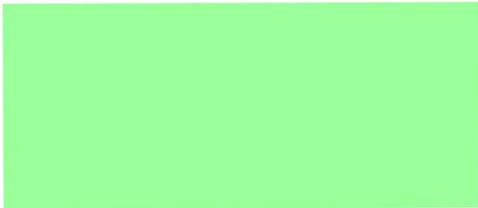




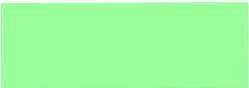
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **JAN 13 2015**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

PETITIONER: 

PETITION:

Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:

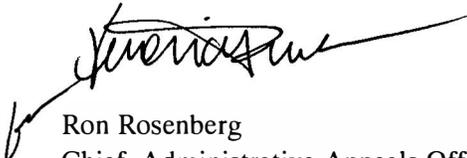


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed the subsequent appeal and motion to reopen and reconsider. The matter is again before the AAO on a motion to reopen. The motion will be granted. The appeal will be dismissed and the underlying petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity. The director denied the Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), on October 24, 2012, because the petitioner did not submit a properly executed Form I-918 Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B) with the petition. The petitioner filed a timely appeal, which was dismissed on October 25, 2013, as the petitioner did not comply with the regulation at 8 C.F.R. § 214.14(c)(2)(i) requiring the Form I-918 Supplement B to be executed by the certifying official within the six months immediately preceding the filing of the Form I-918 U petition. The petitioner's subsequent motion to reopen and reconsider was also denied on May 8, 2014, as the petitioner had not demonstrated that the failure to submit a properly executed certification was due to ineffective assistance of counsel and the AAO lacked the authority to disregard the regulatory requirements for the Form I-918 Supplement B. The petitioner has now filed a second motion to reopen with the AAO.

On motion, the petitioner asserts that she has satisfied the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), to demonstrate that the failure to file her petition within six months of the certifying official's execution of the Form I-918 Supplement B was due to ineffective assistance of counsel. The petitioner further asserts that, in the absence of clear Congressional intent otherwise, the six-month filing requirement is "non-jurisdictional" in nature and may be equitably tolled in this instance, given the ineffective assistance of the petitioner's former counsel. The petitioner submits a brief and additional documentary evidence in support of her claim. The petitioner has met the requirements for a motion to reopen pursuant to 8 C.F.R. § 103.5(a), and consequently, the motion will be granted.

Applicable Law

Section 101(a)(15)(U) of the Act, 8 U.S.C. § 1101(a)(15)(U), provides U nonimmigrant classification to alien victims of certain qualifying criminal activity and their qualifying family members. Section 214(p)(1) of the Act, 8 U.S.C. § 1184(p)(1) states:

The petition filed by an alien under section 101(a)(15)(U)(i) shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 101(a)(15)(U)(iii). This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity described in section 101(a)(15)(U)(iii).

Regarding the application procedures for U nonimmigrant classification, the regulation at 8 C.F.R. § 214.14(c) states, in pertinent part:

(2) *Initial evidence.* Form I-918 must include the following initial evidence:

- (i) Form I-918, Supplement B, "U Nonimmigrant Status Certification," signed by a certifying official within the six months immediately preceding the filing of Form I-918[.]

The regulation at 8 C.F.R. § 214.14(c)(4), prescribes the evidentiary standards and burden of proof in these proceedings:

The burden shall be on the petitioner to demonstrate eligibility for U-1 nonimmigrant status. The petitioner may submit any credible evidence relating to his or her Form I-918 for consideration by [U.S. Citizenship and Immigration Services (USCIS)]. USCIS shall conduct a *de novo* review of all evidence submitted in connection with Form I-918 and may investigate any aspect of the petition. Evidence previously submitted for this or other immigration benefit or relief may be used by USCIS in evaluating the eligibility of a petitioner for U-1 nonimmigrant status. However, USCIS will not be bound by its previous factual determinations. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including Form I-918, Supplement B, "U Nonimmigrant Status Certification."

