



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: SEP 22 2014 OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

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 service center director denied the nonimmigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office (AAO), and we dismissed the appeal. The matter is again before us on a motion to reopen. The motion will be dismissed.

On the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an "Export Company." The petitioner states that it was established in [REDACTED] and employs 15 personnel in the United States. It seeks to employ the beneficiary in a position to which it assigned the job title "Operations Management Analyst" on a full-time basis and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through prior counsel, submitted an appeal of the director's decision to this office. We reviewed the record of proceeding and determined it did not contain sufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. Accordingly, we dismissed the appeal in a decision issued on April 4, 2014.

New counsel for the petitioner subsequently submitted a Form I-290B, Notice of Appeal or Motion (Form I-290B), to U.S. Citizenship and Immigration Services (USCIS) checking Box 2.d. of Part 3 of the Form I-290B, indicating that the petitioner is filing a motion to reopen. Counsel asserts that the basis of the motion to reopen is former counsel's ineffective assistance of counsel in rendering legal services in this matter.

## I. MOTION REQUIREMENTS

### A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a USCIS officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action:

[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), "*Processing motions in proceedings before the Service*," "[a] motion that does not meet applicable requirements shall be dismissed."

### B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), "*Requirements for motion to reopen*," states:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence . .

..

This provision is supplemented by the related instruction at Part 3 of the Form I-290B, which states:<sup>1</sup>

**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence.

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

On motion, present counsel (hereinafter counsel) asserts that the petitioner's former counsel:

- Provided inconsistent and confusing position and occupational category information.
- Provided generalized, vague, and inconsistent job descriptions.
- Failed to critically review evidence, such as letters purported to be supportive of the case, for probative value.
- Used job postings purported to be for positions parallel to the position proffered here, but failed to review the job postings provided by the beneficiary.
- Failed to obtain the petitioner's signature to a letter sent on its letterhead in response to the director's request for evidence (RFE).
- Filed an appeal of the denial of the beneficiary's wife's H-4 petition although the AAO has no jurisdiction over such an appeal.
- Submitted for consideration an unpublished decision.

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<sup>1</sup> The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.



[Paraphrased and bullet points added for clarity.]

Counsel contends that the above actions constitute ineffective assistance of counsel and submits evidence in an attempt to comply with the requirements set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

To demonstrate a claim of ineffective assistance of counsel, we generally follow the three procedural requirements delineated by the Board of Immigration Appeals in *Lozada*. Thus, a claim of ineffective assistance of counsel typically requires:

1. That the claim be supported by an affidavit of the allegedly aggrieved respondent (the petitioner) 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 (petitioner) 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.

*Id.* at 639. Complying with these requirements alone does not establish ineffective assistance of counsel; they are minimum evidentiary requirements that provide a basis for us to evaluate whether the alleged ineffective assistance rendered the proceeding "fundamentally unfair" and whether the alien was "prejudiced by his [or her] representative's performance." *Id.* at 638.

In support of the petitioner's claim of ineffective assistance of former counsel, counsel submits:

1. A statement signed by the petitioner's director, [REDACTED]
2. A document designated an affidavit signed by the beneficiary as president of the petitioner which includes a notary public's certification, dated May 5, 2014.
3. A copy of the beneficiary's "affidavit" and a completed [REDACTED] Inquiry/Complaint form enclosed with counsel's letter to the petitioner's former counsel, dated May 5, 2014.
4. A copy of the beneficiary's completed [REDACTED] Inquiry/Complaint form, the beneficiary's May 5, 2014 "affidavit," and a copy of our April 4, 2014 decision in this matter enclosed with counsel's May 5, 2014 letter to the [REDACTED]

As noted above, *Matter of Lozada* requires that any appeal or motion based upon a claim of ineffective assistance requires, *inter alia*, 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 instant record contains no such affidavit from the petitioner.

We acknowledge the May 5, 2014 statement signed by [REDACTED] as the petitioner's director and the individual who signed the Form I-129 on behalf of the petitioner as well as signed the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, authorizing former counsel to file the petition on the petitioner's behalf.<sup>2</sup> However, the statement was not attested to before a notary public under penalty of perjury. Although Mr. [REDACTED] states that the petitioner and the beneficiary entered into an agreement with former counsel to represent both the petitioner and the beneficiary in filing the Form I-129 petition, Mr. [REDACTED] does not indicate that either he or any other official of the petitioning company had any direct contact with counsel whose performance is being impugned. The petitioner has not provided documentary evidence of the agreement between the petitioner and former counsel or documentary evidence that the petitioner paid former counsel for the representation.<sup>3</sup> As such, even if Mr. [REDACTED] letter constituted an affidavit, it would not be competent evidence of any agreement between the *petitioner* and the former counsel whose performance is being impugned.

