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



U.S. Citizenship  
and Immigration  
Services

DATE: **NOV 29 2013** OFFICE: CALIFORNIA 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a stylized flourish at the end.

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and dismissed a subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner described itself as a finance company with two employees. In order to continue to employ the beneficiary in what it designates as an IT specialist/systems analyst position, the petitioner seeks to classify her 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 on January 11, 2013, finding that the petitioner failed to establish that the proffered position was a specialty occupation, and a subsequent motion to reopen and motion to reconsider was dismissed by the director on March 14, 2013. The matter is now before the AAO on appeal.

On appeal, newly-retained counsel for the petitioner contends that the denial of both the underlying petition and the subsequently-filed combined motion to reopen and reconsider was due to ineffective assistance of counsel. In support of this contention, counsel submits a brief and additional evidence, and also asserts that the proffered position qualifies as a specialty occupation.

The petitioner filed the instant Form I-129 petition, requesting both the continuation of the beneficiary's previously-approved H-1B employment with the petitioner as well as an extension of her stay in H-1B status. The director found that the proffered position of IT specialist/systems analyst is not a specialty occupation, and denied the petition in a decision dated January 11, 2013. The director properly advised the petitioner of its right to file an appeal of the H-1B petition's denial. In a separate decision, also issued on January 11, 2013, the director denied the simultaneously-filed request for extension of stay, and correctly advised the petitioner that there is no appeal from a denial of an extension of stay filed on Form I-129.<sup>1</sup>

On February 11, 2013, the petitioner filed a timely motion on Form I-290B. The petitioner checked Box F in Part 2 of the form to demonstrate that it was filing a combined motion to reopen and a motion to reconsider. In Part 3, the petitioner stated:

The decision says that Petitioner was able to appeal however the notice of decision states that there is no appeal, only a motion. Please clarify and kindly provide the Petitioner with an additional 30 days to submit its brief and additional evidence, as

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<sup>1</sup> A request for a change of status and an extension of stay in an H-1B submission is not a petition within the meaning of section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1), and does not confer any of the appeal rights normally associated with a petition. The Form I-129 in this context is merely the vehicle by which information is collected to make a determination on the application for change of status and extension of stay. The regulations are clear on this matter. Under 8 C.F.R. § 214.1(c)(5), there is no appeal of a denial of an application for extension of stay. The AAO notes that some confusion arose due to the director's issuance of two separate decisions in this matter. However, each decision issued by the director properly identified the matter being adjudicated and the appeal rights, if any, that were available to the petitioner.

the principal of the petitioner has requested additional time due to the recent birth of twins and elevated business activity.<sup>2</sup>

The director dismissed the motion, finding that the petitioner had failed to comply with the requirements for a motion to reopen and a motion to reconsider. The director found that the petitioner had not submitted or alleged new facts for consideration, had not stated what law had been inappropriately applied, and had not furnished precedent decisions to support a conclusion other than the one already reached by USCIS.

On appeal, newly-retained counsel claims that the dismissal of the combined motion and the denial of the initial petition were the result of former counsel's "misconduct." Current counsel for the petitioner submits evidence in support of the ineffective assistance of counsel claim, and requests that the AAO review the merits of the petition as a remedy for former counsel's actions.

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. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

On appeal, current counsel submits a copy of an affidavit executed under oath on April 9, 2013 by the petitioner's Managing Director, [REDACTED] which outlines the details of the petitioner's agreement with former counsel with respect to the actions to be taken during representation. Also submitted on appeal is a copy of an Injury/Complaint Form for the Florida Bar dated April 8, 2013, identifying former counsel as the subject of the complaint and the petitioner as the complainant.

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). Although the record contains a copy of the required affidavit, the petitioner has failed to establish that it has satisfied the remaining two requirements under *Lozada*. Specifically, the appeal fails to establish that (1) prior counsel was informed of the allegations

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<sup>2</sup> It is noted that former counsel supplemented the record with a brief in support of the motion, which was received by USCIS on March 11, 2013. This submission, however, was not considered by the director. Although the regulation at 8 C.F.R. §103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R. §§ 103.5(a)(2) and (3).

leveled against her and given an opportunity to respond, and (2) a complaint was filed with the appropriate disciplinary authorities, or if not, why not.