Facts and Procedural History

The petitioner is a native and citizen of Guatemala who claims to have entered the United States in September, 1985, without admission, inspection or parole. The petitioner filed the instant Form I-918 U petition on November 17, 2011, along with a Form I-918 Supplement B, dated May 13, 2011.¹ The director issued a Request for Evidence (RFE), notifying the petitioner that the Form I-918 Supplement B was signed more than six months immediately preceding the filing of the petition and requesting an updated or newly issued certification from the certifying official. The petitioner was unable to obtain a new or updated Form I-918 Supplement B from the certifying official. The director subsequently denied the petition because the Form I-918 Supplement B was not signed within the six months immediately preceding the filing of the petition. As discussed, the petitioner's appeal and subsequent motion to reopen and reconsider were dismissed. The petitioner has now filed a second motion to reopen.

Analysis

We review these proceedings *de novo*. A full review of the record, including the evidence submitted on appeal, fails to establish the petitioner's eligibility. The petitioner's assertions and evidence submitted on motion do not overcome the stated grounds for the denial in this matter, and thus, the underlying petition will remain denied for the following reasons.

¹ The certifying official signed the Form I-918 Supplement six months and four days prior to the filing of the petitioner's Form I-918 U petition.

The submission of a Form I-918 Supplement B is required by statute at section 214(p)(1) of the Act (“The petition filed by an alien under section 101(a)(15)(U)(i) shall contain a certification . . .”). Although there is no statutory filing deadline for a Form I-918 U petition, the regulation at 8 C.F.R. § 214.14(c)(2)(i) requires that when such a petition is filed, it “must include” as initial evidence a Form I-918 Supplement B “signed by a certifying official within the six months immediately preceding the filing of Form I-918.” The petitioner here filed the Form I-918 U petition more than six months after the certifying official signed the Form I-918 Supplement B on May 13, 2011. Consequently, the certification does not comply with the regulatory requirements for a certification and the petitioner’s Form I-918 U petition was denied. 8 C.F.R. § 214.14(c)(2)(i).

On motion, the petitioner asserts that, but for the ineffective assistance of prior counsel, her Form I-918 U petition would have been filed within six months after the certifying official signed the certification in this matter, in compliance with the regulations. A claim based upon 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 entered into with counsel with respect to the actions to be taken and the representations made or not made by counsel in this regard; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond; and (3) that the appeal or motion reflect whether a complaint has been filed with the appropriate disciplinary authorities where counsel’s actions involved a violation of ethical or legal responsibilities, and if not, why not. See *Lozada*, 19 I&N Dec. at 639.

The petitioner has not properly articulated a claim for ineffective assistance of counsel under the requirements set forth in *Matter of Lozada*. In support of her ineffective assistance claim, the petitioner submits a personal statement and a statement from prior counsel.² Both statements are brief and provide no detail as to the agreement entered into between the parties and what representations were made. The petitioner states only that she gave her former counsel all the paperwork for her U petition in a timely manner and that she has no idea why the filing of the petition was delayed. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Further, the petitioner’s statement here does not reflect whether or not she attempted to file a complaint with appropriate disciplinary authorities against her former counsel, and if not, why not. Counsel asserts on brief that no complaint was ever filed with the appropriate disciplinary authorities because the facts surrounding the filing of the petition are unclear. However, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988). Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Relying on case law arising out of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), the petitioner contends that strict adherence *Lozada* is not required where the record clearly reflects the ineffective assistance of counsel. See *Castillo-Perez v. INA*, 212 F.3d 518, 525-27 (9th Cir. 2000). The petitioner’s reliance on *Castillo-Perez* is misplaced, as this matter arises in the jurisdiction of the Court of Appeals for the Fifth Circuit, which explicitly declined to follow the Ninth Circuit’s interpretation of the

² The record indicates that former counsel was also affiliated with the same law firm that currently represents the petitioner.

Lozada requirements. See *Hernandez-Ortez v. Holder*, 741 F.3d 644, 647 (5th Cir. 2014) (rejecting the petitioner's contention there that strict adherence to *Lozada* requirements were not necessary).

