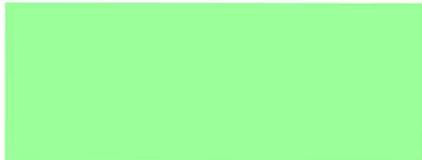


(b)(6)

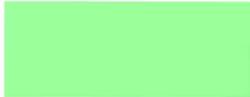


U.S. Citizenship  
and Immigration  
Services



DATE: **NOV 18 2014**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

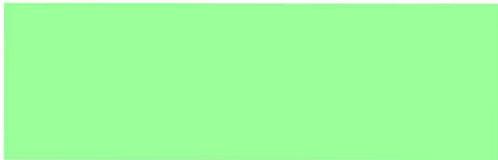
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (the director), denied the immigrant visa petition and dismissed the petitioner's motion to reopen as untimely. The Director treated the petitioner's appeal from the motion's dismissal as a motion and dismissed it. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. We granted the petitioner's first motion to reopen and reconsider, and affirmed our appellate decision. We dismissed the petitioner's second, third and fourth motions to reopen and reconsider. The matter is now before us on the petitioner's most recent motion to reopen and motion to reconsider. The motions will be dismissed, our prior decisions will be affirmed, and the petition will remain denied.

The petitioner operates a retail shipping business. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. The petition requests classification of the beneficiary as a skilled worker under section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i). The director concluded that the petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. Accordingly, he denied the petition on April 13, 2009.

We dismissed the petitioner's appeal on the same ground on May 31, 2013. We also concluded that the petitioner did not establish a continuing intention to employ the beneficiary in the offered position. On August 20, 2014, we granted the petitioner's fourth motion to reopen and reconsider, affirmed our dismissal of the petitioner's third motion to reopen and reconsider and affirmed our prior decisions.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon motion. On motion, counsel submits a brief, a declaration from the beneficiary and a declaration from counsel.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(3) *Requirements for motion to reconsider.*

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.

On motion counsel contends that the delay in filing was reasonable and beyond control of the petitioner and attorney of record. Counsel contends that she reasonably expected that the Phoenix lockbox would accept a filing made by a messenger service because the address was listed as accepting "Express mail and courier deliveries." In support of her contention, counsel cites to [businessdictionary.com](http://businessdictionary.com) which defines "courier service" as meaning "fast, door to door, local or international, pickup and delivery service for high-value goods or urgently required documents."<sup>1</sup>

<sup>1</sup> It is noted that the "messenger service" utilized by counsel is not a courier service but rather a service processor. *See* [www.](http://www.)

The term “courier delivery” is generally accepted as referring to overnight or same day delivery of documents by services such as [REDACTED]. See www.[REDACTED]. Moreover, lockboxes and other government addresses do not accept hand delivery of documents due to mail screening requirements, unless instructions specifically state that hand-deliveries are accepted. Furthermore, as with any entity which does not accept the “mailbox rule,” receipt by any other entity such as a courier service does not suffice to show filing of an appeal or motion and failure of a courier or overnight delivery service does not excuse filing deadlines.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

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. . .

Counsel bases the motion to reopen on ineffective assistance of counsel. 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.

*Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff’d*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

In support of this assertion, counsel submits a declaration from the petitioner and herself stating that the petitioner and counsel entered into an agreement that counsel would timely file a motion to reopen our March 13, 2014 decision and that counsel failed to timely file the motion because the hand delivered motion was not accepted at the lockbox. The petitioner states that he did not chose to file a complaint against counsel for ineffective assistance because counsel assured the petitioner that she would take the necessary steps to correct the mistake. However, counsel fails to establish that the petitioner was prejudiced by her performance as a representative. See *Matter of Lozada* at 638 (one must show, moreover, that he was prejudiced by his representative’s performance). In establishing that counsel’s failure to timely file the third motion we look to whether the documents and arguments submitted by counsel in filing the third motion to reopen to reopen and motion to reconsider were sufficient to overcome our March 13, 2014.

In response to our March 13, 2014 dismissal, counsel contended that she was submitting new documents to establish that the beneficiary possesses the minimum requirements as set forth in the labor

certification and to establish the petitioner's ability to pay the proffered wage. Counsel also contended that our decision was based on an incorrect application of *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) when we failed to accept additional documentation regarding the petitioner's ability to pay the proffered wage on motion.

