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



U.S. Citizenship
and Immigration
Services

DATE: OCT 30 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".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center ("director") approved the underlying H-1B petition but denied the request for an extension of stay. The decision was certified to the Administrative Appeals Office (AAO) for review. The AAO finds that the petitioner has not established that the beneficiary is eligible for an extension of stay in H-1B classification. Furthermore, upon review of the record of proceeding, the AAO has determined that the petition was approved in error. Thus, while the director's decision to deny the extension of stay will be affirmed, the matter will also be remanded to the service center director for further action relative to the approved H-1B petition.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on September 6, 2012. On the Form I-129 and supporting documents, the petitioner stated that it is a "Low Income Housing Tax Credit/Residential Housing" enterprise that was established in 1998. Seeking to employ the beneficiary in what it designates as a tax credit compliance manager position, the petitioner filed this H-1B petition in an endeavor 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 approved the H-1B petition but denied the petitioner's request to extend the beneficiary's stay.¹ Thereafter, the petitioner submitted a Notice of Appeal or Motion (Form I-290B), requesting the director reopen and reconsider the prior decision. The director dismissed the joint motion, finding that the motion did not meet the applicable requirements for reopening or reconsidering the prior proceeding. The petitioner subsequently submitted a second joint motion, which was also dismissed for failing to meet the applicable requirements for motions.

On July 21, 2013, the director certified the petition to the AAO for review. Typically, the AAO does not review a director's decision to approve or deny a request for an extension of stay, as such issues surrounding the beneficiary's authorized stay in the United States are not appealable. See 8 C.F.R. § 214.1(c)(5).² In this case, however, the director certified the decision to the AAO for

¹ The Form I-129 indicates that if the petition is approved but the requested extension of stay cannot be granted, the director will notify a U.S. consulate (designated by the petitioner on the form) and the alien may apply abroad for a visa. It appears that Congress intended that individuals who remain in the United States beyond the period of authorized stay be subject to additional scrutiny and required to appear before a consular officer for an interview. See 63 Fed. Reg. 670 (January 7, 1998) (stating that "it seems clear . . . [that] Congressional intent lay in requiring special scrutiny of 'overstay' visa applicants"). Upon obtaining a visa and being admitted to the United States, the alien would be authorized to be employed by the petitioner.

² 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 the Secretary 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 - petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement (ICE). The regulations limit the AAO's jurisdiction over petitions for temporary workers to those described under 8 C.F.R. §§ 214.2 and 214.6. See 8 C.F.R. § 103.1(f)(3)(iii)(J) (2003).

review pursuant to 8 C.F.R. § 103.4(a)(1) and (5). Thus, the AAO has jurisdiction over this matter by virtue of the director's certification.³

In response to the director's certification, current counsel submitted a brief to the AAO as permitted by 8 C.F.R. § 103.4(a)(2). Counsel asserts that the beneficiary's failure to maintain his nonimmigrant status was due to extraordinary circumstances beyond the control of the petitioner and the beneficiary. According to counsel, the petitioner's request to extend the beneficiary's stay warrants a favorable exercise of discretion pursuant to the regulation at 8 C.F.R. § 214.1(c)(4).

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's decision; (3) the petitioner's motion to reopen and reconsider, filed on October 18, 2012; (4) the director's decision on the joint motion; (5) the petitioner's second motion to reopen and reconsider, filed on December 6, 2012; (6) the director's decision on the second joint motion; (7) the Notice of Certification; and (8) counsel's submission to the AAO. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established that the beneficiary is eligible for an extension of stay in H-1B classification.

I. Petitioner's Combined Requests on the Form I-129

As a preliminary matter, the AAO notes that the Form I-129 consists of three separate benefit requests. As a change of status was not requested in this matter, the remaining two benefit requests are: (1) the petition to classify the employment offer as appropriate for the H-1B category (the basis for classification); and (2) an application for the procedural benefit relevant to the beneficiary's authorized stay in the United States (requested action).⁴ Therefore, a request for a petition

A request for 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 separate application for an extension of stay. *See* 8 C.F.R. § 214.2(h)(15)(i).

³ Under 8 C.F.R. § 214.1(c)(5), there is no appeal of a denial of an application for extension of stay. A case for which there is no appeal procedure may be certified only after an initial decision is made. *See* 8 C.F.R. § 103.4(a)(4). Thus, the AAO has jurisdiction in this matter, because the director issued a decision and certified the decision to the AAO.

⁴ These functions previously required two to three separate filings depending upon on whether a change of status was being requested: one by the petitioner (Form I-129H) and the others by the beneficiary (Forms I-506 and I-539). For example, the regulations on January 1, 1991 provided that a petitioner "shall file a petition in duplicate on Form I-129H with the service center which has jurisdiction over I-129H petitions in the area where the alien will perform services or receive training or as further prescribed in this section." 8 C.F.R. § 214.2(h)(2)(i)(A) (1991). Further, the 1991 regulations required applications for a change of status or visa classification to be submitted by the nonimmigrant alien on Form I-506, Applicant for Change of Nonimmigrant Status, filed with the district director having jurisdiction over the place of employment if changing to H or L status. 8 C.F.R. § 248.3(a) and (b) (1991). In addition, the 1991 regulations provided that "[a]n alien . . . shall apply for an extension of stay on Form I-539. . . . [E]ach alien seeking an extension

extension and a request for an extension of stay are filed together on the Form I-129 by the petitioner. The regulations indicate, however, that even though the request to extend the petition and the request to extend the beneficiary's stay are combined on the Form I-129, the director shall make a separate determination on each. *See* 8 C.F.R. § 214.2(h)(15)(i).

Title 8 C.F.R. § 214.2(h) states, in pertinent part, the following about petition extensions:

(14) *Extension of visa petition validity.* The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. A request for a petition extension may be filed only if the validity of the original petition has not expired.

As noted above, a request for a petition extension may be filed only if the validity of the original petition has not expired. Thus, the regulations do not permit for the late filing of a petition extension. If a prior H-1B petition is no longer valid, a petitioner must instead file the petition as a request for new employment together with supporting evidence. *See id.*

Title 8 C.F.R. § 214.2(h) provides the following information regarding extension of stay requests (emphasis added):

(15) *Extension of stay--*

(i) *General.* The petitioner shall apply for extension of an alien's stay in the United States by filing a petition extension on Form I-129 accompanied by the documents described for the particular classification in paragraph (h)(15)(ii) of this section. The petitioner must also request a petition extension. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. *Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each.* If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa. *When the total period of stay in an H classification has been reached, no further extensions may be granted.*

of stay generally must execute and submit a separate application for extension of stay to the district office having jurisdiction over the alien's place of temporary residence in the United States." 8 C.F.R. § 214.1(c)(1) (1991). In implementing the Immigration Act of 1990 (IMMACT90) Pub. L. No. 101-649, 104 Stat. 4978, these functions were combined into one form (Form I-129) to more efficiently process the separate requests. *See* 56 Fed. Reg. 61111 (Dec. 2, 1991); 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991).

Thus, under the current regulations, the petitioner (rather than the beneficiary) governs the filing of the Form I-129 and, therefore, both the request to extend the petition *and* the request to extend the beneficiary's stay.⁵ 8 C.F.R. § 214.2(h)(15)(i). Although the requests are submitted on the same form, a separate determination is made on each request. When the total period of stay in an H classification has been reached, no further extensions may be granted. *Id.*

II. Procedural and Factual Background

The petitioner submitted an H-1B petition to the California Service Center on September 6, 2012. On the Form I-129 (Part 2.2), the petitioner indicated the basis for the classification request as "[c]ontinuation of previously approved employment without change with the same employer." For requested action (Part 2.4), the petitioner requested that the director "[e]xtend the stay of [the] beneficiary since [he] now hold[s] this status."⁶

With the Form I-129 petition, counsel submitted a brief requesting that the director exercise discretionary authority and excuse the petitioner's failure to file the petition before the period of the beneficiary's previously authorized stay expired. Counsel claims that the "failure to maintain uninterrupted status was due to extraordinary circumstances beyond the control of the Petitioner and the Beneficiary." In the brief, counsel asserts that the petitioner received ineffective assistance of counsel from its prior attorney, [REDACTED] (also referred to in this decision as "former counsel").

In support of this assertion, current counsel provided several exhibits, including affidavits from the petitioner, the beneficiary, and the beneficiary's spouse; an agreement between Mr. [REDACTED] and the beneficiary, dated May 9, 2000; an invoice (dated July 16, 2010) issued to the beneficiary for the payment of filing fees for appeals;⁷ notices and decisions from U.S. Citizenship and Immigration Services (USCIS) regarding various petitions and applications; medical records; a family photograph; documents related to the petitioner's filing of an Immigrant Petition for Alien Worker (Form I-140) with USCIS and the petitioner's submission to the U.S. Department of Labor (DOL) regarding an Application for Alien Labor Certification; as well as other evidence.

