



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUN 02 2015

PETITION RECEIPT #:



IN RE:

Petitioner:



Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office, and we dismissed the appeal and a subsequent motion to reopen. The matter is again before us on a motion to reopen. The motion will be dismissed.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 15-employee "Export Company" established in [REDACTED]. In order to employ the beneficiary in what it designates as an "Operations Management Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in an H-1B specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, concluding that the petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through its previous counsel, submitted an appeal of the Director's decision. We reviewed the record of proceeding and determined it did not contain sufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. We provided a comprehensive analysis of the evidence and dismissed the appeal. The first motion in this matter was dismissed for not meeting the requirements pertinent to motions to reopen.

I. MOTION REQUIREMENTS

For the reasons discussed below, we conclude that the instant motion will also be dismissed because the instant motion does not meet the requirements of a motion to reopen and does not merit reopening.

A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a U.S. Citizenship and Immigration Services (USCIS) officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action:

[T]he official having jurisdiction may, for proper cause shown, [(a)] reopen the proceeding or [(b)] reconsider the prior decision.

Thus, to merit reopening, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), "*Processing motions in proceedings before the Service*," "[a] motion that does not meet applicable requirements shall be dismissed."

B. Requirements for Motions to Reopen

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

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence

This provision is supplemented by the related instruction at Part 3 of the Form I-290B, which states:¹

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence.

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); see also *Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

II. DISCUSSION AND ANALYSIS

The submissions constituting the instant motion consist of the following: (1) the Form I-290B; (2) a brief; (3) a statement by [REDACTED] the petitioner's president; and (4) materials submitted to the Florida Bar.

The previous motion contended that the petitioner had satisfied all H-1B evidentiary requirements, but was largely concerned with a claim of inadequate representation by previous counsel. It contained a statement signed by [REDACTED] pertinent to that asserted inadequate representation. In the decision on that motion, we declined to consider the claim of inadequate representation, finding that the evidence submitted did not satisfy the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) pertinent to such claims. Among the requirements of *Lozada* is "an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard."

The statement by Mr. [REDACTED] submitted with the instant motion is substantially similar to a statement provided with the first motion, in that it describes an agreement between the petitioner and the petitioner's previous attorney to provide representation and assistance in this matter, and asserts that previous counsel's assistance was inadequate.

One difference between the two statements is that the first statement is headed, "Statement of [REDACTED] Director of [the petitioner]," and the statement submitted with the instant motion is headed, "Affidavit of [REDACTED] Employer and President of [the petitioner]."

¹ The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

However, changing the title of that document to "Affidavit" does not convert Mr. [REDACTED] statement to an affidavit and does not satisfy the affidavit requirement of *Lozada*.

Section 92.50, Florida Statutes (2014), states in pertinent part:

Oaths, affidavits, and acknowledgments . . . may be taken or administered by or before any judge, clerk, or deputy clerk of any court of record within this state, including federal courts, or before any United States commissioner or any notary public within this state. The jurat, or certificate of proof or acknowledgment, shall be authenticated by the signature and official seal of such officer or person taking or administering the same

Mr. [REDACTED] statement submitted with the second motion does not identify any court official or notary public before whom it was sworn and contains no other indication that it was signed under oath. Further, it is not accompanied by the requisite jurat, or certificate of proof or acknowledgment. As such, it does not appear to qualify as an affidavit pursuant to Florida law. For this reason, the statement of [REDACTED] submitted with the instant motion to reopen does not aid that motion in meeting the requirements of *Lozada*.

The motion is also accompanied by a previously submitted "Affidavit" from the beneficiary who is identified as the petitioner's president.² As we noted in our earlier decision on motion, the notary public certification under the beneficiary's signature attests to the personal appearance of a different person, i.e., [REDACTED] President," as affirming the truth and correctness of the statements in the document signed by the beneficiary, rather than attesting to the appearance of the beneficiary. The notary indicates that a driver's license was produced to identify the signatory, and the record includes a photocopy of the beneficiary's driver's license on the page following the notary's certificate. However, the notary's certificate does not correctly identify the signatory of the document to which it is appended; therefore, the affidavit does not appear to have been properly authenticated.

