed by new counsel, if any, that the performance of former counsel fell below minimal standards of professional competence.¹⁸ If the petitioner is unable to provide any of this documentation, it must explain the reason.

The AG determined that the new filing requirements apply only to motions filed after January 7, 2009. Therefore, while the three substantive standards for consideration in assessing a motion to reopen based on deficient performance of counsel set forth by the AG in *Matter of Compean* apply to the instant motion, the filing requirements of *Matter of Compean* do not apply since the motion was filed on September 29, 2008. Instead, the filing requirements articulated in *Matter of Lozada* apply to the instant motion.¹⁹

Pursuant to *Matter of Compean*, to establish deficient performance of counsel, the petitioner must meet three substantive standards. Each standard is reviewed below.

¹⁰ *Id.*

¹¹ *Id.* at 733-734.

¹² *Id.* at 734-735.

¹³ Even if the petitioner complies with all requirements, reopening is still discretionary. *Id.* at 739.

¹⁴ *Id.* at 736.

¹⁵ *Id.*

¹⁶ *Id.* at 737.

¹⁷ *Id.* at 738.

¹⁸ *Id.*

¹⁹ See *infra* note 9.

First, the failings of the petitioner's former counsel must be "egregious."²⁰ It is not sufficient to demonstrate that the lawyer made "an ordinary mistake." There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."²¹ In the instant matter, we find that the petitioner has failed to establish that its former counsel's actions were egregious. The record does not contain any documentation from the petitioner indicating that it found the performance of [REDACTED] to be deficient. Instead, with the motion, the petitioner submitted a letter dated August 21, 2008 stating "we followed the guidance of [the beneficiary's] previous attorney, in all related matters concerning his I-140 Immigrant Petition filing in 2006 and appeal in 2007." All other assertions made in the record regarding the alleged deficient conduct of [REDACTED] are from the beneficiary and [REDACTED]. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, we cannot determine that the petitioner's former counsel's actions were egregious in light of the petitioner's failure to fully inform [REDACTED] about the specifics of the job offer. In a letter dated January 26, 2009 submitted on motion, [REDACTED] opines that the petitioner's former counsel made errors with regard to two requirements of the Schedule A filing- the prevailing wage determination and the April 16, 2006 notice. The petitioner gave the April 16, 2006 notice to the nurses bargaining union SEIU Local 790 regarding the filing of applications to certify the position of registered nurse at the rate of \$36.88 per hour.²² According to the wage rate in effect at that time under the CBA between the nurses union and the City of San Francisco, the wage rate of \$36.88 represented the hourly wage for a Step 1 registered nurse.²³ The record includes a copy of the CA February 2, 2006 PWD and a copy of the CA July 25, 2006 PWD.

The CA February 2, 2006 PWD expressly indicates that this PWD was issued on February 2, 2006 and was valid until June 30, 2006. The CA February 2, 2006 PWD was issued for the position of Registered Nurse at a Step 1 hourly rate of \$36.88 under the CBA. The CA July 25, 2006 PWD was issued on July 25, 2006 and the EDD officer checked "90 days from the date of this determination" box for its validity period. That means the CA July 25, 2006 PWD was valid from July 25, 2006 to October 23, 2006. The CA July 25, 2006 PWD was issued for the position of Registered Nurse at a Step 1 hourly rate of \$38.3625 under the CBA. The petitioner signed the Form I-140 and Form ETA 9089

²⁰ The Merriam-Webster dictionary defines the word egregious as "conspicuous; especially: conspicuously bad: FLAGRANT." <http://www.merriam-webster.com/dictionary/egregious> (accessed March 13, 2009).

²¹ *Id.* at 732.

²² On motion, the petitioner submits a letter dated July 28, 2008, from [REDACTED], Worksite Organizer for Local Union SEIU 1021 in San Francisco, California, confirming that on or about April 16, 2006, the union received a copy of the ETA 9089 for the position of registered nurse on behalf of the beneficiary. While this letter is sufficient to establish that the union received the April 16, 2006 notice, it does not cure the defect on the notice relating to the incorrect wage rate.