The documentation indicates that between 1999 and 2006, Mr. [REDACTED] prepared six H-1B petitions for the petitioner on behalf of the beneficiary.⁸ All of the petitions were approved. The

⁵ It must also be noted that an "affected party" means the person or entity with legal standing in a proceeding. 8 C.F.R. § 103.3(1)(iii)(B). It does not include the beneficiary of a visa petition. *Id.*

⁶ Despite this selection by the petitioner on the Form I-129, the petitioner acknowledged within the record of proceeding that the beneficiary does not currently hold H-1B classification.

⁷ As previously mentioned, an "affected party" means the person or entity with legal standing in a proceeding. 8 C.F.R. § 103.3(1)(iii)(B). It does not include the beneficiary of a visa petition. *Id.* Furthermore, the affected party must pay the fee for filing an appeal. 8 C.F.R. § 103.3(a)(2)(i).

⁸ The initial petition was submitted by [REDACTED]. Thereafter, there was a change in the corporate structure, and the petitioner filed the subsequent H-1B petitions.

validity of the last H-1B petition expired on November 16, 2007.

In addition, Mr. [REDACTED] prepared an application for alien labor certification for the petitioner on behalf of the beneficiary, which was certified by DOL. Thereafter, Mr. [REDACTED] prepared an immigrant petition for the petitioner. Additionally, in connection with the Form I-140 petition, Mr. [REDACTED] prepared applications for permanent residency and applications for work and travel authorization for the beneficiary and his spouse. These documents were filed with USCIS on July 26, 2007.

In an affidavit dated September 4, 2012, the petitioner's president stated, in part, the following:

[The beneficiary's] H-1B status was expiring on November 16, 2007. [The beneficiary] informed me that Attorney [REDACTED] had advised him that an extension of his H1B status was a waste of time and money, since both [the beneficiary] and his wife had I-485 Applications that were pending. Attorney [REDACTED] recommended that [the beneficiary] wait for the I-485 approval and that his H-1B extension was not needed.

On April 28, 2008, the Form I-140 immigrant petition was denied, along with the applications for permanent residency that were filed by the beneficiary and his spouse. The petitioner indicates that Mr. [REDACTED] recommended filing a motion to reopen the decision on the Form I-140. The petitioner's president asserts that subsequent to the filing of the motion, "[the beneficiary] questioned Attorney [REDACTED] regarding his and his wife's status." The petitioner's president continues by stating that the beneficiary told him that Mr. [REDACTED] stated that he and his wife "were in 'legal' status until such time as the I-140 Motion was denied." The AAO notes that the director reopened the proceedings and reviewed the documentation provided by the petitioner. However, upon review, the director found that the petitioner still failed to establish eligibility for the benefit sought, and thus the petition was once again denied on July 24, 2008.

Thereafter, Mr. [REDACTED] prepared an appeal regarding the denial of the petitioner's immigrant petition, which was filed on August 26, 2008. The petitioner indicates in his affidavit that Mr. [REDACTED] also prepared and filed a second Form I-140 petition. In a letter dated September 25, 2008, USCIS rejected the second Form I-140 filing because an appeal of the initial immigrant petition was still pending. The petitioner states that when USCIS returned the second Form I-140, the beneficiary told him that "Attorney [REDACTED] did not offer any additional options at that point, other than waiting for a decision on the appeal."

The petitioner further reports that the beneficiary informed him that he had consulted a second attorney, [REDACTED] regarding his desire to travel, and that Mr. [REDACTED] informed him that he may be out of status." The beneficiary told the petitioner's president that Mr. [REDACTED] "advised [the beneficiary] to speak with Attorney [REDACTED] to determine if he was out of status."

The petitioner's president claims that he was informed by the beneficiary that he had spoken with Mr. [REDACTED] about filing another H-1B petition, and that Mr. [REDACTED] indicated that he did not believe that such a petition would be approved. The petitioner's president stated that "[the

beneficiary] made it clear that Attorney [REDACTED] was confident that the appeal [of the Form I-140] would be approved and we did not need to file the H1B."

In a decision dated June 21, 2010, the AAO dismissed the appeal of the denial of the Form I-140 immigrant petition. The petitioner's president claims that he, the beneficiary, and the beneficiary's wife all met with Mr. [REDACTED] "to discuss the decision and the strategy for going forward." Thereafter, Mr. [REDACTED] prepared a joint motion to reopen and reconsider the AAO's decision dismissing the appeal.

According to the petitioner, in July 2010, Mr. [REDACTED] "grudgingly filed an H1B extension petition . . . despite his belief that it would be denied." The petitioner stated that Mr. [REDACTED] "explanation was vague" as to why the H-1B would be denied, but they nonetheless "relied on his recommendations for the next courses of action." The H-1B petition was prepared by former counsel and filed by the petitioner on July 22, 2010.

On January 5, 2011, USCIS approved the H-1B petition and denied the request to extend the beneficiary's stay. The petitioner indicated that "[the beneficiary] related to [him] that Attorney [REDACTED] explained that the H1B would only be valid if [the beneficiary] travelled to India, but that this may be risky, given that USCIS said that [the beneficiary] was accruing 974 days of unlawful presence in the U.S." The petitioner states that "[the beneficiary] told [him] that he asked Attorney [REDACTED] what the unlawful presence meant and that Attorney [REDACTED] said it was only for the H1B and that it had nothing to do with the I-140 and I-485."

On July 12, 2012, the AAO dismissed the joint motion to reopen and reconsider the decision to dismiss the appeal of the denied Form I-140 immigrant petition. The petitioner reports that "[the beneficiary] told [him] that Attorney [REDACTED] advised to file another motion on the denial of the appeal." The petitioner further claims that at that point he "recommended to [the beneficiary] that we need to change law firms and that [he] didn't trust Attorney [REDACTED] counsel any longer."

The petitioner states that at his encouragement, the beneficiary contacted another attorney, [REDACTED]. The specific date of the beneficiary's meeting with Ms. [REDACTED] was not provided, however, according to the petitioner, the beneficiary stated that Attorney [REDACTED] told the beneficiary that he and his wife were out of status.

Thereafter, on July 19, 2012, the beneficiary contacted another law firm and spoke with [REDACTED] who indicated that there might be an issue with the beneficiary's status. On August 1, 2012, the beneficiary then spoke with a different attorney at the same firm, [REDACTED] who told the beneficiary that he was not in valid status and did not have work authorization. The petitioner subsequently hired the firm to file the instant H-1B petition for the beneficiary. This H-1B petition was submitted on September 6, 2012.

The AAO observes that the record indicates that Mr. [REDACTED] prepared another joint motion for the petitioner, which was filed on August 13, 2012 (thus, *after* the beneficiary had spoken with four other attorneys). Further, no explanation was provided by the petitioner as to why it hired Mr. [REDACTED] to prepare and file another joint motion if the petitioner's president "didn't trust Attorney

counsel any longer."

The director reviewed the evidence submitted by the petitioner and current counsel and approved the H-1B petition on September 19, 2012. However, the director denied the request to extend the beneficiary's stay in the United States, noting that the beneficiary was ineligible for the requested extension due to his failure to maintain nonimmigrant status since the expiration of his prior H-1B nonimmigrant status on November 16, 2007.

On October 18, 2012, current counsel filed a motion to reopen and reconsider the director's decision regarding the request for an extension of the beneficiary's stay in H-1B classification. Current counsel provided several documents with the motion, including an affidavit from Mr. [REDACTED] a printout of e-mail correspondence between current counsel and the California Service Center;⁹ a document entitled "AILA Liaison/VSC Meeting Minutes (12/5/07)"; a complaint filed by the beneficiary with the Missouri Office of Chief Disciplinary Counsel (OCDC) against Mr. [REDACTED]¹⁰ and a complaint filed with the Missouri OCDC against Mr. [REDACTED] by an unnamed individual;¹¹ as well as previously submitted documents.

The director reviewed the evidence provided by current counsel. On November 5, 2012, the director issued a decision dismissing the joint motion, stating that the submission failed to meet the requirements for either a motion to reopen or a motion to reconsider.

On December 6, 2012, current counsel filed a second motion to reopen and reconsider, asserting that the director failed to consider the additional evidence submitted with the prior motion. Specifically, current counsel indicated that the director failed to consider Mr. [REDACTED] affidavit regarding the legal services provided to the petitioner and the beneficiary, and the e-mail correspondence between current counsel and the California Service Center regarding the director's initial decision in this matter.

With the second joint motion, current counsel provided a copy of a letter from the Missouri Office of the Chief Disciplinary Counsel addressed to the beneficiary, acknowledging receipt of his complaint against Mr. [REDACTED]. The AAO observes that current counsel did not provide a letter from the Missouri Office of Chief Disciplinary Counsel acknowledging receipt of a complaint from the petitioner.

⁹ On the Form I-129 (Part 4.9), the petitioner states that it had "previously filed H-1B petition(s) on behalf of [the beneficiary], most recently [REDACTED] which was valid from November 17, 2006 to November 16, 2007." Notably, the most recent H-1B petition filed by the petitioner on behalf of the beneficiary was actually on July 22, 2010 (receipt number [REDACTED]).

