

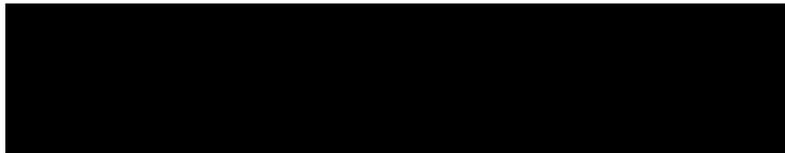
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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



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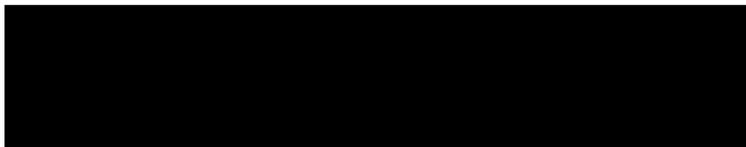
FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

MAR 09 2011

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

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

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) summarily dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen. The AAO will dismiss the motion.

The petitioner is a church that seeks to classify the beneficiary as a nonimmigrant religious worker under section 101(a)(15)(R)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(R)(1), to perform services as a pastor. The director determined that an authorized church official did not sign the petition, and that therefore the petition was not properly filed. The AAO summarily dismissed the appeal because it included no supporting evidence or arguments.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.5(a)(2) states that a motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Attorney [REDACTED] signed the Form I-290B Notice of Appeal or Motion. She submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative, indicating that she represents the beneficiary. The beneficiary, however, is not an affected party with standing in this proceeding. See 8 C.F.R. § 103.3(a)(1)(iii)(B). It is clear from the regulations at 8 C.F.R. §§ 103.5(a)(1)(i) and (iii)(A) that only an affected party may file a motion. Because the beneficiary is not an affected party, and Ms. Rost has not shown that she represents the petitioner, we cannot accept, and must dismiss, the motion.

In the alternative, the motion would not prevail on its merits, as we shall discuss below.

The beneficiary held R-1 nonimmigrant religious worker status, valid from August 23, 2005 to August 23, 2007. As that status neared expiration, [REDACTED] identified as pastor of the petitioning church, electronically filed the Form I-129 petition on August 22, 2007 in order to extend the beneficiary's stay as an R-1 nonimmigrant. [REDACTED] of [REDACTED] prepared the petition form. The USCIS regulation at 8 C.F.R. § 214.2(r)(5) then in effect required an authorized official of the organizational unit to attest to the worker's continuing eligibility for classification as an R-1 nonimmigrant.

A USCIS officer visited the church on July 9, 2008, seeking to verify the information in the petition. The officer spoke to the church treasurer, [REDACTED], and learned that [REDACTED] (actually a volunteer assistant pastor) had no hiring authority, and no authority to sign the petition on the church's behalf.

The director denied the petition on February 2, 2009, stating:

The signatory of the petition does not have the authority to petition [for] a pastor as he is not among the decision making board members. The church intends to employ the beneficiary, but a church representative with authority must sign the petition. . . . The signatory of the petition does not have the authority to sign the petition without the prior

consent of the denomination's regional headquarters . . . and therefore, does not have the right to file the petition. As such the petition is invalid.

By finding that the petition was not properly filed, the director could have rejected the petition outright under 8 C.F.R. § 103.2(a)(7)(i). The director chose, instead, to deny the petition.

The petitioner, through its attorney of record, [REDACTED] filed a timely appeal on March 4, 2009. The AAO summarily dismissed the appeal on July 1, 2010, stating:

The U.S. Citizenship and Immigration Services regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part, “[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.”

On the Form I-290B Notice of Appeal, filed on March 4, 2009, counsel indicated that a brief would be forthcoming within thirty days. The appeal contains no substantive discussion of the proceeding, only the assertion that the petitioner will submit a brief. To date, over 15 months later, careful review of the record reveals no subsequent submission; all other documentation in the record predates the issuance of the notice of decision.

[REDACTED], on the beneficiary's behalf, filed the present motion to reopen on August 2, 2010. On motion, [REDACTED] does not claim that the director or the AAO made incorrect decisions based on the evidence available to them at the time of their respective decisions. Instead, Ms. [REDACTED] states:

Petitioner and respondent received ineffective assistance of counsel from their prior legal representative, [REDACTED] in [REDACTED]. Based on this fact, they request that the USCIS reopen their case and given [*sic*] an opportunity to submit another R visa application signed by a member of the Church authorized to do so.

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), reaffirmed in *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009).