²³ The CBA lists ten salary steps for the position of registered nurse, with Step 1 receiving the lowest hourly wage and Step 10 receiving the highest hourly wage.

on June 9, 2006.²⁴ The position listed at Part F of Form ETA 9089 was for a Level 1 registered nurse at a prevailing wage rate and offered wage rate of \$36.88 per hour. The Form I-140 also listed a wage rate of \$36.88 per hour (\$1,475.20 per week). The instant petition was filed with the labor certification application on July 17, 2006. At the time of filing, the CA February 2, 2006 PWD had already expired, however, the CA July 25, 2006 PWD had not been issued yet. Therefore, the director and the AAO determined that the petitioner failed to submit a valid PWD with the petition at the time of filing and denied the petition accordingly.

With respect to the April 16, 2006 notice, the petitioner provided a letter dated May 26, 2006 addressed to the director and a copy of the April 16, 2006 notice as evidence that the April 16, 2006 notice was provided to the bargaining representative. The rate of pay contained in the April 16, 2006 notice was \$36.88 per hour. The director determined that the petitioner failed to provide a proper notice of filing to the bargaining representative because the rate of \$36.88 is lower than the prevailing wage.

Although the AAO ultimately determined that the PWD was not valid, the petitioner's former counsel believed that based on his interpretation of the regulations and the facts provided to him by the petitioner, the PWD was in fact valid. Under *Matter of Compean*, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 732. [REDACTED] was not given the facts he needed to properly prepare the prevailing wage request, the Form ETA 9089 and the Form I-140. Specifically, he was not informed that the job being offered to the beneficiary was in fact a Step 3 registered nurse position under the CBA, and not a Step 1 registered nurse position. On motion, the petitioner submitted a copy of a memorandum dated March 24, 2006 from [REDACTED], Executive Administrator for the petitioner, indicating that the beneficiary was being placed on the Step 3 hourly wage under the CBA based on the beneficiary's special experience, qualifications and/or skills. The memorandum indicates that the beneficiary was provided with a copy. Pursuant to a memorandum dated March 10, 2006 from [REDACTED] Director of Human Resources for the petitioner, the beneficiary was appointed as Step 3 registered nurse based on the following justification under paragraph 369 of the CBA:

The appointee possesses special experience, qualifications, and/or skills which, in the appointing officer's opinion, warrants appointments above the entrance rate:

[The beneficiary] is a new graduate RN hired to participate in the MedSurg Nurse Training program.

This salary step is comparable to the salaries that he is being offered by our competitors in the Bay Area; we would prefer that he work at SFGH.

²⁴ The petitioner must establish eligibility at the time the Form I-140 was filed. See 8 C.F.R. § 103.2(b)(12).

The beneficiary's pay statements indicate that he began receiving payments as a Step 3 registered nurse under the CBA on April 22, 2006.²⁵ The petitioner also stated in a letter dated August 21, 2008 that "[f]rom the time he was hired as a Registered Nurse on February 13, 2006, [the beneficiary] was paid a Step 3 wage under the union wage scale, set at \$39.22 per hour. On June 9, 2006, the date the ETA-9089 and I-140, were signed, [the beneficiary] was being paid at a rate of \$39.22." Therefore, the proffered job should have been listed as a Step 3 registered nurse on the prevailing wage request, the April 16, 2006 notice, the Form ETA 9089 and the Form I-140. Regardless of the date of expiration of the PWD, the PWD would not have been valid because it described a Level 1 position, and not the Level 3 position being offered to the beneficiary. Further, the April 16, 2006 notice stated an incorrect wage level for a Step 3 Registered Nurse.²⁶ We cannot say that the petitioner's former counsel's actions were egregious in light of the petitioner's failure to fully inform ██████████ about the specifics of the job offer.

