



U.S. Citizenship
and Immigration
Services

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DATE: JUN 28 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

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

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DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO), which remanded the petition to the director for a new decision based on revised regulations. The director again denied the petition, and the petitioner again appealed the decision to the AAO, which dismissed the appeal. The petitioner then filed a motion to reopen, which the AAO also dismissed. The matter is now before the AAO on another motion to reopen. The AAO will grant the motion and affirm the dismissal of the appeal.

The petitioner is a church belonging to the [REDACTED]

[REDACTED] 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 “Chinese Community Liaison – pastor to the Chinese Community.” The director determined that the petitioner had not established that the beneficiary had the required two years of qualifying, lawful work experience immediately preceding the filing date of the petition.

On motion, the petitioner submits a brief from counsel, affidavits from the beneficiary and an official of the petitioning church, and supporting exhibits.

The AAO’s dismissal notice of January 25, 2011 listed the prior history of the proceeding. Briefly, the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the petition’s filing date (in this instance, July 20, 2007). The USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires that qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

The beneficiary’s R-1 nonimmigrant religious worker status authorized her to work for the [REDACTED] [REDACTED] from July 2005 to November 10, 2007. At the time of that employment, the USCIS regulation at 8 C.F.R. § 214.2(r)(6) read:

Change of employers. A different or additional organizational unit of the religious denomination seeking to employ or engage the services of a religious worker admitted under this section shall file Form I-129 with the appropriate fee. . . . Any unauthorized change to a new religious organizational unit will constitute a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The record shows that the beneficiary left the [REDACTED] on April 30, 2007, and began working for the petitioner in Philadelphia on May 1, 2007, thereby violating her R-1 nonimmigrant status. The director denied the petition on March 15, 2010 on that basis.

On appeal from that decision, prior counsel claimed that the beneficiary “was, in effect, in the employ of the [REDACTED] at all applicable times.” The petitioner documented recent fund transfers in an attempt to show that [REDACTED] had reimbursed the petitioner for the

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beneficiary's salary, and that therefore the [REDACTED] retroactively became the beneficiary's employer throughout that period. Prior counsel stated that "[n]unc pro tunc relief should be recognized in this matter." In response to this argument, the AAO stated: "*nunc pro tunc* relief is a remedy for administrative or judicial error *by the government* as a means to prevent inequity or injustice. It is not a means for a petitioner, or any related private entity, to correct its own errors or retroactively change disqualifying circumstances of its own making." The AAO cited 8 C.F.R. § 103.2(b)(1), *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998), and *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which require the petitioner to establish eligibility as of the petition's filing date. The AAO also found the evidence in the record was not consistent with the petitioner's claim that it was always the intention for [REDACTED] to pay the beneficiary's salary, and that other arrangements were in place only because they were simpler.

On motion from that decision, counsel again stated that the petitioner sought *nunc pro tunc* relief. In dismissing that motion, the AAO reiterated that "*nunc pro tunc* relief is a means to remedy government error, not a means by which the petitioner could, several years after the fact, retroactively erase disqualifying violations by the beneficiary." The AAO stated that counsel had not overcome the AAO's dismissal of the appeal.

Also during that motion proceeding, [REDACTED], senior pastor of the petitioning church, stated: "We now understand that we have improperly filed petitions based on poor advice from our prior attorneys." 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 (1st Cir. 1988). The AAO found the petitioner's claims regarding "poor advice from . . . prior attorneys" did meet the *Lozada* test and that the petitioner failed to meet the requirements of a motion to reopen.

Now, on motion from the latest decision, counsel does not provide arguments and evidence relating to the AAO's most recently issued decision, rather, the petitioner submits affidavits and evidence intended to meet the *Lozada* test. On motion, the AAO will only consider arguments and evidence relating to the grounds underlying the AAO's most recent decision. The petitioner bears the burden of establishing that the AAO's dismissal of the petitioner's prior motion was itself in error. If the petitioner can demonstrate that the AAO erred by dismissing that motion, then there would be grounds to reopen this proceeding. The petitioner has not done so in this proceeding.

Regardless, even when the petitioner's present *Lozada* evidence is reviewed on motion, such evidence is insufficient to establish eligibility for an ineffective assistance of counsel claim as well as eligibility for the petition.