¹⁰ An attachment to the complaint references "Enclosure Documents." These documents, however, were not provided to USCIS. No explanation was provided for failing to provide a copy of the entire submission.

¹¹ The identity of the person filing this complaint was not provided. That is, question number one, which asks for the complainant's name and address, was left blank. No explanation was provided. The AAO notes that this form appears to be accompanied by a letter from the petitioner.

On March 20, 2013, the director dismissed the second joint motion to reopen and reconsider, noting that although current counsel presented additional evidence on motion, the evidence did not establish any new facts that had not been previously presented, nor did current counsel provide a legal argument establishing that the director's prior decision was erroneous.¹²

On July 31, 2013, the director certified the petition to the AAO for review. In response to the certification, current counsel submitted a brief. In the brief filed with the AAO, current counsel asserts that the evidence of record establishes that the beneficiary failed to maintain nonimmigrant status due to the ineffective assistance of prior counsel, Mr. [REDACTED]. Current counsel further asserts that such ineffective assistance constitutes "extraordinary circumstances" beyond the control of the petitioner and the beneficiary and, thus, the petitioner's untimely filing of a request for extension of stay should therefore be excused pursuant to the regulation at 8 C.F.R. § 214.1(c)(4).

III. Standard of Proof

In response to the director's certification, current counsel asserts that the petitioner has established by a preponderance of the evidence that approval of the request to extend the beneficiary's stay is warranted. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the

¹² The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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." 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. 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 (2008) (emphasis in original). Accordingly, the new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. Cf. 8 C.F.R. § 1003.23(b)(3).

context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.¹³ The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; see e.g., *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

IV. Period of Authorized Admission – Limited to Six Years

The AAO reviewed the record of proceeding in its entirety and, as will be discussed below, has identified an issue that precludes the approval of the H-1B petition that was not identified by the

¹³ Current counsel repeatedly references the actual weight of the evidence, i.e., "over ten (10) pounds" of documents. The AAO reviewed the record in its entirety and must note that it is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence.

Further, it must be noted that the petitioner and its current counsel have repeatedly submitted multiple copies of the same documents, as well as documentation that does not specifically relate to the instant matter. For instance, the petitioner submitted multiple copies of documentation that was provided to DOL in 2000 and 2002 in support of the Form ETA 750, Application for Alien Employment Certification. The documentation includes advertisements placed in newspapers in 2000 and 2001 and copies of resumes and cover letters received in response to the advertisements. The Form ETA 750 was certified by DOL eight years prior to the submission of the instant petition to USCIS, and it is not at issue here. Nevertheless, while the AAO examined each piece of evidence in the record of proceeding, for the reasons stated herein, the documentation fails to establish eligibility under the applicable provisions and the preponderance of the evidence standard.

director.¹⁴ Consequently, the issue certified to the AAO as to whether the beneficiary is eligible for an extension of stay in H-1B classification is moot.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides: "In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years." The AAO notes that section 106(a) and 104(c) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) temporarily removes the six-year limitation on the authorized period of stay in H-1B classification for aliens under certain conditions.

More specifically, an exemption is available under section 106(a) of AC21 for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays. See Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002). According to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21.

As amended by section 11030A(a) of DOJ21, section 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act* (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since *the filing of any of the following*:

(1) *Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).*

(2) *A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.*

Section 11030A(b) of DOJ21 amended section 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

¹⁴ The director shall send to the petitioner a notice of intent to revoke the petition if the director finds that the approval of the petition violated 8 C.F.R. § 214.2(h) or involved gross error. 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Pub. L. No. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based immigrant petition under section 203(b) of the Act is considered "a lengthy adjudication delay" for purposes of this exemption. See Pub. Law No. 107-273, 116 Stat. at 1836.

In the instant case, the beneficiary was granted H-1B classification from December 3, 1997 until November 16, 2007. As it appears that the beneficiary has been present in the United States since at least January 1997, he has therefore reached the six-year limitation in H-1B classification and, as will be discussed, the petitioner has neither demonstrated nor claimed that the beneficiary has since spent more than one year outside the United States or otherwise qualifies for an exemption to this limitation.

More specifically, the petitioner submitted an Application for Alien Employment Certification (Form ETA 750) to DOL. It was certified by DOL on May 6, 2004.¹⁵ The petitioner then submitted an Immigrant Petition for Alien Worker (Form I-140) on behalf of the beneficiary to USCIS on July 26, 2007, which was denied on April 28, 2008.

Thereafter, the petitioner submitted a motion regarding the decision on the Form I-140 petition, which the director dismissed on July 24, 2008. The petitioner then submitted an appeal to the AAO, which was dismissed on June 21, 2010. The petitioner subsequently submitted two additional motions to the AAO, which were dismissed on July 12, 2012 and May 28, 2013 respectively.¹⁶

¹⁵ DOL certifies to USCIS that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. See 20 C.F.R. § 656.24(b).

¹⁶ As stated above, the mere filing of a motion with the AAO does not suspend the decision to deny the immigrant petition or authorize the beneficiary to remain in the United States. 8 C.F.R. § 103.5(a)(1)(iv). In addition, with regard to the filings that were submitted after the filing of the instant H-1B petition, the AAO notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Further, as noted above, the mere filing of a motion with the AAO does not suspend the decision to deny the immigrant petition or authorize the beneficiary to remain in the United States. As such, these subsequent filings do not establish that the beneficiary qualifies for an exemption from the six-year limitation in H-1B classification.

The regulations indicate that "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). Thus, the mere filing of a motion to reopen or reconsider does not suspend the decision to deny the immigrant petition or authorize the beneficiary to remain in the United States.

An exemption from the six-year period is permitted for aliens only until such time as a final decision is made on the relevant application or petition. Notably, a final decision to deny an immigrant petition is evidence that USCIS has completed its process of adjudicating the petition and that the beneficiary's application process for obtaining lawful permanent resident status in the United States by way of that petition has ended. Thus, the final decision to deny the petition precludes USCIS from further processing a nonimmigrant extension of stay request based upon section 106(a) of AC21. To accept a contrary interpretation, USCIS would be required to indefinitely extend an individual's stay in the United States in one-year increments. Nothing in the AC21 or DOJ21 legislative history serves to suggest that Congress intended that petitioners on behalf of individual aliens retain the ability to have those aliens remain in the United States indefinitely, e.g., for twenty or thirty years, simply by submitting motion after motion. Rather, the legislative intent reflects only a desire to shield individual aliens from the inequities of government bureaucratic inefficiency and does not include a mandate for an infinite extension of stay in a nonimmigrant status.

Here, the director denied the Form I-140 petition over *four years prior* to the filing of the H-1B petition. Since then, the director has issued a decision on the petitioner's motion, and the AAO has issued decisions on the petitioner's appeal of the director's decision to deny the immigrant petition and on two motions filed on the AAO's decision to dismiss the appeal. Although an additional motion in connection with the immigrant petition (which was filed *after* the instant H-1B petition) is currently pending before the AAO, the regulations indicate that the mere filing of a motion does not suspend the decision in the case or extend the previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv). Accordingly, upon a complete review of the record of proceeding, the petitioner has not established that the beneficiary qualifies for an exemption from the six-year limit and is thereby eligible for an extension of stay under section 106(a) of AC21.¹⁷

The AAO now turns to section 104(c) of AC21 regarding the other exemption to the limited period of authorized admission under section 214(g)(4) of the Act. More specifically, section 104(c) of AC21 reads in, pertinent part, as follows:

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—

¹⁷ Again, the instant H-1B petition was filed on September 6, 2012. On October 15, 2012 (over a month *after* filing the instant H-1B petition), the petitioner submitted another Form I-140 petition on behalf of the beneficiary. Additionally, the petitioner submitted another motion (with regard to the initial immigrant petition) to the AAO on June 26, 2013 (over nine months *after* filing the H-1B petition), which is currently pending.

(1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,

may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253.

Section 104(c) of AC21 is applicable when an alien, who is the beneficiary of a Form I-140 petition, is eligible to be granted lawful permanent resident status but for the application of a per country limitation to which that alien is subject or, alternatively, if the immigrant preference category applicable to that alien is, as a whole, "unavailable." Thus, to establish eligibility under the exemption at 104(c) of AC21, the petitioner must establish that at the time of filing for the extension of H-1B nonimmigrant status, the beneficiary is not eligible to be granted lawful permanent resident status on the sole basis that he/she is subject to a per country or worldwide visa limitation in accordance with the his/her immigrant visa "priority date."

Here, the petitioner does not claim that the beneficiary qualifies for an exemption under 104(c) of AC21. Nevertheless, upon review, the AAO notes that the record of proceeding does not establish that the beneficiary is eligible to be granted lawful permanent resident status as the Form I-140 immigrant petition filed on his behalf was denied. Thus, he does not qualify for an exemption from the six-year limitation based upon 104(c) of AC21. Accordingly, the AAO need not address this exemption further.

Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B nonimmigrant in the United States. Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay. Moreover, the AAO again notes that the regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1).

The petitioner has not established that the beneficiary is eligible for an exemption from the six-year limitation on the authorized period of stay in H-1B classification. This basis for denial of the petition renders the remaining issues in this proceeding moot. Thus, while the AAO need not address the director's decision that the beneficiary is not eligible for an extension of stay in H-1B classification, it will nevertheless address this issue as the director has certified the decision to the AAO as involving a complex or novel issue of law or fact.¹⁸

¹⁸ The petitioner has not established that the beneficiary is eligible for an exemption from the six-year

V. Request for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4)

Current counsel for the petitioner acknowledges that the petitioner's request to extend the beneficiary's stay was untimely filed and requests that the untimely filing be excused. The regulation at 8 C.F.R. § 214.1(c)(4) provides the following regarding the timely filing of an extension of stay request (emphasis added):

- (4) *Timely filings and maintenance of status.* An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status, or where such status expired before the application or petition was filed, except that a failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, and where it is demonstrated at the time of filing that:
- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
 - (ii) The alien has not otherwise violated his or her nonimmigrant status;
 - (iii) The alien remains a bona fide nonimmigrant; and
 - (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

As a threshold issue, it is noted that 8 C.F.R. § 214.1(c)(4) requires that the petitioner demonstrate that all of the criteria listed at (i) to (iv) is satisfied for the director to be authorized to excuse the untimely filing of the extension of stay request. Thus, the regulation at 8 C.F.R. § 214.1(c)(4) allows the director discretion to excuse the untimely filing if in this matter it finds that (1) the petitioner demonstrated that "at the time of filing"; (2) there was a delay due to extraordinary circumstances beyond the control of the petitioner; (3) that the director finds the delay "commensurate with the circumstances"; (4) the beneficiary has not otherwise violated his nonimmigrant status; (5) the beneficiary remains a bona fide nonimmigrant; and (6) the beneficiary is not the subject of removal proceedings. In the instant case, the petitioner and its counsel focus on the criterion regarding the circumstances of the delay in filing the Form I-129 (which the AAO will

limitation in accordance with the applicable statutory and regulatory provisions. Accordingly, the petition will be remanded to the director for further action relative to the approved H-1B petition. Given that this issue is dispositive, the AAO reserves the remaining issues that it observes in the record with regard to the approval of the H-1B petition. That is, as the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, the AAO will not address and will instead reserve its determination on the additional issues (not identified by the director) that it observes in the record of proceeding with regard to the approval of the H-1B petition.

address later in the decision). However, as a preliminary matter, the AAO notes that another issue precludes the director from having the authority to exercise discretion in this matter.

More specifically, the regulations require that the petitioner establish that the beneficiary has not otherwise violated his nonimmigrant status. 8 C.F.R. § 214.1(c)(4)(ii). An alien in the United States may not engage in any employment unless he or she has been accorded a nonimmigrant classification which authorizes employment or has been granted permission to engage in employment. 8 C.F.R. § 214.1(e); 8 C.F.R. § 274a.12. Title 8 C.F.R. § 214.1(e) further states that an alien may only engage in such employment as has been authorized, and "any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section [237](a)(1)(C)(i) of the Act."¹⁹

In the instant case, the beneficiary was authorized to be employed by the petitioner in accordance with the H-1B petitions that were approved and valid until November 17, 2007. In connection with an application for permanent residency, the beneficiary applied for employment authorization. The application was approved, and the beneficiary was issued an Employment Authorization Document (EAD), with validity dates of September 24, 2007 to September 23, 2008.²⁰ According to current counsel, the beneficiary then began working pursuant to the EAD. During the interim, his application for adjustment of status was denied on April 28, 2008.²¹

¹⁹ With regard to nonimmigrant status violations, the Act states that "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted . . . or to comply with the conditions of any such status is deportable." Section 237(a)(1)(C)(i) of the Act; 8 U.S.C. 1227(a)(1)(C)(i).

Section 237 of the Act was formerly designated as section 241 of the Act, redesignated as section 237 of the Act by section 305(a)(2), Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009, the former § 237 of the Act having been struck out by section 305(a)(1) of IIRAIRA.

²⁰ Employment authorization automatically terminates upon the expiration date specified on the EAD (Form I-766). See 8 C.F.R. § 274a.14(a)(1)(i).

²¹ In accordance with 8 C.F.R. § 274a.14(b), the director may revoke the grant of employment authorization prior to the expiration date specified on the EAD when it appears that any condition upon which it was granted has not been met or no longer exists, including the denial of an application for adjustment of status for permanent residence. See also 8 C.F.R. § 274a.12(c)(9).

In the instant case, the AAO has not reviewed the file containing the Application for Employment Authorization (Form I-765), and thus has not determined if the director revoked the grant of employment authorization when the beneficiary's application to adjust status was denied. Nevertheless, even assuming *arguendo* that the director did not revoke the approval of the beneficiary's employment authorization, the beneficiary would only have been granted authorization to work in the United States on this basis until September 23, 2008 (the date specified on the EAD). The petitioner has not demonstrated that the beneficiary was subsequently granted authorization to work in the United States based upon any further grounds.

On July 22, 2010, the petitioner filed an H-1B petition (WAC 10 202 51119).²² The director approved the H-1B petition (with validity dates of December 16, 2010 to June 28, 2013), but denied the extension of stay request. The director's decision stated that the beneficiary was without lawful immigration status and was present in the United States in violation of the law. Moreover, the notice also indicated that the beneficiary was not authorized to be employed by the petitioner until he obtained a visa and was admitted to the United States in H-1B classification.²³

The beneficiary stated on the Form G-325A (Biographic Information) signed on September 8, 2013 that he worked for the petitioner from December 1999 to August 2012 (without interruption). Moreover, the petitioner submitted several Form W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary indicating that the beneficiary received compensation from 2002 to 2012. Thus, the beneficiary has worked in the United States without employment authorization (and that the petitioner has employed him), in violation of the statutory and regulatory provisions, for approximately four years.

The Immigration Reform and Control Act required employers to verify the identity and employment eligibility of their employees and created criminal and civil sanctions for employment related violations. Employers are required to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. Section 274A(b) of the Act; 8 U.S.C. § 1324a(b). Verification is documented on the Employment Eligibility Verification Form (Form I-9).

²² A nonimmigrant alien may accept new H-1B employment under the increased portability provision of the Act when certain conditions are met, including: (1) the nonimmigrant alien has been lawfully admitted into the United States; (2) the petitioner has filed a nonfrivolous petition for new employment before the date of expiration of the authorized period of stay; and (3) subsequent to such lawful admission, the nonimmigrant alien has not been employed without authorization in the United States before the filing of the petition. Section 201(n)(1) and (2) of the Act; 8 U.S.C. § 1184(n)(1) and (2). In the instant case, the H-1B petition was filed after the expiration of the authorized period of stay and, as discussed *infra*, the beneficiary was employed without authorization before the filing of the H-1B petition. Thus, the beneficiary was not eligible to commence employment with the petitioner on this basis. Likewise, as the Form I-129 petition was submitted after the expiration of the beneficiary's authorized period of stay, the beneficiary was also not authorized to work for the petitioner pursuant to 8 C.F.R. § 274a.12(b)(20).

²³ The petitioner submitted the instant H-1B petition on September 6, 2012 (approximately 20 months after the director issued this notice). Again, the AAO notes that the director's decision notified the petitioner that (1) the beneficiary was without lawful immigration status, (2) he was present in the United States in violation of the law, and (3) he was not authorized to work for the petitioner. Additionally, the AAO observes that the petitioner's president indicated (in a statement dated September 4, 2012) that "[the beneficiary] related to me that Attorney Wichmer explained that the H1B would only be valid if [the beneficiary] traveled to India and back, but this may be risky, given that USCIS said [the beneficiary] was accruing 974 days of unlawful presence in the United States."

Despite this information, the beneficiary chose to remain in the United States and work for the petitioner (without authorization), and the petitioner elected to continue to employ the beneficiary.

Employers determined to have knowingly hired or continued to employ unauthorized workers under section 274A(a)(1)(A) or (a)(2) of the Act will be required to cease the unlawful activity, may be fined up to \$16,000 per violation, and may be criminally prosecuted. Additionally, an employer found to have knowingly hired or continued to employ unauthorized workers may be subject to debarment by the U.S. Immigration and Customs Enforcement, meaning that the employer will be prevented from participating in future federal contracts and from receiving other government benefits.