As discussed in our March 13, 2014 decision, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence of the petitioner's ability to pay the proffered wage, including information on household expenses and personal assets of the sole proprietor and his spouse. We also issued a notice of intent to deny (NOID) instructing the petitioner to submit evidence of the petitioner's ability to pay the proffered wage, including information on household expenses and personal assets of the sole proprietor and his spouse. The director's decisions and our denial of the appeal and dismissal of the first motion all stated that the petitioner failed to submit sufficient evidence of the petitioner's ability to pay the proffered wage, including information on household expenses and personal assets of the sole proprietor and his spouse.

Upon filing the second motion to reopen, the petitioner sought to submit additional documents regarding the petitioner's ability to pay the proffered wage, including information on household expenses and personal assets of the sole proprietor and his spouse. Our March 13, 2014 decision found that the petitioner had been put on notice of the deficiencies in the evidence regarding the petitioner's ability to pay the proffered wage and had been given four other opportunities to respond to those deficiencies. We held that we would not accept the evidence offered on the second motion regarding the petitioner's ability to pay the proffered wage as ample opportunity had been provided to the petitioner to rectify the deficiencies regarding the ability to pay. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence, our NOID or during any of the other motions and appeal it had previously filed. *Id.*

On the third motion counsel again submitted additional documentation to establish the petitioner's ability to pay the proffered wage. As discussed above, under the circumstances, we need not, and do not, consider the sufficiency of the evidence submitted on the third motion regarding the petitioner's ability to pay the proffered wage as it does not constitute "new" evidence.

Alternatively, counsel contended that *Matter of Soriano* dictated that we should have remanded the original appeal decision to the director because we solicited copies of the petitioner's 2008 tax returns, an updated list of monthly household expenses and missing 2007 bank statements, documents which were submitted for the first time on appeal. However, unlike the Board of Immigration Appeals (BIA) we conduct appellate review of facts on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>2</sup> Further, counsel had been given an additional opportunity to overcome any deficiencies found in the petitioner's 2008 tax returns, updated list of monthly

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<sup>2</sup> The BIA applies the "clearly erroneous" standard to review all factual determinations, including findings as to credibility of testimony. 8 C.F.R. § 3.1(d)(3); see *Matter of S-H-*, 23 I&N Dec. 462, 464 (BIA 2002).

household expenses and missing 2007 bank statements when we issued our November 26, 2013 decision in response to the petitioner's first motion before our office.

In the third motion, counsel did not establish that our March 13, 2014 decision was based on an incorrect application of law or policy or that the decision was incorrectly based on the evidence of record at the time of the decision. Accordingly, even if it had been timely filed we would have dismissed the third motion to reopen and motion to reconsider. Thus, the petitioner was not prejudiced by counsel's failure to timely file the third motion.

In our March 13, 2014 decision we noted that, even if the petitioner were able to meet the requirements of a motion and established that it had the ability to pay the proffered wage, it had not established that the beneficiary meets the minimum requirements of the labor certification. We also noted that there were additional concerns regarding the location of the proffered position and whether there was a permanent job offer. In response to our March 13, 2014 decision, counsel contended that these issues had not been previously raised by the director or in our NOID and submitted evidence of the beneficiary's education and documentation to clarify the inconsistencies we noted in the beneficiary's qualifying experience letter. Counsel requested that the case be remanded to the director for adjudication because the petitioner had provided independent, objective evidence to resolve the inconsistencies. However, our March 13, 2014 decision was based on failure to meet the requirements of a motion to reopen or a motion reconsider regarding our November 26, 2013 decision finding that the petitioner had failed to establish its ability to pay the proffered wage. The statements made regarding the beneficiary's qualifications and permanent job offer did not form the basis of our March 13, 2014 decision to dismiss the second motion to reopen and motion to reconsider. As indicated in our previous decisions such statements are only issued as a notice to the petitioner of issues which need to be addressed beyond the decision of the director if the petitioner were to file another Form I-140 immigrant petition based on the instant labor certification or file a motion to reopen or motion to reconsider our decision. As discussed above, the petitioner has failed to establish that its response to our March 13, 2014 decision meets the requirements of a motion to reopen or motion to reconsider.<sup>3</sup>

Accordingly, the motions will be dismissed, the proceedings will not be reopened or reconsidered and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motions are dismissed.

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<sup>3</sup> We withdraw our statements regarding the beneficiary's qualifying education and experience as the petitioner has provided documentation to establish the beneficiary's possession of a High School diploma and resolved the inconsistencies in the beneficiary's qualifying experience letter.