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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
and Immigration
Services

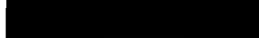
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Date: **MAR 07 2012**

Office: VERMONT 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The petitioner appealed that decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal and denied the petition. The matter is again before the AAO on appeal. The appeal will be rejected.

On the Form I-129 visa petition, the petitioner states that it is a convenience store chain established in 2001. In order to employ the beneficiary in what it designates as a market research analyst position, the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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).

The director denied the petition on the basis that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation. The petitioner appealed that decision to the AAO. The AAO dismissed the appeal and denied the petition. The instant appeal was filed to contest that decision.

The petitioner's appeal must be rejected. The AAO does not exercise appellate jurisdiction over AAO decisions. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception, i.e., petitions for approval of schools to accept foreign students are now the responsibility of Immigration and Customs Enforcement (ICE). *See* DHS Delegation Number 0150.1(U) supra; 8 C.F.R. § 103.3(a)(iv); and 8 C.F.R. § 214.3. Accordingly, the appeal is not properly before the AAO.

Therefore, as the appeal was not properly filed, it must be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

Furthermore, the instant appeal was untimely filed on April 20, 2010, two years and two months after the AAO decision was issued on February 4, 2008. In defense of the petitioner's filing of an untimely appeal, counsel raised the claim of ineffective assistance of counsel.

Upon review of the record, the petitioner has failed to fulfill the prerequisites for allegations of ineffective assistance of counsel. *See Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The AAO notes that 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 the 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. at 637.

Here, the petitioner has not submitted an affidavit, evidence that the prior counsel has been informed of the allegations leveled against him and given an opportunity to respond, and evidence that a complaint has been filed with the appropriate disciplinary authorities, and if not, explanation of why not. As the petitioner has not satisfied the criteria for a *Lozada* claim, the appeal would have to be dismissed even if it had been properly filed.

Finally, it should be noted that the petitioner did have the option of filing a motion to reopen and/or a motion to reconsider the AAO's most recent decision within 33 days of service pursuant to 8 C.F.R. § 103.5. The petitioner's appeal as filed, however, does not meet the requirements of a motion. 8 C.F.R. § 103.5(a)(2) and (3).

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

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for a motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Even if the instant appeal had been timely filed as a motion, it would not have escaped dismissal. The instant appeal meets neither the requirements for a motion to reopen or a motion to reconsider and would have to have been dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

ORDER: The appeal is rejected.