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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



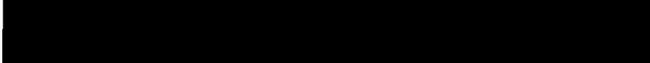
U.S. Citizenship
and Immigration
Services

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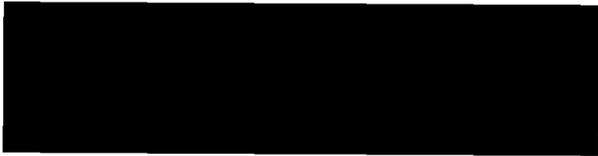
Date: **DEC 19 2011**

Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Nonimmigrant Petition for Religious Worker Pursuant to Section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1)

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motions will be dismissed.

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). 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 (USCIS) policy. 8 C.F.R. § 103.5(a)(3).

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.

A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. Rather, the “additional legal arguments” that may be raised in a motion to reconsider should flow from new law or a de novo legal determination reached in the decision that may not have been addressed by the party. Further a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

The director determined that the petitioner had not established how it would compensate the beneficiary. Counsel asserts that the petition should be reconsidered because the director’s decision was based on regulations no longer in effect at the time the decision was made. As indicated in the AAO’s previous decision, the AAO reviews cases on a *de novo* basis. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Given the AAO’s *de novo* review, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner had the opportunity to supplement the record on motion after notice of the AAO’s decision but failed to provide any further documentary evidence regarding the petitioner’s compensation of the beneficiary. It would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Counsel also argues that the petition should be reopened based on ineffective assistance of counsel. Counsel alleges that prior counsel abandoned the petition prior to the completion of the

immigration petition process “effectively leaving the petition to proceed with its own case process.” Counsel further argues:

██████████ affidavit [] shows that even before he abandoned the case, prior counsel’s assistance was at best, inadequate. . . . ██████████ description of the process by which USCIS’s requests for additional evidence were handled makes the point clear. [] When requests for additional evidence were received, rather than address the requests himself, as was the petitioner’s expectation, prior counsel would simply forward the requests to the petitioner with instructions on how they themselves should respond. [] Thus, prior counsel was apparently not active in the process of collecting and reviewing the evidence submitted.

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).

Citing *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006), counsel asserts that the petitioner is not required to satisfy all three requirements of *Lozada*. However, *Barry* provides that the petitioner must substantially comply with the provisions of *Lozada*. The AAO does not find that meeting only one element of *Lozada* constitutes substantial compliance.

Regarding the first *Lozada* requirement, the petitioner, through its ██████████ submits an affidavit in which he states that prior counsel advised the petitioner that he was leaving and was transferring its case to his partner. The partner confirmed that he had received the case. This is far from prior counsel abandoning the case, as counsel alleges. Moreover, the statement does not address the agreement that the petitioner had with prior counsel with respect to what actions prior counsel agreed to take in the petitioner’s case. In fact, counsel acknowledges in his brief that “the petitioner did not sign a retainer agreement with prior counsel.”

Regarding the second and third prongs of *Lozada*, counsel states that the petitioner failed to contact prior counsel because the petitioner believes that prior counsel “may still be travelling outside the country.” ██████████ however, offers no such statement in his affidavit. In fact, the affidavit does not address the issue of the petitioner’s attempt at contacting prior counsel and the petitioner’s knowledge or lack thereof of prior counsel’s whereabouts. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The petitioner has provided no support or documentation to demonstrate any agreement made with prior counsel and failed to provide any indication that prior counsel is aware of the charge of ineffective assistance, either through notification by the petitioner or through a complaint filed with the appropriate disciplinary authorities, and has been given an opportunity to address the petitioner's claims. The petitioner's allegation that although it was represented by prior counsel, it prepared the documentation and responded to USCIS, is not sufficient in and of itself to establish ineffective assistance of counsel.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motions will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motions are dismissed. The AAO's December 22, 2010 decision is affirmed, and the petition remains denied.