USCIS offers customer support specifically for Form I-9 questions and concerns for employers and for employees. The USCIS website provides toll-free telephone numbers (specifically for Form I-9 questions), a designated e-mail address, a link to a Handbook for Employers, a "Self-Check" tool to confirm work eligibility, as well as several additional links and tools. See www.uscis.gov

Thus, upon review of the record of proceeding, the AAO finds that an extension of stay may not be approved because the record indicates that the beneficiary violated his nonimmigrant status by working without employment authorization. Accordingly, the AAO need not address the additional criteria at 8 C.F.R. § 214.1(c)(4). Nevertheless, the AAO will continue its discussion on the matter to provide assistance to the petitioner and its current counsel in understanding some of the additional deficiencies in the record of proceeding.²⁴

As noted earlier, the regulation 8 C.F.R. § 214.1(c)(4) confers discretionary authority to extend the beneficiary's stay "where it is demonstrated at the time of filing" that the delay was due to extraordinary circumstances. The AAO observes that current counsel relies heavily on Mr. [REDACTED] affidavit to demonstrate the existence of extraordinary circumstances, i.e., ineffective assistance of counsel. However, as Mr. [REDACTED] affidavit was not provided to USCIS at the time of filing, but rather in support of a later motion to reopen and reconsider, under a plain reading of the regulation at 8 C.F.R. § 214.1(c)(4), the affidavit cannot be considered.²⁵ However, as will be described below, the AAO notes that even if this evidence, as well as the other additional documentation provided for the first time on motion (including the complaint forms submitted to the Missouri Office of Chief Disciplinary Counsel), had been submitted at the time of filing, the record of proceeding would still fail to establish that the petitioner received ineffective assistance of counsel in this matter.

²⁴ It must be emphasized that the issue is moot as the petitioner has not demonstrated the beneficiary is exempt from the six-year limitation in H-1B classification. Furthermore, and as just discussed, the record of proceeding indicates that the beneficiary worked without employment authorization and, thus, the director did not have the discretion to excuse the late filing of the extension of stay. 8 C.F.R. § 214.1(c)(4)(ii).

²⁵ The plain language of 8 C.F.R. § 214.1(c)(4) requires demonstration of the criteria within this subsection "at the time of filing." The AAO observes, however, that even if the evidence provided subsequent to the filing of the instant petition had indeed been provided at the time of filing (which it was not), the evidence would still fail to establish that the petitioner received ineffective assistance of counsel in this matter for the reasons discussed in greater detail, *infra*.

As previously discussed, the petitioner (rather than the beneficiary) is the affected party, and it is the petitioner who elects whether or not to file the Form I-129 (which encompasses both the request to extend the petition *and* the request to extend the beneficiary's stay). 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 214.2(h)(14) and (15). Here, current counsel asserts that the petitioner received ineffective assistance from prior counsel, Mr. [REDACTED] and that his ineffective assistance constitutes extraordinary circumstances beyond the control of the petitioner and the beneficiary.

In evaluating whether a petitioner has demonstrated ineffective assistance of counsel, the AAO generally follows the procedural guidelines delineated by the Board of Immigration Appeals (BIA) in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). 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.* Complying with these requirements alone does not establish ineffective assistance of counsel; they are minimum evidentiary requirements that provide a basis for the AAO to evaluate whether the alleged ineffective assistance rendered the proceeding "fundamentally unfair." *Id.* at 638.

Here, at the time of filing the H-1B petition, the petitioner failed to submit evidence to establish that the minimum *Lozada* evidentiary requirements had been met. Specifically, with respect to the first requirement under *Lozada*, the petitioner provided an affidavit from its president dated September 4, 2012. The AAO observes that in the affidavit, the petitioner's president does not detail either the petitioner's agreement with Mr. [REDACTED] regarding the actions to be taken or Mr. [REDACTED] representations (or lack thereof) *to the petitioner*. Notably, the petitioner repeatedly indicated that it relied on the beneficiary to relay information from Mr. [REDACTED]. Further, the only documentation regarding an agreement and/or fees consists of (1) a letter from Mr. [REDACTED] to the beneficiary dated May 9, 2000 (which limited their agreement to "processing your labor certification and subsequent immigrant visa"); and (2) an invoice from Mr. [REDACTED] to the beneficiary dated July 16, 2010 in connection with filing fees for appeals. The documentation does not detail any particular agreement that was entered into with Mr. [REDACTED] with respect to the actions to be taken after submitting the immigrant petition and application to adjust status, nor does it provide any representations that prior counsel did or did not make to the petitioner or beneficiary.

Significantly, although the petitioner claims to have hired Mr. [REDACTED] to prepare immigration documents on its behalf for over a decade, the AAO observes that the petitioner provided no evidence of its own agreement or contract with Mr. [REDACTED]. Further, the petitioner does not allege that it contracted with Mr. [REDACTED] to provide a specific service, which was subsequently not provided. Rather, the petitioner indicates that it was dissatisfied with the advice that it received from prior counsel, which it appears, with the exception of a meeting in June or July 2010, was primarily received second-hand through the beneficiary. For example, the petitioner does not allege

that it consulted directly with Mr. [REDACTED] with regard to filing an H-1B petition in 2007. Instead, it relied on the beneficiary's statement that the filing would be a "waste of time and money." Specifically, the petitioner's president states that the beneficiary "informed" him of Mr. [REDACTED] advice and recommendations.

Regarding the second criterion under *Lozada*, which requires that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, the petitioner has not provided sufficient evidence to establish that at the time of filing, prior counsel was informed of the allegations or given an opportunity to respond. The AAO notes that on motion, current counsel *for the first time* provided an affidavit from Mr. [REDACTED] (dated October 16, 2012) that generally describes the advice and services that he provided to the petitioner and the beneficiary.²⁶ However, current counsel did not provide any evidence as to whether Mr. [REDACTED] was informed of any specific allegations against him.²⁷

Under *Lozada*, 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." *Matter of Lozada*, 19 I&N Dec. at 639. Mr. [REDACTED] affidavit does not indicate that he provided the affidavit in response to the specific allegations of ineffective assistance. With the first joint motion, current counsel provided complaint forms for the Missouri Office of Chief Disciplinary Counsel (OCDC), along with delivery confirmation receipts.²⁸ Notably, the forms were not sent to OCDC until approximately a month *after* the director issued the decision on the H-1B petition and extension of stay request. In any event, upon review of the record of proceeding, the petitioner has not demonstrated that it informed Mr. [REDACTED] of the petitioner's allegations of ineffectiveness and that he was given an opportunity to respond.

²⁶ Mr. [REDACTED] repeatedly states that he advised the beneficiary and his wife about "the pros and cons" of filing various applications and petitions.

²⁷ As an exhibit attached to the complaint filed in federal district court regarding this matter, current counsel included an e-mail dated October 4, 2012 from the beneficiary to Mr. [REDACTED] indicating that the beneficiary's current counsel requested that the beneficiary "forward [him] the attached affidavit." The record is unclear who prepared the draft, but in the e-mail, the beneficiary requested that Mr. [REDACTED] "review and sign" the affidavit. A copy of the draft affidavit was also provided with the exhibit and, notably, the draft affidavit differs from the final affidavit that was actually endorsed by Mr. [REDACTED]. Moreover, there is no indication that Mr. [REDACTED] was informed of any allegations of ineffectiveness or provided the affidavit in response to such allegations.

²⁸ The AAO observes that on motion, current counsel submitted, for the first time, two complaint forms. One of the complaint forms was filed by the beneficiary; the second complaint form does not contain the identity of the complainant – as the entry of the document requesting the complainant's name and address (question 1) was left blank.

The AAO further notes that in support of the petitioner's second motion to reopen and reconsider, current counsel provided a letter from the Missouri Office of Chief Disciplinary Counsel, dated November 27, 2012, acknowledging receipt of the beneficiary's complaint; however, no similar acknowledgement for the petitioner was provided. Moreover, the petitioner did not provide the disposition of either complaint.

Regarding the third requirement under *Lozada*, the AAO observes that the petitioner's initial Form I-129 petition and supporting documents did not "reflect whether a complaint [had] been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not." *Id.* The petitioner and its current counsel did not provide any information or address this requirement in the initial H-1B submission. After the petition was denied, current counsel submitted a motion with documentation indicating that the beneficiary submitted a complaint *after* the director's decision was issued on the petition. No explanation for the delay was provided. Thus, at the time of filing the H-1B petition, the third *Lozada* requirement had not been met.

In support of its second motion to reopen and reconsider, filed on December 6, 2012, the petitioner provided a copy of a letter from the Missouri Office of Chief Disciplinary Counsel, dated November 27, 2012, acknowledging receipt of the beneficiary's complaint. The AAO observes that the letter states that the beneficiary would receive a copy of the attorney's response to the allegations of misconduct. The letter further states that the Regional Disciplinary Committee would advise the beneficiary in writing of its decision regarding the complaint.²⁹ The AAO notes that, although the Missouri OCDC indicated in its letter that the beneficiary would be informed of developments in the investigation, current counsel failed to provide any update regarding the status of the complaint against Mr. [REDACTED] in its August 2013 submission to the AAO.³⁰

²⁹ The Missouri Office of the Chief Disciplinary Counsel website states, in part, the following regarding the disclosure of status of complaints:

Will I be informed of the progress of my complaint?

