



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF E-G-H-

DATE: JULY 22, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT VISA PETITION FOR ALIEN WORKER

The Petitioner, an operator of a residence for developmentally disabled adults, seeks to permanently employ the Beneficiary as a caregiver. It requested his classification as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director, Nebraska Service Center, denied the petition on September 11, 2009. The Director found that the offered position did not qualify for classification as a skilled worker because the minimum requirements were a high school education and no experience. We dismissed the Petitioner's appeal on February 27, 2013, affirming the Director's decision that the job opportunity does not require a skilled worker.

The matter is now before us on the Petitioner's motions to reopen and reconsider.<sup>1</sup> The Petitioner asserts a claim of ineffective assistance of counsel and submits evidence that its prior attorney requested the wrong classification on the Form I-140, Immigrant Petition for Alien Worker. Because the filings are untimely, we will deny the motion to reopen and the motion to reconsider.

Motions must generally be filed within 33 days of decisions served by mail. 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b). But we may excuse an untimely motion to reopen "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." *Id.*

In the instant case, we received the Petitioner's motions on November 16, 2015, more than 2 years after we mailed our appellate decision. The motions are therefore untimely.

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<sup>1</sup> The Form I-290B, Notice of Appeal or Motion, submitted by the Petitioner contains two copies of Page 2: one identifying the filing as an appeal; and the other indicating the filing of motions to reopen and reconsider. Because we cannot exercise appellate jurisdiction over our own decisions, we will not consider the filing as an appeal. *See* former 8 C.F.R. § 103.1(f)(3)(iii)(B); Dep't of Homeland Sec. Delegation No. 0150.1, § II. U. (effective Feb. 28, 2003) (delegating appellate jurisdiction to us over only the matters described in the former regulation).

The Petitioner's motions include a June 8, 2015, letter from its prior counsel. The letter states that the attorney "inadvertently" indicated on the Form I-140 that the Petitioner sought the Beneficiary's classification as a skilled worker, rather than as an unskilled worker. See section 203(b)(3)(iii) of the Act (allocating immigrant visas for "other workers" capable of performing unskilled labor for which qualified workers are unavailable in the United States). In a joint letter of October 27, 2015, the Petitioner's director and the Beneficiary state that they obtained the letter from prior counsel "[a]fter months of trying to locate and contact [him]."

The record does not demonstrate that the delay in the Petitioner's motion to reopen was reasonable and beyond its control. Although the Petitioner's director and the Beneficiary state that they spent months trying to locate prior counsel, the record indicates that the Petitioner could have perfected its claim of ineffective assistance of counsel sooner.

The Petitioner first raised its claim of ineffective assistance of counsel in its appeal of October 8, 2009. Our appellate decision of February 27, 2013 informed the Petitioner that, in bringing its claim, it did not satisfy case law requirements. See *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (holding that a motion based on a claim of ineffective assistance of counsel must generally include: an affidavit detailing the representation agreement with former counsel; evidence that former counsel was informed of the allegations and allowed an opportunity to respond to them; and an indication whether a complaint was filed with appropriate attorney disciplinary authorities and, if not, why not).

The record on motion does not specify or document the number of "months" the Petitioner's director and the Beneficiary spent locating prior counsel. The record therefore does not establish that the motion's filing delay of more than 6 years from the date that the Petitioner discovered former's counsel error and more than 2 years from the date of our appellate decision was reasonable. In addition, prior counsel's letter is dated June 8, 2015, suggesting that the Petitioner unreasonably delayed the submission of its November 2015 filing even from the date it obtained prior counsel's response.

The record does not establish that the Petitioner's delay in filing its motion to reopen was reasonable and beyond its control pursuant to 8 C.F.R. § 103.5(a)(1)(i). We therefore decline to excuse the delay. We will therefore deny the motions to reconsider and reopen as untimely.

Even if we accepted the filing as an untimely motion to reopen, the record would not establish the petition's approvability. The Petitioner has not complied with all of *Lozada's* requirements for a motion based on a claim of ineffective assistance of counsel. The record indicates that the Petitioner informed former counsel of the allegations and provided him an opportunity to respond. But the Petitioner did not submit an affidavit detailing its representation agreement with former counsel, nor did it indicate whether it filed a complaint against him with appropriate disciplinary authorities. See *Lozada*, 19 I&N Dec. at 639.

Also, as noted in our decision and the Director's, the record does not establish the Petitioner's ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence).

As a sole proprietor, the Petitioner's director relied on his individual income and assets to demonstrate his ability to pay the proffered wage. But the record does not sufficiently detail his household expenses to establish his simultaneous ability to pay the proffered wage and to support himself and his dependent daughter. See *Ubeda v. Palmer*, 539 F. Supp. 647, 649 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) (holding that a sole proprietor did not establish his ability to pay where his net taxable income was insufficient to cover the proffered wage and to support himself, his spouse, and their five children).

The Petitioner's director submitted copies of bills he received in individual months. But the record does not indicate some of his basic living expenses, such as food, clothing, and electricity, and does not state his total annual expenses or his average monthly expenses. The record also lacks evidence of the Petitioner's ability to pay in the years since it responded to the Director's request for evidence in March 2009. See 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its "continuing" ability to pay a proffered wage "until a beneficiary obtains lawful permanent residence").

In addition, online government records indicate the formation of a corporation with the Petitioner's name and address on July 26, 2010. See Cal. Sec'y of State, Bus. Programs, "Business Search," at <http://kepler.sos.ca.gov/> (accessed Apr. 11, 2016). The corporation's formation suggests that the petitioning sole proprietorship no longer exists and that a separate corporation operates its former business. Unless the corporation establishes itself as the sole proprietorship's "successor in interest," see *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 451, 452-53 (Comm'r 1986), the petition may be moot because the Petitioner no longer exists. See *Matter of Luis*, 22 I&N Dec. 747, 753 (BIA 1999) (explaining that an administrative tribunal may dismiss an appeal or motion as moot as a matter of prudence); see also 8 C.F.R. § 205.1(a)(3)(iii) (stating the automatic revocation of an employment-based petition "[u]pon termination of the employer's business").

In any future filings in this matter, the Petitioner must demonstrate that the petitioning sole proprietorship continues to operate the business or, pursuant to *Dial Auto*, document the existence of a successor in interest.

The motions to reopen and reconsider are untimely. Because the record does not demonstrate that the delay in filing the motion to reopen was reasonable and beyond the Petitioner's control, we decline to excuse the delay. We will therefore deny the motions.

The petition will remain denied for the reasons stated above. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

*Matter of E-G-H-*

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of E-G-H-*, ID# 17864 (AAO July 22, 2016)