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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **AUG 19 2010**

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:
[Redacted]

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 \$585. 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 of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of an assistant network administrator as an H-1B nonimmigrant in a specialty occupation pursuant to § 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 petitioner is a telecommunications company.

On December 14, 2009, the director denied the petition determining that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker. On appeal, the petitioner asserts that, due to ineffective prior counsel, the Department of Labor (DOL) Form ETA-9035E Labor Condition Application (LCA) was not certified until after the submission of the I-129 petition.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 30, 2009 and supporting documentation, which included an LCA for a position with a different job title than the one proffered and that did not cover even one day of the requested dates in the H-1B petition; (2) the director's August 10, 2009 request for additional evidence (RFE); (3) prior counsel's submission in response to the RFE, which includes an LCA that was certified on September 17, 2009 for employment dates September 12, 2009 to September 11, 2010; (4) the director's denial decision; and (5) the Form I-290B with current counsel's brief and supporting documentation. The AAO has considered the record in its entirety before issuing its decision.

Counsel does not disagree with the director's finding that the petitioner did not establish filing eligibility under 8 C.F.R. § 214.2(h)(4)(i)(B) at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS) on April 30, 2009. The only issue for consideration on appeal by the AAO is whether the record supports a claim of ineffective assistance of counsel.

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).

With respect to the first requirement under *Lozada*, counsel submitted a copy of the petitioner's affidavit, dated December 22, 2009. In pertinent part, the affidavit states as follows:

In 2003, we hired [prior counsel] to handle the petition for [the beneficiary] as a nonimmigrant worker. [The beneficiary] has been working as an Assistant Network Administrator at [the petitioner] since he graduated from Southeast Missouri State University in H-1B status since 2003.

We also filed an I-140 petition on [the beneficiary's] behalf, which was approved in September 2007. Due to the fact that [the beneficiary] only has a Bachelor's degree, there is no immigrant visa available to him immediately.

We have been faithfully following the procedures and laws to renew [the beneficiary's] legal status as H-1B, and his wife's as H-4.

On December 14, 2009, we received a denial letter from the Department of Homeland Security denying the H-1B and H-4 extension applications.

We found out that the reason for the denial was because [prior counsel] failed to submit some document in a timely fashion.

Because of [prior counsel's] mistake, my company is facing the problems of losing [sic] a good worker and the money we have invested into this matter. The worse [sic] thing is [the beneficiary] and his family is now facing serious immigration problems.

I know [the beneficiary] has a young son who has some medical problems. If [the beneficiary] cannot get his H-1B extension approved, they will suffer both financially and emotionally.

I want to file a complaint against [prior counsel] for her mistake in this matter. . . .

Lozada is clear that the petitioner must set 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*. While the AAO sympathizes with the petitioner's and beneficiary's situation, the affidavit does not discuss in detail either the petitioner's agreement with prior counsel regarding the actions to be taken or prior counsel's representations (or lack thereof) to the petitioner. Therefore, the petitioner has not met the first requirement under *Lozada*.

Regarding the second criterion under *Lozada*, which requires that counsel whose integrity or competence is being impugned be informed of the allegations leveled against her and be given an opportunity to respond, counsel provides a copy of the petitioner's letter to prior counsel, dated December 22, 2009. This letter states as follows: "Please be advised that I have filed a complaint to the State Bar of California against you. Attached [sic] is my affidavit for your reference." The affidavit that is attached is the one that was previously discussed, above. While the letter, together with the affidavit, informs prior counsel of the petitioner's allegations, the petitioner did not provide evidence that it gave prior counsel an opportunity to respond. Moreover, the petitioner and current counsel do not explain on appeal whether prior counsel ever responded or not to these allegations.

Prior counsel's response to the RFE, dated September 29, 2009, states as follows:

The petitioner has filed the form I-140 petition in January 2008 on behalf of the beneficiary here.

On or about April 28, 2009, this office has filed H-1B and H-4 extension[s] on behalf of the beneficiary and his wife. It just came to my attention that the ETA Form 9035/9035E Attestation I have submitted to your office was expired. Enclosed please find the updated and signed original ETA Form 9035/9035E.

Thank you in advance for your understanding of this mistake and your favorable consideration in this matter is greatly appreciated. . . .

Although prior counsel's letter states that she submitted the expired LCA, prior counsel does not describe the circumstances under which this error arose, nor does she specifically admit that she, or someone else in her office, was responsible for the mistake. Moreover, it is clear under *Lozada* that counsel must be informed of the petitioner's allegations of ineffectiveness and given an opportunity to respond. *Lozada* specifically states that, "[a]ny subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion." *Matter of Lozada*, 19 I&N Dec. at 639.

It is clear that the intent of the Board of Immigration Appeals (BIA) in establishing some of the criteria under *Lozada* is to provide prior counsel with the chance to refute any allegations of ineffectiveness made against her. The BIA explains as follows:

The high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel Where essential information is lacking, it is impossible to evaluate the substance of such claim. . . . Then, too, the potential for abuse is apparent where no mechanism exists for allowing former counsel, whose integrity or competence is being impugned, to present his version of events if he so chooses, thereby discouraging baseless allegations. . . .

Id. Current counsel and the petitioner do not provide any evidence that prior counsel was given an opportunity to respond to the petitioner's allegations against her. In fact, based on the date the letter was mailed to prior counsel, December 26, 2009, and the date the appeal was mailed to USCIS, December 31, 2009, the AAO cannot find that sufficient opportunity was provided to prior counsel to respond to these allegations before the appeal was filed. *See Asaba v. Ashcroft*, 377 F.3d 9, 12 (1st Cir. 2004) (upholding the denial of a motion to reopen where insufficient time was given to counsel to respond to charges before filing the motion to reopen). Therefore, the petitioner has not met the second requirement under *Lozada*.

As the petitioner has provided a copy of the complaint to the State Bar of California regarding prior counsel along with proof of mailing the complaint, the petitioner has satisfied the third requirement under *Lozada*. However, the petitioner must satisfy all three requirements. Since the petitioner did not satisfy the first and second requirements under *Lozada*, the petitioner has not met all the requirements to establish ineffectiveness of prior counsel. Accordingly, the AAO shall not disturb the director's denial of the petition.

Lastly, even if all of the *Lozada* requirements had been met, the evidence of record fails to establish that the outcome of these proceedings would have been different but for the alleged ineffective assistance of prior counsel. See *Miranda-Lores v. INS*, 17 F.3d 84 (5th Cir. 1994) (requiring actual prejudice be shown regarding the benefit sought); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1272-75 (11th Cir. 2005) (requiring prior counsel's performance be established as being so inadequate that it may have affected the outcome of the proceeding); *Zern v. Gonzales*, 503 F.3d 59, 72-73 (1st Cir. 2007) (requiring a need to establish that the outcome would be different such that there is a reasonable probability of prejudice). First, the second LCA that was submitted indicates that the prevailing wage rate for the proffered position had increased to \$30,160 per year. As the petitioner only offered to pay the beneficiary \$28,128 per year on the Form I-129, it could not be found that the petitioner's second LCA would correspond with the petition. See 20 C.F.R. § 655.705(b). Second, it is also not apparent from the record of proceeding that the proffered position would qualify as a specialty occupation. Thus, even if the second LCA had been properly submitted to USCIS, it has not been established that the outcome of these proceedings would have been different.

Under § 291 of the Act, the burden of proof in these proceedings rests solely with the petitioner. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.