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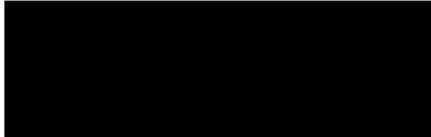
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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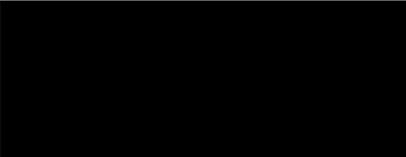


DATE: **MAY 02 2011** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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 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 service center director denied the nonimmigrant visa petition, and dismissed three subsequently-filed motions by the petitioner and counsel. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general construction/construction management company and seeks to employ the beneficiary as a civil engineer. It endeavors 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).

On November 4, 2004, the director denied the petition on the ground that the proffered position is not a specialty occupation. The petitioner filed an untimely appeal on December 15, 2004, which the director treated as a motion to reopen/reconsider. The director dismissed the motion on December 29, 2004, and the petitioner filed a subsequent motion to reopen/reconsider on October 4, 2006.¹ The director dismissed the motion as untimely on December 20, 2006, and an additional motion to reopen was filed by newly-retained counsel for the petitioner on January 7, 2010. The director dismissed the motion on August 10, 2010, and counsel filed a timely appeal with the AAO on September 8, 2010.

The issue before the AAO is whether the director's decision dated August 10, 2010 dismissing the petitioner's motion to reopen was proper.

Upon review, the director denied the motion based on the petitioner's failure to submit new facts and evidence to overcome the basis for the original denial. On appeal, counsel for the petitioner contends that the motion filed by the petitioner was based on ineffective assistance of the petitioner's prior counsel and claims that a motion based on ineffective assistance of counsel in and of itself warrants reopening of the proceedings because the claims therein are new claims.

The AAO notes that in dismissing the petitioner's motion, the director did not address counsel's claims regarding ineffective assistance of counsel. However, upon review of the record, the AAO concurs with the director's ultimate conclusions and finds that the director's omission is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

¹ It is noted that the petitioner attempted to file this motion prior to its receipt date of October 4, 2006; however, the motion was rejected based on the petitioner's failure to include the required filing fee.

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).

The record contains insufficient evidence demonstrating that the petitioner complied with the requirements set forth above. The petitioner's claim for relief in this proceeding is not accompanied by evidence demonstrating that the petitioner filed a complaint with the appropriate disciplinary authorities against its prior attorney for ineffective assistance of counsel. Additionally, the record does not establish that the petitioner's prior attorney, whose integrity or competence is being impugned, has been informed of the allegations leveled against him and been given an opportunity to respond. Finally, the claim is not supported by an affidavit 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.

Although the motion was accompanied by a declaration by the beneficiary dated November 5, 2009, the beneficiary is not an affected party in these proceedings. See 8 C.F.R. §§ 103.2(a)(3) and 103.3(a)(2)(iii)(B). As such, the beneficiary's statement is irrelevant to an ineffective assistance of counsel claim. Even if it were relevant, the declaration provided on motion is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). However, the AAO notes that the declaration does contain the requisite statement, permitted by Federal law, that the beneficiary, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746. Nevertheless, the affected party in this proceeding, i.e., the petitioner, has failed to satisfy the three independent requirements for a claim of ineffective assistance of counsel.

Counsel on appeal argues that by virtue of raising the claim of ineffective assistance of counsel, it has stated new facts to be proved in the reopened proceeding. In support of this contention, counsel refers to various precedent decisions, including but not limited to *Zhao v. United States Dep't of Justice*, 265 F.3d 83 (2d Cir. 2001), *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) and *Henry v. INS*, 8 F.3d 426 (7th Cir. 1993). However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the decisions cited on motion and on appeal, and, more importantly, fails to address the criteria outlined in *Matter of Lozada*. While the AAO acknowledges that counsel's claim against the petitioner's former counsel was newly raised in the motion to reopen, counsel overlooks the fact that such an allegation, without more, is insufficient to meet the petitioner's burden of proof in these proceedings.

The regulation at 8 C.F.R. § 103.5 provides in pertinent part that "a motion to reopen must state the new facts to be provided in the reopened proceeding *and be supported by affidavits or other documentary evidence.*" (Emphasis added). "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In this matter, the petitioner's motion to reopen alleged new facts, but it was not supported by affidavits or other documentary evidence. The only new document submitted was the irrelevant

declaration of the beneficiary discussing his relationship with former counsel; however, for the reasons set forth above, this document alone does not satisfy the evidentiary requirements for an ineffective assistance of counsel claim. The other evidence submitted included documents previously contained in the record, such as prior decisions of the director and notices sent to the petitioner.

Furthermore, the AAO notes counsel's claim that, as a result of searching state bar records, it was determined that the petitioner's former counsel were not licensed attorneys. There is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). For the reasons set forth above, the AAO concurs with the director's dismissal of the petitioner's motion to reopen, and the decision of the director will not be disturbed.

The AAO also notes that the motion failed to meet another applicable filing requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion did not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), the director's dismissal was proper.

In visa petition proceedings, the burden of proving eligibility remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.