You will be informed of the disposition of your complaint and of any cooperation that is needed on your part. The OCDC and the Regional Disciplinary Committees attempt to keep complainants informed of the general status of and major developments that occur in their complaints.

Office of the Chief Disciplinary Counsel, For the Public, Disciplinary Proceedings, available on the Internet at <http://mochiefcounsel.org/ocdc.htm?id=24&cat=2> (last visited October 29, 2013).

³⁰ Through the submission of the documentation, the petitioner indicated that the complaint(s) are relevant to the instant proceeding. The petitioner, however, failed to provide any further information regarding the status of the complaint(s). Accordingly, the AAO contacted the Office of the Chief Disciplinary Counsel for the Supreme Court of Missouri regarding the status of any complaints against Mr. [REDACTED]. On September 27, 2013, [REDACTED] Deputy Disciplinary Counsel responded to the request. He indicated that the office does not have any public information regarding a complaint filed against Mr. [REDACTED] and provided information indicating that (1) Mr. [REDACTED] is not the subject of a disciplinary matter pending with a Disciplinary Hearing Panel; (2) Mr. [REDACTED] is not the subject of a disciplinary matter pending at the Missouri Supreme Court; and (3) Mr. [REDACTED] has not been disciplined by the Missouri Supreme Court. Furthermore, there is no indication that Mr. [REDACTED] has been disbarred, suspended, placed on probation or reprimanded. Moreover, it must be noted that the petitioner submitted a printout indicating that Mr. [REDACTED] is currently an active member of the Missouri bar and in good standing.

As previously noted, to establish that ineffective assistance of counsel constitutes extraordinary circumstances beyond the control of the applicant or the petitioner that prevented timely filing of a request for extension of stay, the petitioner must satisfy all three *Lozada* requirements at the time of filing. As none of these requirements were satisfied at the time of filing, the AAO finds that the petitioner failed to establish ineffective assistance of prior counsel.

Current counsel asserts that the petitioner has provided substantial documentation in the record evincing Mr. [REDACTED] ineffective assistance. The AAO disagrees.

For the petitioner to establish ineffective assistance of counsel, it must demonstrate that Mr. [REDACTED] actions rendered the proceeding "fundamentally unfair." *Matter of Lozada*, 19 I&N Dec. at 638. Moreover, the petitioner must establish that it was "prejudiced" by Mr. [REDACTED] representation. *Id.*

In response to the director's certification, current counsel asserts that the director failed to consider the evidence demonstrating Mr. [REDACTED] ineffective assistance. Current counsel states that the director failed to acknowledge "the blatant misconduct and erroneous legal advice of Attorney [REDACTED]. Further, current counsel claims that "[t]he record is replete with the reassurances that Attorney [REDACTED] gave to the Petitioner and the Beneficiary, and his wife, regarding the continuing work authorization and status based on the Appeals and Motions of the I-140." Current counsel continues, "The Service need not rely merely on the Beneficiary's Affidavit and his wife; Attorney [REDACTED] own Affidavit confirms that he advised that [the beneficiary] had been authorized to work despite not having an EAD or valid I-94 Card."

The AAO reviewed the record in its entirety. However, the evidence fails to establish by a preponderance of the evidence that Mr. [REDACTED] actions rendered these proceedings "fundamentally unfair." Specifically, the AAO observes that, although the petitioner and the beneficiary state that Mr. [REDACTED] advised the beneficiary in 2007 that extending the H-1B classification at that time would be a "waste of time and money," in his affidavit, Mr. [REDACTED] states that, "[a]round the time that their I-485 Applications were filed, and again as the H-1B expiration date approached, [he] advised [the beneficiary] and his wife about the pros and cons of applying for further extensions of their H status." Mr. [REDACTED] further states that "[a]fter consultation, they elected not to extend their H-1B and H-4 because their I-485 Applications were pending." Thus, although the beneficiary and the petitioner indicate that they were dissatisfied with the ultimate result of the decisions made after consulting with Mr. [REDACTED] the evidence of record does not establish that the failure to timely file an extension was caused by a lack of competent legal services.³¹

³¹ The AAO will not speculate as what "pros and cons" may have been discussed in the meeting between Mr. [REDACTED] the beneficiary and his wife. Notably, the American Immigration Lawyers Association (AILA) published an Immigration and Nationality Handbook (2008-2009 Edition), which contains an article, "The Eternal Adjustment Applicant – Frequently Asked Questions" that addresses this issue. Specifically, question 14 states, "Is it wise to extend H or L status if an adjustment is pending?" The response provided is that it "depends upon a number of factors" and a list of nine factors for consideration is provided, including cost. See Tammy Fox-Isicoff & H. Ronald Klasco, *The Eternal Adjustment Applicant – Frequently Asked Questions*, in IMMIGRATION AND NATIONALITY HANDBOOK 2008-2009 Edition, 575, 577 (Richard J. Link

After reviewing the affidavits in the record of proceeding, the AAO further notes that the individuals provide different accounts of the conversations. As discussed, the current regulations indicate that *the petitioner*, rather than the beneficiary, is responsible for filing both the request to extend the petition and the request to extend the beneficiary's stay. See 8 C.F.R. § 214.2(h)(14) and (15). However, the petitioner's president does not allege that he spoke directly with Mr. Wichmer to discuss filing an H-1B extension for the beneficiary, but rather relied on the beneficiary's representations regarding the "pros and cons" of filing a Form I-129 petition.

Although the petitioner and the beneficiary represent that they followed Mr. Wichmer's advice and "relied on his recommendations," it does not appear that they always did so. Notably, Mr. Wichmer states that "[i]n June 2008, at the insistence of [the] clients, we considered filing a new I-140 and concurrent I-485s for [the beneficiary and his spouse]." Mr. Wichmer continues by stating that he prepared and filed the petition and applications and that he "did not believe that this course of action was likely to be successful, though [he] believe[d] there was and is legal justification for such action."³² The petitioner's president states in his affidavit that in 2010, Mr. Wichmer "grudgingly filed an H1B extension petition for [the petitioner] on behalf of [the beneficiary] despite his belief that it would be denied." Thus, the statements suggest that the petitioner and the beneficiary did not substitute Mr. Wichmer's judgment for their own, at least with regard to these filings.

In support of the extension of stay request, current counsel cites *Hovhannisyan v. U.S. Dep't of Homeland Sec.*, 624 F.Supp.2d 1135 (C.D. Cal. 2008) as relevant in the instant matter and claims that "[t]he facts in that case are similar to the facts presented here." The AAO disagrees with counsel and finds that counsel has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the decision. More specifically, in *Hovhannisyan*, the petitioner contracted an attorney to file a Form I-129 petition to extend the beneficiary's stay in H-1B classification. *Id.* at 1139. The attorney failed to obtain a Labor Condition Application (LCA) from DOL that was certified prior to the date the petition was filed, and the petition was ultimately denied. *Id.* at 1139-40. The attorney subsequently filed a new Form I-129 petition, and requested that USCIS excuse the untimely filing of the request for the extension of stay, indicating that it was the attorney's failure to obtain the LCA. *Id.* at 1140. The director issued a split decision, granting H-1B classification but denying the request for extension of stay. *Id.* The court observed that the administrative record reflected that the attorney had "admitted responsibility for the failure to file a certified LCA." *Id.* at 1150. The court remanded the case for further action. *Id.* at 1153.

ed., Am. Immigr. Law. Ass'n. 2008). The AAO does not endorse the information provided in the Handbook or the article but notes that a number of factors may be considered by a petitioner with regard to this issue.

³² On October 12, 2012, the petitioner submitted another Form I-140 on behalf of the beneficiary and seeks to use a previously submitted labor certification. For this new Form I-140, the petitioner is represented by the same firm that is representing it in the instant H-1B matter. Additionally, the beneficiary and his current counsel submitted a Form I-485, Application to Register Permanent Residence or Adjust Status, along with a Form I-765, Application for Employment Authorization, to USCIS on April 26, 2013.

Contrary to the facts in *Hovhannisyán*, the instant record does not contain an admission of error by the attorney assuming direct responsibility for the failure to timely file the request for an extension of stay. Rather, in the instant matter, the petitioner does not allege that it hired Mr. [REDACTED] to file a Form I-129 petition that Mr. [REDACTED] failed to file or improperly filed. Further, Mr. [REDACTED] has not "admitted responsibility" for failing or improperly filing a petition. Rather, the ineffective assistance alleged in this matter is the quality of Mr. [REDACTED] legal advice to the petitioner as primarily relayed by the beneficiary.³³ That is, the affidavits indicate that the petitioner's source of information was principally the beneficiary, who provided a summary of his conversations with Mr. [REDACTED]

Further, the record contains conflicting perspectives on Mr. [REDACTED] advice and insufficient information regarding the full content of the discussions between Mr. [REDACTED] and the beneficiary regarding the "pros and cons" of extending the beneficiary's H-1B classification. Notably, the petitioner, the beneficiary, his spouse, and Mr. [REDACTED] refer to discussions that occurred over a five year period, between 2007 and 2012. It appears that their statements (regarding the discussions that occurred during that time period) are largely (if not entirely) based upon the individuals' recollections of the conversations rather than notes or recordings created contemporaneously.³⁴

In addition to demonstrating extraordinary circumstances, the petitioner must establish that the delay in filing was "commensurate with the circumstances." To that end, current counsel represents that, due to misrepresentations by Mr. [REDACTED] the petitioner and the beneficiary believed that the beneficiary was authorized to work until the beneficiary had a consultation with current counsel on August 1, 2012. Current counsel claims that "that they were truly shocked and actually thought until that moment that status and work authorization was given to them by the continuing challenges to [the petitioner's] I-140 petition denial."