[REDACTED] on motion, claims that the “motion meets the requirements set out in *Matter of Lozada*,” but provides no evidence of the filing of a complaint against the prior attorney. Instead, [REDACTED] cites

Rojas-Garcia v. Ashcroft, 339 F.3d 814, 824-828 (9th Cir. 2003), in which “the Ninth Circuit Court of Appeals held that where the administrative record demonstrates the legitimacy of the ineffective assistance claim, and where substantial compliance with *Lozada* can be shown, it is not necessary to submit affidavits or a complaint to the State Bar.” Here, however, [REDACTED] has not shown “substantial compliance with [REDACTED].” The record does not contain any evidence relating to the second *Lozada* prong, requiring that the party claiming ineffective assistance notify the attorney so accused. [REDACTED] does not explain how the movant meets this requirement.

The motion includes an affidavit from the beneficiary, claiming difficulty in contacting [REDACTED] (the beneficiary never names [REDACTED]). An affidavit from the aggrieved respondent falls under the first [REDACTED] prong, not the second. Also, as we have already noted, the beneficiary is not the affected party in this proceeding, and has no standing to contest the denial of the petition. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). The beneficiary’s affidavit, therefore, does not satisfy the first [REDACTED] prong. The regulation at 8 C.F.R. § 214.2(m)(5) does not permit an alien to self-petition for extension of stay as an R-1 nonimmigrant religious worker. Therefore, we cannot give much weight to the beneficiary’s complaint that the attorney did not present the petition for his approval before filing it. The attorney may have erred by pursuing such a filing at the request of the beneficiary rather than the employer, but the beneficiary’s attempt to pursue a benefit that he was in no position to request does not require us to proceed as though the employer had been the one filing the petition.

In *Rojas-Garcia*, the Court found that “[t]he second *Lozada* requirement was fully satisfied” because the accused attorney had “admitted to his own mistake in the motion for reconsideration and his accompanying declaration.” *Id.* at 825. The present motion includes no comparable admission from either [REDACTED] or [REDACTED]. The movant has not established compliance, either actual or substantial, with any of three [REDACTED] requirements. [REDACTED] has simply claimed, supported only by the beneficiary’s affidavit, that [REDACTED] was incompetent or negligent, and therefore we should disregard procedural issues that date back all the way to the filing of the petition. [REDACTED] does not mention attorney Max [REDACTED], who prepared and filed the appeal. [REDACTED] refers only to [REDACTED] and “[REDACTED] office.”

[REDACTED] claims: “In *Escobar-Grijalva v. INS*, the Ninth Circuit Court also held that [REDACTED] requirements need not be followed where the administrative record demonstrates ineffective assistance of counsel. *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1334-35 (9th Cir. 2000).” That decision, however, describes a set of facts very different from the present proceeding, including an attorney (named [REDACTED]) who had entered the case as an ill-prepared, last-minute substitute for the previous attorney of record:

The Board’s reasonable rules for the normal ineffective assistance claim are not dispositive here. The facts are plain on the face of the administrative record – no need of an affidavit to establish them. Frost himself was not [REDACTED] counsel, nor was she his client – no need to give him a chance to defend himself or to give the bar an opportunity to discipline him. What is puzzling is that anyone concerned with the high standards expected of the immigration bar should indulge the illusion that [REDACTED] could have functioned as counsel for [REDACTED].

To call Frost her lawyer and Escobar his client mocks the meaning of what a lawyer is – a counselor and advocate knowledgeable of the matters on which he or she provides counsel and of the cause he or she represents.

Id. at 1335. ██████████ has not established that ineffective assistance of counsel is self-evident from the record in this proceeding. ██████████ repeatedly claims that ██████████ must have known that ██████████ was not authorized to sign petition forms, but provides no evidence to support the claim that ██████████ knowingly and deliberately mishandled the petition. 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 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). Even if ██████████ had shown that she is the petitioner's attorney of record, the unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With respect to the lack of an appellate brief, the record does not disclose the circumstances underlying that omission. ██████████ maintains that "this appeal was never perfected, the lawyer being well aware of the fact that he had the wrong person sign the authorization to begin with." Deliberate dereliction of responsibility is not the only possible explanation for the failure to file a brief. It may be, for instance, that the petitioner stopped paying fees to ██████████, at which point that firm's attorneys would have understandably ceased to render services to the petitioner. We do not claim to know that this is the case. The point is simply that the lack of an appellate brief is not self-evident proof of ineffective assistance of counsel that would make the ██████████ test moot.

Regarding ██████████ statement that the petitioner seeks "an opportunity to submit another R visa application," the petitioner is free to file a new petition on the beneficiary's behalf, if it so chooses. We make no representations as to the outcome of that petition. But we will not hold that the August 22, 2007 filing date should attach to that filing.

The motion rests entirely on ██████████ claim. Because the movant has not met any of the requirements for such a claim, and has not persuasively shown that those requirements do not apply in this proceeding, the motion is without foundation. Therefore, even if the petitioner had properly filed the motion (which is not the case), we would have dismissed the motion because it does not meet the applicable requirements.

ORDER: The motion is dismissed.