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The first element of a *Lozada* claim is 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. The petitioner submits four affidavits, two regarding attorney [REDACTED] and two regarding attorney [REDACTED]. Rev. [REDACTED] affidavit concerning Ms. [REDACTED] reads, in part:

The first attorney I dealt with was [REDACTED]. I never spoke to her because she was never available, but I spoke with people in her office and corresponded with her via fax. We went back and forth a number of times because the documents sent to our office contained many errors. I remember communication being difficult because of the language barrier. I never understood what I was supposed to provide and what purpose it served.

. . . [In mid-2009, the beneficiary's spouse,] Pastor [REDACTED] told me that he was very upset with the representation that he was getting from [REDACTED]. He spoke with a member of the congregation who was an attorney and they referred the family to [REDACTED].

After several attorneys, numerous requests for additional information, and denials, I met with Mr. [REDACTED] who requested 1) we file a complaint with the disciplinary committee against [REDACTED] 2) we have [the beneficiary] return the salary, benefits, and expenses we covered from May to October of 2007 (The money was returned to the [REDACTED] who, I believe, subsequently paid her), 3) we appeal all the denials.

Mr. [REDACTED] formulated his plan with the family and I provided whatever documentation they requested. . . .

We now understand that we have improperly filed petitions based on poor advice from our prior attorneys. All of the communication about these petitions did not always arrive at the church in a timely manner.

Rev. [REDACTED] does not describe the agreement between the petitioner and [REDACTED] or what representations Ms. [REDACTED] did or did not make concerning that agreement. Instead, she provides a rough chronology of events beginning in late 2007, by which time the beneficiary's disqualifying change of employment had already occurred. Rev. [REDACTED] affidavit does not meet the *Lozada* test. General complaints about poor legal representation cannot suffice in this regard.

An affidavit jointly signed by the beneficiary and her spouse reads, in part:

In May of 2007, I . . . was scheduled to be deployed to work for the [petitioner]. . . . Around the same time, the [petitioner] began the process of filing an I-360, Special

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Immigrant Religious Worker petition on [my] behalf. We hired [redacted] to represent us.

We told [redacted] that we were moving to [redacted] and wanted to proceed in a lawful manner. We asked if we needed to file an R-1 with [the petitioning church]? We were advised to just file the I-360. She told us that we didn't need to file anything other than the I-360. . . . She said, "You will get Green Cards within six months . . . before your current R-1 expires." . . .

We were not advised to file an R-1 transfer for our visas to the [petitioning church] or that we were not allowed to work at [the petitioning church] because the [redacted] was the only body authorized to be our employer.

In the meantime, RFE had been issued for the I-360 in September 2007. . . .

Ms. [redacted] eventually advised us to file an R-1 with [the petitioning church]. It was filed [on the beneficiary's behalf] on October 29, 2007 . . . [and] approved by the USCIS on November 17, 2008. . . .

In December 2007, the I-360 was denied. . . .

We were advised to file an appeal. Again, Ms. [redacted] never informed us that by going to work for [the petitioner] before our R-1s were transferred to them would cause a break in the "2 years of continuous employment" required for approval of the Special Immigrant I-360.

. . . We know that due to Ms. [redacted] advising us improperly, the I-360 petition was denied by the USCIS.

In June 2009, USCIS mailed a letter to [redacted] office. The letter said our family had to apply for adjustment of status before September 2009. The letter expressly warned that if we did not apply we would be out of status. Ms. [redacted] kept the Letter in our file and did not tell us. . . . [A]t the end of November 2009 . . . we found the letter and made a copy. We contacted her at a later date to see what else we could do. She said we weren't going to be able to get green cards and she couldn't help us anymore. Again, Ms. [redacted] did not act in our best interests.

Regarding, [redacted] second new affidavit does not contain any further information about any agreement with [redacted]. In their second affidavit on motion, the beneficiary and her spouse state:

The first thing [redacted] advised us to do was have the [petitioner] return [the beneficiary's] salary to the [redacted] and say that the [redacted]

Annual Conference actually paid her salary. He also advised us to have [the beneficiary] return the money that she received from [the petitioner] and change her tax return to show that she was paid [by] the [redacted] Annual Conference. This was the first problem. It was very elaborate and complicated for everyone involved to fix all of these documents. No one really understood what they were doing and it ultimately created a lot of suspicion in the minds of the USCIS officers when Mr. [redacted] filed an appeal for our revoked R visas on April 16, 2010. . . .