In addition, in a letter dated September 22, 2008 submitted with the instant motion, the beneficiary indicated that he received his International Commission on Healthcare Professionals (ICHP) Visa Screen Certificate "on or about June 22, 2006" and that he immediately provided it to former counsel.²⁷ He indicates that he "signed the paperwork on 7/5/2006 when [former counsel] had them ready." However, the petitioner signed the Form I-140 and the Form ETA 9089 on June 9, 2006. By signing the petition, the petitioner's representative certified under penalty of perjury that the petition and the evidence submitted with it were true and correct. By signing the labor certification application, the petitioner's representative certified that she had read and reviewed the application and that to the best of her knowledge, the information contained on the petition was true and correct. Therefore, the ETA 9089 and the Form I-140 appear to have been completed as of June 9, 2006. The record is not clear as to why there was a delay in filing the petition, although it appears that based on the beneficiary's own admission, ██████████ was waiting for the beneficiary's ICHP Visa Screen Certificate to file the Form I-485 concurrently with the Form I-140. The delay in filing

²⁵ In a statement dated September 22, 2008 submitted on motion, the beneficiary states:

Looking back at the papers, I now realize that ██████████ had used Step 1 union wage of \$36.88 in the I-140. In fact, I have realized for the first time very recently, by June 2006 my wage level had increased to Step 3 at \$39.22, and apparently both [the petitioner] and I failed to notice that when we signed and delivered the I-140 and ETA-9089 papers on June 9 and July 5, 2006. During the passage of time for ██████████ to prepare and file the papers, apparently we accidentally did not point out that, effective July 1, 2006 under the union contract, my Step 3 wage would increase to \$40.80, which it did.

²⁶ The record does not demonstrate that the beneficiary would be willing to accept a demotion to a Step 1 registered nurse position upon obtaining permanent residence, or that the CBA would permit such a demotion under these circumstances.

²⁷ We note that the visa screen certificate was submitted with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, which was filed concurrently with the Form I-140. Registered nurses must complete a screening program in order to qualify for an employment-based immigrant visa. *See* 8 C.F.R. § 212.15.

appears to have been caused, in part, by the beneficiary. Because the petitioner has not established that the delay in filing the I-140 petition after June 30, 2006 was caused by the petitioner's former counsel, the petitioner has not established that its former counsel's actions were egregious.

Second, pursuant to *Matter of Compean*, the motion to reopen must be filed within the applicable time limit, unless the petitioner can prove it exercised due diligence in discovering and seeking to cure the alleged deficient performance.²⁸ The petitioner has not established it exercised due diligence in discovering and seeking to cure the alleged deficient performance. The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen a proceeding before USCIS must be filed within 30 days of the decision that the motion seeks to reopen. Three days are added to the permissible period when the notice of the decision is by mail. 8 C.F.R. § 103.5a(b). In the instant case, the petitioner seeks to reopen the AAO's decision dated January 31, 2008. The petitioner filed the instant motion to reopen on September 29, 2008, or 242 days after the date of the AAO's decision. On motion, the petitioner did not explain the delay in filing the motion.²⁹ Instead, counsel submitted a letter from the beneficiary detailing *his* reasons why the motion was untimely filed. Thus, the petitioner has not proved it exercised due diligence in discovering and seeking to cure the alleged deficient performance.

Third, pursuant to *Matter of Compean*, the petitioner must establish prejudice arising from the lawyer's errors, which means showing that "but for" the lawyer's deficient performance, "it is more likely than not that the [petitioner] would have been entitled to the ultimate relief [it] was seeking."³⁰ Where the petitioner seeks discretionary relief, the petitioner must also present evidence that would have led to a favorable exercise of discretion.³¹ The petitioner has not established prejudice arising from the alleged errors of its former counsel. A memorandum dated March 24, 2006 from [REDACTED], Executive Administrator of the petitioner, indicates that the beneficiary was placed on the Step 3 hourly wage rate under the CBA based on the beneficiary's special experience, qualifications and/or skills. The petitioner's current counsel states that the petitioner failed to notify its former counsel that the beneficiary was a Step 3 registered nurse under the CBA. Therefore, the petitioner's former counsel was not able to issue the proper notice to the union and to request the proper PWD, as the petitioner did not give him the proper information regarding the proffered job. The proffered job should have been listed as a Step 3 registered nurse under the CBA, rather than a Step 1 registered nurse. Regardless of the validity date of the PWD, the PWD would not have been valid because the wage rate requested was for a Step 1 registered nurse.³² Therefore, the petitioner has not satisfied the third substantive standard of *Matter of Compean*.