Further, even if the petitioner established that the delay in filing the Form I-918 U petition was due to ineffective assistance of former counsel, her appeal would still fail. On motion, the petitioner again asserts that the regulatory requirement to file the U petition within the six months immediately after the certifying official's signature on the Form I-918 Supplement B should be considered a "non-jurisdictional" requirement, which USCIS or the AAO may equitably toll in the exercise of our authority, given the ineffective assistance of her former counsel. The petitioner cites various federal cases and an administrative case from the Board of Alien Labor Certification Appeals (BALCA) for the proposition that the six-month limitation at issue here should be treated as non-jurisdictional and subject to equitable tolling because Congress has not given a clear statement to the contrary. See Petitioner's Brief at 3-5 (citing *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817, 184 L.Ed.2d 627 (2013); *Matter of Madeleine S. Bloom*, 88 INA 152, 1989 WL 250369 (Bd.Alien Lab.Cert.App. 1989)). The petitioner is mistaken on her reliance on the cited cases. In *Sebelius*, the Supreme Court found that a 180-day limit imposed under a provision of the Medicare statute for health care providers to file an administrative appeal was not jurisdictional, but regardless, was not subject to equitable tolling, because the implementing regulation for the Medicare provision required the dismissal of an appeal filed beyond the 180-day limit and there was no showing that this regulation was "arbitrary, capricious, or manifestly contrary to statute." See 133 S. Ct. at 826 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Thus, even if the regulatory six-month filing requirement at issue here is not jurisdictional in nature as the petitioner contends, the petitioner has not shown that the regulation imposing the time requirement is arbitrary, capricious or manifestly contrary to the statute it implements, such that it should be tolled.

The petitioner's assertion in favor of equitable tolling is also not supported by *Matter of Madeleine S. Bloom*, in which the BALCA court concluded that the failure to file a timely rebuttal may be excused absent a specific intent to treat regulatory filing deadlines as jurisdictional and not waivable. 1989 WL 250369 at *4. As an initial matter, the decision of the BALCA court is not binding on USCIS or the AAO. Moreover, the administrative court there specifically limited its holding to rare instances where failing to toll regulatory deadlines would result in manifest injustice. See *id.* at *4 n.8. The court in a subsequent decision explained that such manifest injustice is found where there is a showing of some "egregious conduct beyond mere attorney negligence or administrative oversight." *Matter of Landscaping Services Sanchez*, 2000 INA 247, 2000 WL 1514258 (Bd.Alien Lab.Cert.App. 2000). Here, as the ineffective assistance claim the petitioner asserts is not based on egregious conduct beyond attorney negligence and administrative oversight, the petitioner has not shown such manifest injustice.

Ultimately, regardless of whether or not the six-month filing requirement set forth in 8 C.F.R. § 214.14(c)(2)(i) is a jurisdictional requirement, the petitioner has not identified, and we are unaware of, any authority that would permit the AAO or USCIS to disregard its own regulations regarding the filing requirements for the Form I-918 U petition. Although we recognize the difficulties that the petitioner faced in obtaining a second Form I-918 Supplement B to file a new petition that meets the regulatory filing requirements, we lack authority to waive the requirements for a certification under the statute, as

implemented by the regulations. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (as long as regulations remain in force, they are binding on government officials).

Accordingly, as the petitioner did not submit a properly executed Form I-918 Supplement B that conforms to the regulatory requirements listed at 8 C.F.R. § 214.14(c)(2)(i) for initial evidence, she has failed to establish eligibility for U nonimmigrant classification under section 101(a)(15)(U)(i) of the Act. *See* subsections 101(a)(15)(U)(i)(I)–(IV) of the Act (requiring qualifying criminal activity for all prongs of eligibility).

Conclusion

The petitioner did not comply with the regulation at 8 C.F.R. § 214.14(c)(2)(i) regarding the submission of initial evidence at the time she filed her petition as required. She is consequently ineligible for nonimmigrant classification pursuant to section 101(a)(15)(U)(i) of the Act and her petition must remain denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion is granted. The appeal remains dismissed and the underlying petition remains denied.