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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC-03-112-52689

Office: TEXAS SERVICE CENTER

Date: **MAR 20 2009**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

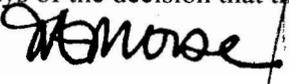
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). On March 13, 2006, the AAO rejected the appeal as it did not have jurisdiction, since it was filed without a valid labor certification. The AAO remanded the petition back to the director. By motion of April 11, 2006, the director allowed the petitioner an additional 30 days to submit evidence. The petitioner failed to respond or submit any evidence. Accordingly, on May 26, 2006, the director determined that the petitioner failed to overcome the reasons for the petition's denial. The director stated that there was no appeal from the decision, but that the petitioner could file a motion to reopen within 30 days in accordance with 8 C.F.R. § 103.5. On April 30, 2007, the petitioner filed a motion to reopen and reconsider the AAO's March 13, 2006 decision and not the director's May 26, 2006 decision. By decision of August 1, 2008, the AAO rejected the motion as improperly and untimely filed. The petitioner filed a subsequent motion to reconsider the AAO's August 1, 2008 decision. The motion will be dismissed.

The petitioner is a construction contractor, and seeks to employ the beneficiary permanently in the United States as a concrete finisher. The petitioner failed to properly submit an original Form ETA 750 Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). The regulation at 8 C.F.R. § 103.2(b)(4) requires that, "application, and petition forms, and documents issued to support an application or petition (such as labor certifications . . .) must be submitted in the original unless previously filed with USCIS [United States Citizenship and Immigration Services]." Here, the petitioner submitted only a copy of the determination page, the first page of Form ETA 750A, and the first page of Form ETA 750B. Petitioner's counsel¹ stated that the original was unavailable as the initial attorney was convicted of immigration fraud, and that the petitioner did not have a full copy of the labor certification in its records. As the record lacked an original labor certification, and further lacked a complete copy, the director could not determine whether the beneficiary was qualified for the position offered. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Accordingly, as set forth in the director's September 17, 2004 decision, the petition was denied as the filing lacked the original Form ETA 750. Additionally, based on conflicts in the evidence, the petitioner failed to establish that the beneficiary had the required experience for the position offered.²

¹ Different counsel initially filed Form ETA 750. A separate attorney represented the petitioner in filing the I-140, and the initial appeal. Current counsel lists that he is Of Counsel to the firm that filed the April 30, 2007 motion to reopen and reconsider.

² Specifically, the director noted that the experience letter submitted to document that the beneficiary had the required experience stated that the beneficiary worked for [REDACTED] in Colombia, but the letter did not list the company's address, and the telephone number was handwritten. Further, the beneficiary was approved in L-1A status to work as the president of

On appeal of the director's decision, the petitioner failed to submit the original Form ETA 750, one of the bases for the petition's denial. Therefore, on March 13, 2006, the AAO rejected the appeal for lack of jurisdiction. The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The AAO remanded the petition back to the director who allowed the petitioner 30 days to submit additional evidence. The petitioner did not respond, did not send a brief, and did not submit any additional evidence. The director denied the motion to reopen and stated that the petitioner's remedy was to file a motion to reopen within thirty days. The petitioner failed to do so.

On April 30, 2007, the petitioner filed a motion to reopen and reconsider the AAO's March 13, 2006 decision. In order to properly file an appeal or motion to reopen, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal 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). The regulation at 8 C.F.R. § 103.5(a)(ii) states that, "The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." As the petitioner filed the motion to reopen and reconsider over a year after the AAO's decision, the AAO rejected the motion as untimely filed. Further, the AAO rejected the petition as improperly filed as Form I-290B listed that it was filed on behalf of the beneficiary and a beneficiary lacks standing to file an appeal. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B).³ Additionally, as the director at the Texas Service Center rendered the last

Transversiones USA in April 2000. The director noted that the beneficiary would have had to demonstrate that he was employed as a manager or executive with the company's foreign parent for one year between April 1997 and April 2000. Additionally, the beneficiary listed on his Form G-325A filed with his Adjustment of Status application that he was employed as a civil engineer from December 1981 to May 2000. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591 (BIA 1988).

³ The record of proceeding contained a properly executed Form G-28 (Form G-28), Notice of Entry of Appearance as Attorney or Representative for the beneficiary's representative. Additionally, the Form I-290B appellate form was signed by counsel, who stated that he represented the beneficiary. U.S. Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R.

decision, the AAO would have lacked jurisdiction as it was not the last official who made the decision.

The petitioner now files a motion to reconsider the AAO's August 1, 2008 decision. 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 U.S. Citizenship and Immigration Services 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Counsel asserts that the initial attorney who filed the labor certification on the petitioner's behalf was arrested by the Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE") agents. Consequently, counsel states that, "on knowledge and belief, the arresting agents seized the immigration records . . . including the original approved labor certification pertaining to the Petitioner and beneficiary." Subsequent counsel sought to obtain the labor certification from the original attorney, but was unable to do so. Present counsel states that the second attorney submitted parts of the Form ETA 750.⁴ Specifically, counsel asserts that the USCIS decision, and AAO decision contain legal errors, and, therefore, would meet the standard for a motion to reconsider.