Current counsel further asserts that "Attorney [REDACTED] own Affidavit confirms that he advised that [the beneficiary] had been authorized to work despite not having an EAD or valid I-94 Card." Counsel further states that Mr. [REDACTED] affidavit indicates that "Attorney [REDACTED] repeatedly advised them that they were in status, that they did not need to file any application or petition to USCIS to maintain their status and work authorization."

The AAO reviewed Mr. [REDACTED] affidavit in its entirety. The affidavit states that, "[a]s per [his] usual practice, [Mr. [REDACTED] advised the [beneficiary and his wife] about the pros and cons of their case, including the effect of the denial [of the Forms I-140 and I-485] on their status and work authorization (there were arguments for and against)."³⁵ Mr. [REDACTED] attests to various other

³³ As previously discussed, the regulations indicate that the petitioner determines whether or not to file a Form I-129 petition for H-1B classification with USCIS, rather than the beneficiary. See 8 C.F.R. § 214.2(h)(14) and (15).

³⁴ For instance, it does not appear that the information provided regarding the conversations is primarily based upon taped recordings, official minutes of meetings, transcripts, memorandums, facsimiles, letters, notes, calendars, e-mails, computer files, voice mails, or related materials.

³⁵ Mr. [REDACTED] statements that there were "pros and cons" and "arguments for and against" taking various actions do not in themselves demonstrate that Mr. [REDACTED] lacked an understanding of the law, as current

conversations with the beneficiary regarding his status, but the affidavit does not provide sufficient information to determine what advice (if any) he may have provided with regard to the beneficiary's authorization to work.

The AAO further notes that in the petitioner's affidavit, the petitioner does not indicate that Mr. [REDACTED] advised him or the beneficiary that the beneficiary "had been authorized to work despite not hav[ing] an EAD or valid I-94 Card," as claimed by current counsel. In addition, the AAO notes that in the beneficiary's affidavit, the beneficiary states that he "asked Attorney Wichmer if [they] could still work and if [they] could still travel," but that the beneficiary and his wife "were more focused on [their] ability to travel," and claims that Mr. [REDACTED] "did not answer [their] question about working." The beneficiary stated, "We thought that since he did not advise us not to work that it was still ok to do so." Thus, the evidence does not establish that Mr. [REDACTED] specifically provided erroneous advice regarding the beneficiary's authorization to work. Moreover, as previously mentioned, the affidavits (provided by the petitioner, the beneficiary, his spouse, and Mr. [REDACTED] are with regard to conversations that took place between 2007 and 2012, and each of the affidavits appears to be based primarily on the declarants' memory of events rather than on recordings or contemporaneous notes.

In response to the director's certification, current counsel references letters provided by Mr. [REDACTED] which the beneficiary and his spouse presented with their respective driver's license renewal applications. Current counsel claims that the letters led "[the petitioner and the beneficiary] to believe that the [b]eneficiary was still in status with permission to work." The AAO reviewed the letters dated November 4, 2010 and August 31, 2011. The letters state that the beneficiary and his wife were "the beneficiaries of concurrently filed I-140 of [the petitioner] and I-485s for both [the beneficiary and his wife]." The letters further state that "[t]he I-140 is still pending before USCIS [or USCIS Administrative Appeals Office] at this time." The letters do not indicate that the beneficiary had permission to work. Moreover, the beneficiary states in his affidavit that "Attorney Wichmer's letters ended up not being of much assistance" and that it was through the help of a congressional representative's office and the Missouri Department of Revenue/License Bureau that the licenses were extended.

The AAO further observes that as the employer of a temporary employee, the petitioner was required to verify the beneficiary's authorization to work in the United States. Specifically, the petitioner had a duty to reverify the beneficiary's authorization to work, and document the authorization on a Form I-9, upon expiration of his EAD.³⁶ If the beneficiary did not have any of

counsel asserted to the director on motion.

³⁶ The version of Form M-274, Handbook for Employers, that was current when the beneficiary's H-1B classification expired states the following regarding an employer's obligation to reverify work authorization of temporary employees:

Reverifying Employment Authorization for Current Employees

When an employee's work authorization expires, you must reverify his or her employment eligibility. You may use Section 3 of the Form I-9, or, if Section 3 has already been used for a previous reverification or update, use a new Form I-9. If you use a new form, you should

the documentation outlined on the Form I-9 and its accompanying instructions, the petitioner should reasonably have been on notice that the beneficiary was not authorized for continued employment in the United States with the petitioner.³⁷ Here, it appears the petitioner elected instead to primarily rely on the beneficiary's representations and beliefs.

write the employee's name in Section 1, complete Section 3, and retain the new form with the original. The employee must present a document that shows either an extension of the employee's initial employment authorization or new work authorization. If the employee cannot provide you with proof of current work authorization (e.g. any document from List A or List C, including an unrestricted Social Security card), you cannot continue to employ that person.

NOTE: List B identity documents, such as a driver's license, should not be reverified when they expire.

To maintain continuous employment eligibility, an employee with temporary work authorization should apply for new work authorization at least 90 days before the current expiration date. If USCIS fails to adjudicate the application for employment authorization within 90 days, then the employee will be authorized for employment on Form I-766 for a period not to exceed 240 days.

NOTE: You must reverify an employee's employment eligibility on the Form I-9 not later than the date the employee's work authorization expires.

Reverifying or Updating Employment Authorization for Rehired Employees

When you rehire an employee, you must ensure that he or she is still authorized to work. You may do this by completing a new Form I-9 or you may reverify or update the original form by completing Section 3.

If you rehire an employee who has previously completed a Form I-9, you may reverify on the employee's original Form I-9 (or on a new Form I-9 if Section 3 of the original has already been used) if:

1. You rehire the employee within three years of the initial date of hire; and
2. The employee's previous grant of work authorization has expired, but he or she is currently eligible to work on a different basis or under a new grant of work authorization than when the original Form I-9 was completed.

To reverify, you must:

1. Record the date of rehire;
2. Record the document title, number and expiration date (if any) of any document(s) presented;
3. Sign and date Section 3; and
4. If you are reverifying on a new Form I-9, write the employee's name in Section 1.

U.S. Dep't of Homeland Security, USCIS, Handbook for Employers: Instructions for Completing the Form I-9 (Employment Verification Eligibility Form), Form M-274 (Rev. 11/01/2007) N.

³⁷ Employers and employees may also contact USCIS customer service through a toll-free telephone number

Furthermore, although current counsel suggests that the petitioner and the beneficiary believed that the beneficiary was authorized to work up until the beneficiary's meeting with current counsel, the evidence does not support such a finding. For example:

- On July 26, 2007, USCIS sent the petitioner a receipt notice regarding the Form I-140 petition. The notice indicates that it does not grant any immigrant status or benefit.
- On April 28, 2008, the Form I-140 petition and Form I-485 application for adjustment of status were denied.
- On June 12, 2008, USCIS sent the petitioner a receipt notice regarding a Form I-290B, Notice of Appeal, (which was subsequently treated as a motion as the Form I-290B was filed late). The notice indicates that it does not grant any immigrant status or benefit.
- On August 27, 2008, USCIS sent the petitioner a receipt notice regarding a Form I-290B, Notice of Appeal. The notice indicates that it does not grant any immigrant status or benefit.
- On September 23, 2008, the beneficiary's employment authorization document expired.
- The beneficiary stated in his affidavit that on March 29, 2010, he met with another attorney, [REDACTED] who reportedly indicated that the beneficiary and his spouse might be out of status.
- On July 19, 2010, USCIS sent the petitioner a receipt notice regarding a Form I-290B, Notice of Motion. The notice indicates that it does not grant any immigrant status or benefit.
- On January 5, 2011, USCIS sent the petitioner a notice approving the H-1B petition [REDACTED] and denying the beneficiary's extension of stay. As previously discussed, the decision notified the petitioner that (1) the beneficiary was without lawful immigration status, (2) he was present in the United States in violation of the law, and (3) he was not authorized to work for the petitioner.
- The beneficiary stated that in January 2011, Mr. [REDACTED] told him the H-1B would only be valid if the beneficiary traveled to India and back. The beneficiary further stated that he was told that USCIS denied the "extension of

status" request and that he was present in the United States in violation of the law.