When everything that we filed and appealed was ultimately denied, Mr. [redacted] advised us to go before an Immigration Judge to plead our case. Thankfully we have friends who did not think this sounded right and we ended our relationship with Mr. [redacted].

Based on the opinions that have since been issued by the USCIS and the AAO, 1) Mr. [redacted] should have advised us to simply tell the truth; that we were poorly advised by [redacted] and because of our ignorance we did not file a request to transfer our R visas to [the petitioner] in a timely fashion. 2) He should have filed a nunc pro tunc motion to cure the time period (72 days) that we were out of status. 3) He should have checked the correct box on our I-485 Motion.

In the new affidavits, the beneficiary provides more detail than Rev. [redacted] does. Rev. [redacted], speaking for the petitioner, provides very little information about what either Ms. [redacted] or Mr. [redacted] agreed to do, or how they failed to live up to those agreements.

The second element of the *Lozada* test is that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond. The petitioner's motion includes copies of identically-worded letters addressed to Ms. [redacted] and to Mr. [redacted] referring them to the "attached Affidavits" and stating: "Our Clients are alleging that you and your Office provided ineffective assistance that has in turn seriously and irreparably jeopardized their case." The letters are dated May 8, 2012, the same day the petitioner mailed its motion. The record contains no response from either Ms. [redacted] or Mr. [redacted].

The petitioner has satisfied this element of the *Lozada* test.

The third and final element of a *Lozada* claim is 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. An exhibit list submitted on motion refers to a "Letter dated March 29, 2010 addressed to the Disciplinary Committee for the First Department seeking disciplinary action against Attorney [redacted]." The record does not contain a letter matching that description.

Counsel states:

Since Attorney [REDACTED] is currently in a Court imposed reporting period following a recommendation by the Court's Committee on Attorney Admissions and Grievances, we have not (as of yet) filed a complaint with the State Bar Association. However, copies of the Affidavits have been mailed to the Court using certified mail, return receipt requested.

As far as Attorney [REDACTED], any complaint will follow the period to respond to the allegations being made by our clients in this matter.

When the petitioner filed its latest motion, it had not complied with the third element of a *Lozada* claim of ineffective assistance of counsel. Rather, the petitioner, through counsel, declared an intention to meet that requirement at an unspecified future date. While the regulation at 8 C.F.R. § 103.3(a)(2)(vii) permits the petitioner to supplement an appeal after filing it, there is no parallel provision for motions to reopen. The motion must, therefore, be complete at the time of filing. Therefore, the petitioner has not presented a complete *Lozada* claim.

The petitioner submits evidence that the United States Court of Appeals, Second Circuit, publicly reprimanded [REDACTED] on November 22, 2011 for negligence, failure to exhaust administrative remedies, and other instances of "conduct unbecoming a member of the bar." Although duly noted, this evidence does not relate to Ms. [REDACTED] conduct in the present proceeding.

For the above reasons, the petitioner has not met the requirements of the *Lozada* test. Furthermore, even if the petitioner had presented a complete *Lozada* claim of ineffective assistance of counsel, the petitioner is not entitled to a reversal of the decision simply by meeting the *Lozada* requirements.

[I]neffective assistance of counsel . . . is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986); *Lopez v. INS*, 775 F.2d 1015 9th Cir. 1985); *see also Magallanes-Damian v. INS, supra* (alien must show not merely ineffective assistance of counsel, but assistance which is so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause). . . .

Litigants are generally bound by the conduct of their attorneys, absent egregious circumstances. *LeBlanc v. INS*, 715 F.2d 685 (1st Cir. 1983).

Matter of Lozada, 19 I&N Dec. 637-38.