Here, we note that the petitioner has filed to reconsider the last AAO decision of August 1, 2008, which relates to late filing, and whether Form I-290 was properly filed.

Counsel asserts that the Adjudicator's Field Manual allows USCIS to accept secondary evidence in some instances, and that granting or denying an application must be consistent with the desires of Congress, and in promoting legal immigration. Counsel asserts that actions of federal government personnel must be consistent with the law and statutory authority. Counsel contends that the requiring of an *original* labor certification exceeds the requirement of Section 203(b)(3)(C) of the Act that the Department of Labor approve a labor certification, and, therefore, the petition's denial was legal error and should be reopened.

Counsel asserts that strict rules of evidence do not apply in administrative proceedings, and that the AFM supports the proposition that any evidence should be accepted if it helps to prove a fact bearing on an issue at hand. Further, counsel cites the Federal Rules of Evidence that the best evidence in the matter would have been the copy of the labor certification submitted. Further, counsel states that under 20 C.F.R. § 656.30 and the AFM, evidence contained in other USCIS records should be obtained from those records prior to seeking such information from the applicant. Counsel asserts

§ 103.3(a)(1)(iii)(B). No evidence suggested that the petitioner consented to the filing of the motion to reopen.

⁴ As noted, however, in the director's decision, as the Form ETA 750 was not a complete copy, the director could not determine whether the beneficiary met the qualifications of the position offered.

that as ICE had the file, USCIS should have obtained the original from ICE. Counsel further asserts that USCIS had direct knowledge of the first attorney's fraud as USCIS Ethics Counsel initiated and prosecuted the disciplinary action against the first attorney. Therefore, counsel asserts that the AAO erred in rejecting the petitioner's appeal based on a lack of jurisdiction.

Counsel next asserts that the standard of proof for an immigration benefit is based on a "preponderance of the evidence." *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). Counsel asserts that USCIS should have accepted the copy and recognized the labor certification that DOL approved as "probably true" based on a preponderance of the evidence.

Again, the AAO notes that these issues go to prior decisions in the record. The issue before us is whether the AAO's August 1, 2008 decision was correct. Further, as the petitioner raises, the initial attorney in this matter was convicted of immigration fraud, and, therefore, a complete and original Form ETA 750 would be necessary for adjudication to verify the authenticity of the information contained therein. *See also* 8 C.F.R. § 103.2(b)(4), which requires an original labor certification.

Next, counsel asserts that its motion to reopen was timely filed. Counsel states that while a motion to reopen must normally be filed within 30 days of the decision's issuance that 8 C.F.R. § 103.5(a)(1)(i) would allow a late filing if the petitioner "demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner."

Counsel asserts given the nature of the allegations against the first attorney, that it "should have clearly been seen as an event that had a major impact on the petitioner's ability to proceed with the case." Further, subsequent counsel that the petitioner obtained advised both the petitioner and the beneficiary that he "was reluctant to take further action such as the filing of a motion to reopen, and that . . . the matter was 'still pending'" according to the USCIS website. Counsel states that it was only after the beneficiary was served with a Notice to Appear in January 2007 that he sought advice from instant counsel prior to his May 2007 master calendar hearing. Only after inquiry and review of the beneficiary's entire case did present counsel determine that there might be a basis of relief through filing a motion to reopen.

Counsel fails to address why the petitioner did not respond to the director's motion to reopen upon remand and why the petitioner, if interested in pursuing the application did not submit a brief or request that USCIS obtain a duplicate copy of the labor certification directly from DOL at that time. *See* 20 C.F.R. § 656.31. Further, while counsel asserts the petitioner's second attorney was reluctant to take action, the petitioner does not assert or set forth any ineffective assistance of counsel claim.⁵

⁵ To the extent that the petitioner or beneficiary seeks to make a claim of ineffective assistance of counsel, they have failed to meet the standard enumerated. To make a claim under *Matter of Lozada*, 19 I&N 637 (BIA 1988) the filing must be accompanied by an affidavit from the aggrieved party attesting to the relevant facts, that former counsel must be informed of the allegations presented and allowed an opportunity to respond, and that if the case involved a violation of legal or

Therefore, the AAO would question whether the delay is reasonable. *See In Re: Applicant: S*, 1988 WL 34060599 (June 22, 1998), where the beneficiary's adjustment of status application was denied. The applicant filed a motion to reopen over six months after the application's denial asserting that based on prior counsel's ineffective assistance, the applicant never received notice of the AAU's decision and her right to file an appeal. As the decision was properly mailed, the applicant's claim of reasonable delay was rejected, and the motion was dismissed. *See also Matter of [name not*

ethical responsibilities that the motion should "reflect whether a complaint has been filed with appropriate disciplinary authorities." *Matter of Lozada*, 19 I&N at 637.