- The beneficiary contacted another attorney, [REDACTED] who (according to the beneficiary) told him in simple terms that he was not in status and had been accumulating unlawful presence in the United States.
- On July 19, 2012, the beneficiary spoke with another attorney, [REDACTED] who (according to [REDACTED] indicated that there might be an issue with the beneficiary's status in the United States.
- On August 1, 2012, the petitioner and the beneficiary spoke with another attorney, [REDACTED] who told the beneficiary that he was not in valid status and did not have authorization to work.
- On August 15, 2012, USCIS sent the petitioner a receipt notice regarding a Form I-290B, Notice of Motion. The notice indicates that it does not grant any immigrant status or benefit.

The AAO acknowledges that the petitioner and the beneficiary claim that they believed the beneficiary was legally authorized to be in the United States and that he had permission to work, but the source of that belief is not established by the evidence provided.

Finally, the AAO observes that in order to demonstrate ineffective assistance of counsel, the petitioner must show that it was "prejudiced" by Mr. [REDACTED] representation. The petitioner claims that it failed to timely file an extension due to Mr. [REDACTED] erroneous advice. Assuming that Mr. [REDACTED] provided erroneous advice (which the evidence of record does not demonstrate), it is not apparent that the petitioner (1) would have been accurately informed of Mr. [REDACTED] advice, or (2) would have followed it. The petitioner attested that he primarily obtained information regarding Mr. [REDACTED] advice from the beneficiary. The beneficiary's descriptions of the conversations with Mr. [REDACTED] differ substantially from Mr. [REDACTED] descriptions of the same conversations. Notably, with regard to whether to extend the beneficiary's H-1B classification, the beneficiary stated that he understood that "since [his] I-485 application and [his] I-140 petition would be pending, [he] did not need to extend [his] nonimmigrant status," and to do so would be "a waste of money." Mr. [REDACTED] in his affidavit, stated that he discussed the "pros and cons" of filing an H-1B extension. However, according to the petitioner, the beneficiary only informed him that, according to Mr. [REDACTED] filing an H-1B at that point "was a waste of time and money." It is not apparent that the beneficiary shared with the petitioner the full content of the discussions that he had with Mr. [REDACTED]

In addition, the AAO observes that the evidence does not indicate that the petitioner uniformly followed Mr. [REDACTED] advice. As previously noted, Mr. [REDACTED] stated that (in June 2008) "at the insistence of [the] clients" he prepared and filed a second Form I-140 petition and Form I-485 applications, although he had concerns. Further, the petitioner stated in his affidavit that in 2010, Mr. [REDACTED] "grudgingly filed an H1B extension petition for [the petitioner] on behalf of [the

beneficiary] despite his belief that it would be denied." It appears that each time the petitioner requested that Mr. [REDACTED] prepare and submit an application or petition, Mr. [REDACTED] immediately did so. Moreover, it is not apparent from the record that the petitioner would necessarily have followed different advice provided by Mr. [REDACTED]. Between 2007 and 2012, the beneficiary spoke with four other attorneys. Yet, the petitioner continued to use Mr. [REDACTED] services through August 13, 2012 when a third motion was prepared and filed by Mr. [REDACTED] on behalf of the petitioner. Based upon a complete review of the record, the petitioner has not established that it was "prejudiced" by Mr. [REDACTED] actions.

VI. Beyond the Decision of the Director

The AAO will briefly provide some additional observations regarding the instant petition, beyond the findings articulated in the director's decision. Here, the instant Form I-129 petition was filed as a request for H-1B nonimmigrant classification for the beneficiary based on "[c]ontinuation of previously approved employment without change with the same employer." The selection of this classification appears erroneous based upon the record of proceeding.

More specifically, the petitioner and its current counsel state that the beneficiary will be employed as a tax credit compliance manager on a full-time basis. In a support letter dated August 23, 2012, the petitioner indicated that the proffered position involves the following duties:

- Review and analyze new, proposed, or revised federal and state laws, regulations, policies, and procedures related to low-income housing tax credits, to ensure compliance and legality of transactions and operations for [the hotel];
- Routinely inspect grounds, facilities, and equipment of [the hotel] to determine necessity of repairs or maintenance;
- Plan, schedule, and coordinate general maintenance, major repairs, and remodeling or construction projects for [the hotel];
- Manage and oversee operations, maintenance, administration and improvement of [the hotel];
- Maintain records of rental or usage activity, special permits issued, and maintenance and operating costs of [the hotel], and other properties, as needed;
- Determine and certify the eligibility of prospective tenants, following government regulations for low-income housing;
- Oversee all front desk, housekeeping, maintenance, security, and payroll issues for low-income housing property;
- Prepare reports and returns for investors and limited partners of [the hotel];

- Liaise with local government officials to ensure compliance with local laws, regulations, codes, policies, and procedures for low-income housing properties;
- Oversee lease negotiations and renewals at [the hotel].

In its letter of support accompanying the Form I-129, the petitioner states the academic requirements for the proffered position as "a Bachelor degree in Business Administration, Economics, Finance, Human Resources, a directly related field, or the equivalent."³⁸

The petitioner indicates that the beneficiary is qualified to perform services in the proffered position by virtue of his foreign degrees, which the petitioner asserted are "the equivalent to a Bachelor of Arts in Economics and Human Resources Management from an accredited United States university." In support of this assertion, the petitioner and its current counsel provided copies of the beneficiary's foreign diplomas and transcripts, and an evaluation prepared by the Trustforte Corporation that states that the beneficiary has attained "the equivalent of at least a four-year Bachelor of Arts Degree in Economics and a Bachelor of Arts Degree in Human Resources Management from an accredited US college or university."

In addition, the petitioner and its current counsel submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification SOC (ONET/OES Code) 13-2061, "Financial Examiners," at a Level III wage.

The AAO reviewed the prior H-1B petition prepared by former counsel, Mr. [REDACTED] and submitted by the petitioner on behalf of the beneficiary on July 22, 2010 (receipt number [REDACTED]). Notably, the petitioner stated that the beneficiary would be employed as a hotel manager/tax credit administrator. The petitioner provided the following description of the proffered position:

³⁸ The petitioner's claim that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Provide complete tax credit administration/management for low income housing hotel. Duties include ensuring full compliance with Section 42 of the Internal Revenue Code concerning low income tax credit procedures, ensuring compliance with the Department of Housing and Urban Development rent and income limitations, filing annual reports to the Missouri Housing Development Commissions, understanding and following the Land Use Restriction Agreement for each tax credit application, preparing applications, monitoring files and verification of income forms receipts on a daily basis, and ensuring the completeness of all tenant files. Be familiar with supervising all hotel operations: maintenance, front-desk, housekeeping, security, complete front and back office management-accounts, books and records, promotion, marketing, advertising, budgeting, staffing and payroll; handling grievance procedures and contract negotiations.

The petitioner and its former counsel indicated that the minimum academic requirement for the hotel manager/tax credit administrator position is "a Bachelor or higher Degree in Economics, Business Administration, or a related field."³⁹

Former counsel indicated that the beneficiary was qualified to perform services in the position by virtue of his foreign degrees, which were described as the "equivalent to a U.S. Bachelor[s] degree in Economics and a Master[s] of Business Administration with a concentration in Industrial Relations and Personnel Management."

As required by 8 C.F.R. § 214.2(h)(4)(iii)(B)(I), the petitioner also submitted an LCA in support of that petition. The AAO notes that the petitioner designated the hotel manager/tax credit administrator position under the occupational category "Administrative Services Managers" SOC (ONET/OES Code) 11-3011 at a Level I (entry level) wage.

Again, the petitioner and its current counsel claim that the instant petition is submitted as a "[c]ontinuation of previously approved employment without change with the same employer." However, the petitioner and its current counsel classified the instant proffered position under an entirely different occupational category and wage level and the petitioner has revised the job title, duties of the position, and academic requirements. No explanation for the variance was provided by the petitioner or its current counsel.

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). The petition will be remanded to the service center director to further address the grounds of the approval of the petition that violated 8 C.F.R. § 214.2(h) or involved gross error. 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

³⁹ The petitioner and its former counsel provided the same job title, duties and requirements for the proffered in the September 28, 2006 H-1B filing (receipt number [REDACTED])

VII. Conclusion and Order

For the reasons described above, the AAO finds that the petitioner has not demonstrated eligibility for the benefit sought. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. 128. Here, that burden has not been met. Thus, the director's decision to deny the extension of stay will be affirmed.

Furthermore, the petition will be remanded to the director for review and to issue a notice of intent to revoke the approval of the petition in accordance with the applicable statutory and regulatory provisions at 8 C.F.R. § 214.2(h)(11)(iii).

ORDER: The director's decision to deny the extension of stay is affirmed. The petition is remanded for further action in accordance with the foregoing and entry of a new decision on the request for H-1B classification.