In this instance, [REDACTED] did not present a false or misleading claim without the knowledge of his clients. Rather, [REDACTED] officials prepared and filed financial and tax documents in furtherance of a specific, material claim that the petitioner now disowns and which the beneficiary now admits was

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something other than “the truth.” The preparation and submission of these documents goes beyond the attorney’s own conduct. The petitioner, by signing the Form I-360 petition, certified under penalty of perjury that the information submitted in support of the petition was true and correct. The petitioner cannot release itself from that obligation simply by asserting that it, and/or related entities, created and submitted false or misleading information only at the urging of the petitioner’s attorney. *Lozada* encompasses prejudicial conduct by the attorney; it does not excuse the conduct of the petitioner, the beneficiary, or any third parties that occurred during the attorney’s involvement with the proceeding.

For the reasons discussed above, the petitioner’s *Lozada* claim of ineffective assistance of counsel does not establish that the director should have approved the petition or that the beneficiary is eligible for the benefit sought.

As stated above, *nunc pro tunc* relief is a means to remedy government error, not a means for parties seeking benefits to remedy past errors or deficiencies. On motion, counsel does not challenge this conclusion. Instead, counsel states:

In earlier describing the relief we were seeking as Nunc Pro Tunc (literally, now for then), we may have inadvertently confused with an earlier claim made by prior counsel. It is true that this relief has primarily been used as a means of rectifying error in immigration proceedings. However, the regulations at 8 C.F.R. § 214.1(c)(4) afford a Nunc Pro Tunc *like* relief in the regulations where it is demonstrated at the time of filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
- (ii) The alien has not otherwise violated his or her nonimmigrant status;
- (iii) The alien remains a bona fide nonimmigrant; and
- (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 [of the Act.]

In this case . . . , the delay in filing was not intentional and beyond the control of the Petitioner. Beneficiary had also not otherwise violated her status. At the time of filing, Beneficiary was not in removal proceedings.

The regulation at 8 C.F.R. § 214.1(c)(4) relates to nonimmigrant petitions, not immigrant petitions. Counsel appears to refer to a Form I-129 nonimmigrant petition that the petitioner filed on the beneficiary’s behalf on February 24, 2011. At the time, counsel referred to the petition as a “request for ‘nunc pro tunc’ change of employment status,” and asserted: “The instant Petition should be treated as having been filed on or about May 1, 2007.” The present decision is not an attempt to reach the merits of the Form I-129 nonimmigrant petition, but it is relevant to discuss that petition insofar as counsel cites it as a basis for the motion under consideration here.

The petition sought to classify the beneficiary as an R-1 nonimmigrant religious worker from May 1, 2007 to October 28, 2007, but the petitioner did not file the nonimmigrant petition until more than three years after that period. The explanation offered for this delay is a claim of poor legal advice, and counsel has not shown that poor legal advice amounts to “extraordinary circumstances beyond the control of the petitioner.” Furthermore, the regulation at 8 C.F.R. § 214.1(c)(4)(i) applies only if USCIS “finds the delay commensurate with the circumstances.” Here, there has been no such finding, for reasons explained in earlier decisions.

Furthermore, counsel fails to quote the first part of the regulation cited above, which indicates the circumstances under which the four quoted clauses apply:

An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired.

Thus, failure to maintain status is grounds for denial of extension of stay, except under limited circumstances. The four cited clauses in the regulation at 8 C.F.R. § 214.1(c) apply only under those limited circumstances, specifically when the petitioner “fail[ed] to file [for extension of stay] before the previously authorized status expired.” They do not apply to instances in which the nonimmigrant alien failed to maintain status through a disqualifying event that took place during the period previously authorized. As explained in the AAO’s prior decision on motion:

. . . the beneficiary’s R-1 status did not expire owing to the untimely filing of an application for extension of stay. Rather, the beneficiary made an unauthorized change of employment several months before her R-1 nonimmigrant status was due to expire, and thereby did violate her nonimmigrant status in a manner unrelated to the expiration of that status.

Counsel has not established that the provisions of 8 C.F.R. § 214.1(c)(4) amount to “Nunc Pro Tunc like relief” to allow a new employer to retroactively seek authorization for disqualifying employment that has already taken place.

The petitioner’s new evidence does not establish the beneficiary’s eligibility for the benefit sought, or show that USCIS should have approved the petition. Counsel reiterates claims already made and addressed in prior decisions. The AAO will therefore affirm its prior decision.

ORDER: The AAO’s decision of April 9, 2012 is affirmed. The petition remains denied.