²⁸ *Matter of Compean*, 24 I&N Dec. at 732.

²⁹ The petitioner simply stated in a letter dated August 21, 2008 that it "followed the guidance of [the beneficiary's] previous attorney, in all related matters concerning his I-140 Immigrant Petition filing in 2006 and appeal in 2007."

³⁰ *Matter of Compean*, 24 I&N Dec. at 733-734.

³¹ *Id.* at 734-735.

³² This office notes that a denial of an I-140 petition is without prejudice to the petitioner submitting a new I-140. *Cf.* 8 C.F.R. § 103.2 (a)(7)(ii) (new fees will be required with any new petition).

Further, pursuant to *Matter of Lozada*, any appeal or motion based upon a claim of ineffective assistance of counsel must be supported by certain evidence, as set forth below. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

First, pursuant to *Matter of Lozada*, the claim must be supported by an affidavit of the allegedly aggrieved petitioner 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 petitioner in this regard. *Id.* at 639. Instead of presenting an affidavit of the petitioner on motion, the petitioner's current counsel submits two statements of the beneficiary, one dated September 22, 2008 and one dated December 8, 2008.³³ He also includes the representation agreement between the beneficiary and [REDACTED] rather than the representation agreement between the petitioner and [REDACTED].³⁴ Therefore, the first requirement of *Matter of Lozada* has not been met.

Second, pursuant to *Matter of Lozada*, the petitioner's former counsel must be informed of the allegations leveled against him and be given an opportunity to respond. *Matter of Lozada*, 19 I&N Dec. at 639. On motion, [REDACTED] includes a copy of an e-mail message sent by him to the petitioner's former counsel on July 21, 2008. The e-mail correspondence details allegations that the petitioner's former counsel made errors with regard to two requirements of a Schedule A filing-the prevailing wage determination and the April 16, 2006 notice. The e-mail correspondence also gives the petitioner's former counsel opportunity to respond to the allegations.³⁵ Thus, the second requirement of *Matter of Lozada* has been met.

Third, pursuant to *Matter of Lozada*, the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of former counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. at 639. On motion, counsel submits a copy of a complaint filed with the California State Bar by the beneficiary against [REDACTED]

³³ The statement of the beneficiary dated December 8, 2008, that has been provided on motion is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signer, in signing the statement, certifies the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. An unsworn statement made in support of a motion is not evidence and thus, as is the case with the arguments of counsel, is not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

³⁴ The representation agreement between the beneficiary and [REDACTED] does not state that [REDACTED] will prepare the Form ETA 9089. Further, the agreement is dated May 12, 2006, after the April 16, 2006 notice was given to the bargaining unit.

³⁵ In e-mail correspondence dated July 24, 2008, the petitioner's former counsel states "we choose to defer responding to your request for information."

However, the proper complainant to satisfy the third requirement of *Matter of Lozada* in connection with a Form I-140 petition is the petitioner, not the beneficiary. See 8 C.F.R. § 204.5(c). The record does not contain a complaint filed by the petitioner with the appropriate disciplinary authorities with respect to any violation of the petitioner's former counsel's ethical or legal responsibilities, and does not contain an explanation as to why the petitioner did not file such a complaint. Therefore, the third requirement of *Matter of Lozada* has not been met.

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 met that burden.

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

³⁶ The beneficiary's complaint is based on his inability to obtain permanent resident status. The record contains correspondence dated December 10, 2008 from [REDACTED] indicating that he declined to represent the beneficiary in a legal malpractice claim against [REDACTED]. His letter states "it appears that many contingencies are involved with you receiving a green card."