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, the record contains no evidence that former counsel was notified of the allegations against her. 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 notified of and given an opportunity to respond to the petitioner's allegations against her. In fact, the AAO notes that petitioner's affidavit and complaint were prepared on April 9, 2013 and April 8, 2013, respectively, less than one week prior to the filing of the instant appeal. Therefore, even if the petitioner had demonstrated that it had forwarded copies of these documents to counsel and the time they were executed, sufficient opportunity would not have been provided to prior counsel to respond to these allegations before the appeal was filed on April 12, 2013. *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). Moreover, there is no evidence in the record that the petitioner contacted former counsel at a previous point in time to notify her of these allegations raised herein and afforded her an opportunity to respond. Therefore, the petitioner has not met the second requirement under *Lozada*.

Finally, although the petitioner has provided a copy of the complaint to The Florida Bar, there is no evidence in the record demonstrating that this complaint was actually filed. There is no proof of mailing, such as a certified mail return receipt or tracking number, nor is there documentation from the Florida Bar confirming its receipt of the complaint. Since the record does not establish that a complaint has been filed against prior counsel, the petitioner is required under *Lozada* to provide an explanation as to why such action has not been taken. The record contains no such statement. The petitioner, therefore, has not satisfied the third requirement under *Lozada*.

The petitioner must satisfy all three requirements. Since the petitioner did not satisfy the second and third requirements under *Lozada*, the petitioner has not met all of the requirements to establish ineffectiveness of prior counsel.

According to the Form I-290B filed by petitioner's new counsel on April 12, 2013, the petitioner is seeking an appeal of the director's decision dated March 14, 2013. The AAO, therefore, will now address the director's dismissal of the combined motion to reopen and reconsider.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>3</sup>

As previously discussed, the petitioner submitted only a brief statement on the Form I-290B filed on February 11, 2013, which did not state new facts to be proved. Moreover, the motion was not supported by affidavits or other documentary evidence. The statement submitted in support of the motion does not contain new facts that were previously unavailable. The director concluded that the petitioner failed to satisfy the requirements for a motion to reopen. Upon review, the AAO agrees.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With regard to the motion submitted to the director, the movant failed to meet that burden. The motion to reopen, therefore, was properly dismissed by the director.

The evidence also fails to satisfy the requirements of a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

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 Service 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.

The petitioner's motion failed to establish that the director's decision was based on an incorrect application of law or USCIS policy. Likewise, the motion was not accompanied by any pertinent precedent decisions, nor did the petitioner establish that the decision was incorrect based on the

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<sup>3</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." WEBSTER'S NEW COLLEGE DICTIONARY 753 (3d ed. 2008) (emphasis in original).

evidence of record at the time of the initial decision. Consequently, the motion to reconsider was properly dismissed by the director.

Moreover, while not addressed by the director, 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). 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 motion did not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it should have been dismissed for this additional reason.

Lastly, even if all of the *Lozada* requirements had been met, the petition must be denied as it was filed after the expiration of the petition it sought to extend. See 8 C.F.R. § 214.2(h)(14). In this matter, the petition that the petitioner sought to extend (EAC 11 141 51059) expired on September 30, 2012. The instant petition was filed on October 1, 2012, one day after the original petition's expiration.

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension. In this matter, the director did not raise this issue in the denial, and thus it appears that the director erroneously exercised favorable discretion to the petitioner under the provisions of 8 C.F.R. § 214.1(c)(4)(i). The director's error is harmless, however, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility, and the omission of this non-discretionary ground for denial did not result in the improper granting of a benefit in this matter, i.e., the error did not change the outcome of this case. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "*harmless error*" and stating that it is not grounds for reversal).

As noted above, the petition must be denied as it was filed after the expiration of the petition it sought to extend. See 8 C.F.R. § 214.2(h)(14). This non-discretionary basis for denial renders the remaining issues in this proceeding moot. For this additional reason, the appeal must be dismissed and the petition 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 appeal is dismissed. The petition is denied.