



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **APR 09 2013** Office: CALIFORNIA SERVICE CENTER

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

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent. The matter is now before the AAO on a motion to reopen. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a minister at a church in Irving, Texas. The director determined that the petitioner failed to complete the required employer attestation and failed to establish that the beneficiary will be working in a qualifying position. The director additionally found that the petitioner failed to establish how it intends to compensate the beneficiary and that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing of the petition. The AAO, in its August 13, 2012 decision, agreed with the director's determinations.

On motion, the petitioner submits a brief and letter from the petitioner, a copy of the petitioner's bylaws, a program from the funeral of [REDACTED], a letter from [REDACTED] regarding a checking account opened by the petitioner on May 18, 2012, an account activity statement from [REDACTED] for August 2012, copies of checks issued to the beneficiary during 2012, a weekly schedule signed by the petitioner, copies of two church fliers from 2005 and 2007, copies of lease agreements, a new Form I-360 petition, and copies of documents previously submitted on appeal.

The petitioner's motion to reopen is based on a claim of ineffective assistance of counsel related to the petitioner's former counsel, [REDACTED]. When a motion to reopen is based on a claim of ineffective assistance of counsel, it requires the alien claiming such ineffectiveness to comply with the requirements set forth by the BIA in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The *Lozada* decision requires the submission of:

1. An affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in that regard;
2. Proof that the alien notified former counsel of the allegations in the ineffective assistance of counsel claim and allowed counsel an opportunity to respond; and
3. If a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien has filed a complaint with the disciplinary authority regarding counsel's conduct or, if a complaint was not filed, an explanation for not doing so.

*Matter of Lozada*, 19 I&N at 639.

On motion, the AAO will only consider arguments and evidence relating to the grounds underlying the AAO's most recent decision. In the decision dismissing the petitioner's appeal, the AAO specifically and thoroughly discussed the record before the director as well as the evidence and arguments presented on appeal. The AAO found that, on appeal, the petitioner had failed to

overcome each of the grounds for dismissal discussed by the director. As the petitioner was not represented on appeal by [REDACTED] but by a different attorney, [REDACTED], it is not clear how the claim of ineffective representation by [REDACTED] addresses the AAO's decision.

Furthermore, the requirements of *Matter of Lozada* have not been met. The petitioner asserts on motion that omissions of relevant evidence at the time of filing the petition and in response to a subsequent request for evidence were due to the "negligence" and "ineffectiveness" of [REDACTED]. However, none of the evidence submitted on motion sets forth the details of the petitioner's agreement with former counsel and how he failed to uphold his portion of the agreement. As a result, the petitioner has failed to comply with *Matter of Lozada*'s first requirement. Regarding the second and third requirements, the petitioner asserts that it "contemplated filing a grievance against the attorney" but could not do so because the petitioner was unable to locate the attorney until learning that he had died on June 28, 2012. The petitioner submits a copy of a program from [REDACTED] funeral service. However, no documentary evidence has been submitted in support of the petitioner's purported attempts to contact or locate [REDACTED] to notify him of the allegations against him. 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'l Comm'r 1972)). Additionally, no explanation has been provided as to how the inability to locate [REDACTED] prevented the petitioner from filing a complaint with the relevant disciplinary authority. Finally, it is not clear that the outcome of the petitioner's appeal was affected by [REDACTED] alleged misconduct. As the petitioner was represented by new counsel on appeal, [REDACTED] purported omissions of evidence do not account for the petitioner's failure to overcome the grounds for dismissal.

For the reasons discussed above, the AAO finds that counsel has not complied with *Matter of Lozada* or demonstrated any prejudice based upon the actions of the petitioner's former counsel in support of the motion to reopen.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup>

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). As evidence of its ability to compensate the beneficiary, the petitioner submits a letter from [REDACTED] regarding a checking account opened by the petitioner on May 18, 2012, an account activity statement from [REDACTED] for August 2012, and copies of checks issued to the beneficiary during 2012. This evidence is not

---

<sup>1</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).

relevant as a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). All of the remaining evidence submitted on motion was either previously submitted or was previously available and could have been provided on appeal. The petitioner's motion is not an opportunity for the petitioner to correct its own defects in the record. The petitioner's arguments on motion are not new facts and the evidence submitted on motion is not "new" and, therefore will not be considered a proper basis for a motion to reopen.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden. The motion to reopen will be dismissed.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

**ORDER:** The motion to reopen is dismissed, the decision of the AAO dated August 13, 2012 is affirmed, and the petition remains denied.