Further, *Matter of Lozada* also requires that the appeal (or motion) indicate whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of former counsel's

² There is no evidence in the record that the beneficiary is the petitioner's officer or authorized representative. An Internet search of the Florida Department of State, Division of Corporations, for the petitioner revealed the names of the petitioner's current president, vice-president, and general manager as well as the names of the officers identified in the petitioner's annual reports filed in 2012, 2013, 2014, and 2015. The beneficiary's name was not listed as an officer of the petitioner. See [REDACTED]

ethical or legal responsibilities. While the record does contain evidence that the beneficiary filed a complaint with the Florida Bar Association, there is insufficient evidence that the *petitioner* has actually filed a complaint regarding the assistance it received from its former counsel. The affected party in this matter is the *petitioner* and the beneficiary has no standing in this matter. See 8 C.F.R. § 103.3(a)(1)(iii)(B). As noted above, the record does not include documentary evidence that the beneficiary is an officer of the petitioner or is an authorized representative. The relevant inquiry is whether the petitioner, and not the beneficiary, received ineffective assistance.

As such, the petitioner has not satisfied the procedural requirements described above, and the claim of ineffective assistance of counsel is not supported by competent evidence.

The facts alleged in the instant motion were considered prior to the issuance of the decision on the previous motion and the petitioner has not established that the evidence submitted with this motion would change the outcome of this case if the proceeding were reopened.³

"There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden.

III. CONCLUSION

In closing this proceeding, we will briefly note and summarize some of the shortcomings that we observed in the record. We do so with the intention that, if the petitioner seeks again to employ the beneficiary or another individual in the proffered position, it will submit sufficient evidence to reconcile these shortcomings when filing a future H-1B petition with USCIS.

To qualify as a specialty occupation position, a position must require a minimum of a bachelor's degree in a specific specialty or its equivalent. The petitioner has never effectively alleged that the proffered position qualifies as a specialty occupation position. We observe that in an unsigned

³ More concretely, we observe that the petitioner has asserted that previous counsel filed duty descriptions that were, for various reasons, inadequate to demonstrate that the proffered position is a specialty occupation position. However, the petitioner has never subsequently submitted a detailed description of the proffered position's duties, which the petitioner asserts are, unlike the previous descriptions, accurate and complete, and which demonstrate that, assuming they are accurate, the proffered position qualifies as a specialty occupation position. Thus, even if we were to find for the petitioner on claim of incompetent representation, we would also find that the petitioner has not submitted evidence sufficient to show that the instant visa petition should be approved. As such, the new facts alleged do not show that "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case," and does not satisfy the requirements of *Coelho* and *Maatougui*, *supra*.

January 18, 2013 letter on the petitioner's letterhead, the petitioner states that a bachelor's degree is the minimum educational qualification for the proffered position, but not that the degree must be in any *specific specialty*. USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position").

The petitioner also submitted a position evaluation, dated January 30, 2013, which states that the proffered position requires a bachelor's degree in operations management, management, business administration, or a related field. That is a somewhat narrower requirement, in that it states that the requisite degree must be in a range of subjects. However, a degree with a generalized title, such as business administration, without further specification, is not a degree in a specific specialty. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. This is among the reasons that a requirement of a minimum of a bachelor's degree or its equivalent in operations management, management, business administration, or a related field is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. Further still, had that position evaluation stated a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner would have been obliged to reconcile that statement with the January 18, 2013 letter, which suggests that the proffered position requires a bachelor's degree, but not that the degree must be in any specific specialty.

The documents presented with the instant motion do not satisfy the requirements of a motion to reopen. However, even if we overlooked that factor and considered the merits of the submitted documents and the arguments made therein, they would still fail to establish error in our decisions. The petitioner should note that, unless USCIS directs otherwise, the filing of a motion to reopen 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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and our previous decisions will not be disturbed.

ORDER: The motion is dismissed.