Upon review of the document titled, "Affidavit of [the beneficiary], President of [the petitioner]" and the notary public certification under the beneficiary's signature, we observe that the notary certification identifies the personal appearance of [REDACTED] "President," as attesting to the true and correct statements in the document signed by the beneficiary.<sup>4</sup> The notary indicates that a driver's license was produced to identify the signatory, and the record includes a photocopy of the beneficiary's driver's license on the page following the notary's certificate. However, as the notary's certificate does not correctly identify the signatory of the document to which it is appended, this document also does not qualify as an affidavit. Moreover, even if Mr. [REDACTED] was incorrectly identified as the petitioner's president, rather than the beneficiary as being in that role, an Internet search of the Florida Department of State, Division of Corporations website does not identify the beneficiary as an officer of the petitioner.<sup>5</sup> Thus, the beneficiary's statement is not a statement by or on behalf of the petitioner as there is no evidence that the beneficiary is the petitioner's officer or authorized representative. Accordingly, this document is

<sup>2</sup> The statement identifies the same actions of former counsel as ineffective assistance as those identified in current counsel's brief on motion as outlined above.

<sup>3</sup> Mr. [REDACTED] statement and the beneficiary's statement, both indicate that \$6,625 was paid to former counsel, but neither statement indicates the source of those funds.

<sup>4</sup> This document contains almost verbatim language as the statement signed by Mr. [REDACTED]

<sup>5</sup> An Internet search of the Florida Department of State, Division of Corporations, for the petitioner revealed the names of the petitioner's current president and vice-president as well as the names of the officers identified in the petitioner's annual reports filed in 2012, 2013, and 2014. The beneficiary's name was not listed as an officer of the petitioner. See [http://se\[REDACTED\]p010000\[REDACTED\]](http://se[REDACTED]p010000[REDACTED])/Page1. (last visited Sept. 19, 2014).



not competent evidence of any agreement between the *petitioner* and the former counsel whose performance is being impugned.

Further, *Matter of Lozada* requires that the appeal (or motion) indicate whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of former counsel's ethical or legal responsibilities. The record does contain evidence that the *beneficiary* filed a complaint with the [REDACTED]. The declaration submitted in support of his bar complaint is the same document titled, "Affidavit of [the beneficiary], President of [the petitioner]," containing the same errors. We observe that within this document the *beneficiary* describes the alleged deficient performance of former counsel in the performance of his duties and responsibilities. However, even if the notary's certification correctly identified the beneficiary as the signatory attesting to the document under penalty of perjury, the affected party in this matter is the *petitioner*. See 8 C.F.R. § 103.3(a)(1)(iii)(B). The *beneficiary* has no standing in this matter. Again, the record does not include documentary evidence that the beneficiary is an officer of the petitioner or is an authorized representative. The relevant inquiry is whether the petitioner, and not the beneficiary, received ineffective assistance. The record does not indicate that the *petitioner* has filed a complaint regarding the assistance it received from its former counsel, nor does it contain documentary evidence of a complaint filed by the petitioner.

Furthermore, even if the beneficiary's assertions in his complaint to The [REDACTED] were construed to be a statement from "the allegedly aggrieved respondent," we observe that the statements in that form, like Mr. [REDACTED] statement, were not attested to before a notary under penalty of perjury and could not, therefore, satisfy the *Lozada* requirement of an affidavit.

As such, the petitioner has not satisfied the procedural requirements of *Matter of Lozada* as described above, and the claim of ineffective assistance of counsel is an insufficient basis to reopen the matter.

### III. MATERIAL CHANGE TO THE PETITION

Of note, the petitioner in this matter initially attested on the Form I-129 that the proffered position is a full-time operations management analyst and that the beneficiary's wages would be \$920 per week (or \$47,840 per year). The certified Labor Condition Application (LCA) submitted with the petition indicated the occupational classification most closely corresponding to the proffered position is an "Operations Research Analyst," SOC (ONET/OES) Code 15-2031, at a Level II (qualified) wage. The LCA was certified on October 24, 2012, for a validity period from November 11, 2012 to November 11, 2015. The LCA identifies the work location as [REDACTED] County), Florida. The LCA identifies the prevailing wage for the proffered position as \$23.62 per hour or \$49,130 per year, the same wage listed in the Online Wage Library for an "Operations Research Analysts" position at the time the LCA was certified for a Level II position in [REDACTED] County, Florida.<sup>6</sup>

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<sup>6</sup> For additional information regarding the prevailing wage for this occupation in [REDACTED] County (FL), see the All Industries Database for 7/2012 - 6/2013 at the Foreign Labor Certification Data

On motion, the petitioner offers the beneficiary employment for the proffered position at a non-speculative salary of \$3,800 per month or \$45,600 per year. The record does not include any explanation regarding the inconsistency between the wage offered to the beneficiary initially and the wage now offered. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, the wage offered on motion is not a wage commensurate with the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services.

According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. See 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at \*8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

It is self-evident that a decrease in the wage offered to the beneficiary is a material change to the petition which requires the filing of a new petition.<sup>7</sup> Thus, the evidence offered on motion regarding the new wage is evidence, in and of itself, which precludes approval of the petition.

#### IV. CONCLUSION

The petitioner should note that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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. Accordingly, the motion to

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Center, Online Wage Library on the Internet at  
<http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-2031&area=33124&year=13&source=1>  
 (last visited Sept. 19, 2014).

<sup>7</sup> The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). As such, a petitioner is only free to pay a wage that is equal to or higher than this minimum required wage described in section 212(n)(1)(A) of the Act. See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL].").

reopen will be dismissed, the proceedings will not be reopened, and our previous decision will not be disturbed.

**ORDER:** The motion to reopen is dismissed.