Matter of Lozada was decided in the context of deportation case, and stressed that former counsel should be allowed an opportunity to respond to the allegations against them, and "any subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion." *Matter of Lozada*, 19 I&N at 639. The petitioner did not submit any documented response, or lack thereof, from any former representative. Further, *Matter of Lozada* added that "the potential for abuse is apparent where no mechanism exists for allowing former counsel, whose integrity or competence is being impugned, to present his version of events if he so chooses." *Id.* Additionally, the petitioner did not provide evidence that a complaint was actually filed with the respective State Bar.

On January 7, 2009 the Attorney General issued a precedent decision relating to ineffective assistance of counsel, superseding *Matter of Lozada*. *See Matter of Compean, et al.*, 24 I&N Dec. 710 (A.G. 2009). In *Compean*, the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* at 711-27. Although the Act and regulations also do not afford aliens a right to effective assistance of counsel, USCIS may, in its discretion, reopen proceedings based on the deficient performance of an alien's prior attorney. *Id.* at 727. *Compean* establishes three elements of proof and six documentary requirements that an alien must meet to prevail on a claim of deficient performance of counsel. *Id.* Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

Despite this change, the AAO will evaluate this appeal under *Matter of Lozada*, the administrative precedent, which applied at the time of filing the instant motion to reconsider, and the prior motion to reopen. Under general rules of legal construction, a substantive, non-curative, adverse change in administrative rules is not to be applied retroactively unless the language of both the administrative rule and the statute authorizing the rule requires such a result. *Uzuegbu v. Caplinger*, 745 F.Supp. 1200, 1215 (E.D. La. 1990). The petitioner, here, has not set forth that it met any of the factors in *Matter of Lozada*.

provided], EAC-98-072-52943 (AAO Sept. 15, 2003), where a motion to reopen was dismissed. The petitioner sought classification as an alien of extraordinary ability. The AAO dismissed the petitioner's appeal on August 30, 1999. The petitioner requested an extension of time to file a motion to reopen based on the need to hire a new attorney and obtain documents. In May 2001, twenty months later, the petitioner submitted a motion to reopen and reconsider. The AAO determined that the delay was not reasonable as, "his choice to change attorneys does not alter the regulatory deadlines for filing motions to reopen and reconsider."

The AAO would not conclude that the delay in this matter was reasonable, and, therefore, the petitioner has failed to establish that the decision was incorrect based on the evidence in the record at the time of the initial decision.⁶

Counsel suggests that the AAO had to recognize that the petitioner's CEO participated in the filing as he submitted a sworn statement with the motion to reopen. Additionally, counsel asserts that the regulation would allow counsel to submit a properly executed Form G-28 within 15 days and cure the defect.

Specifically, 8 C.F.R. § 103.3(a)(2)(v)(2)(ii) states that when an *appeal is properly filed*, that the "official shall ask the attorney or representative to submit Form G-28 to the official's office within 15 days of the request." As the motion to reopen was late filed, and therefore improperly filed, the AAO was not required to ask the attorney to submit a properly executed Form G-28.

While the petitioner submitted a properly executed Form G-28 with the instant filing, the Form G-28 in the record at the time of filing the late-filed motion to reopen was improperly completed and, therefore, the petitioner has not demonstrated that the decision was incorrect based on the evidence in the record at the time of the decision.

Accordingly, the petitioner's motion to reconsider has failed to establish that the AAO's decision was incorrect based on the evidence in the record at the time of the initial decision.

The initial AAO decision determined that based on the lack of an original labor certification, the AAO lacked jurisdiction. The petitioner failed on appeal to submit either an original valid Form ETA 750 or a complete copy of the entire Form ETA 750. Without an original Form ETA 750, the AAO lacked jurisdiction at the time of its initial decision.⁷ It is incumbent on the petitioner to

⁶ Additionally, as noted above, the petitioner should have sought to reopen the director's decision of May 26, 2006, as the director would have made the last decision, and would have been the venue with proper jurisdiction.

⁷ Even if the AAO reviewed the matter substantively, we would affirm the director's findings that the petitioner failed to establish that the beneficiary has the required experience for the position offered. As the record both lacks evidence to address the conflicts in the beneficiary's experience, the issue related to discrepancies in the beneficiary's experience cannot be properly resolved. See *Matter of Ho*, 19 I&N Dec. at 591-592.

resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the motion fails to establish that the AAO's prior decisions were based on an incorrect application of law or policy.

The petitioner has failed to establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Accordingly, the motion to reconsider is dismissed.

ORDER: The motion to reconsider is dismissed.