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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D7



File: WAC 08 068 51846 Office: CALIFORNIA SERVICE CENTER Date: APR 02 2009

IN RE: Petitioner:

Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

A nonimmigrant visa petition was filed on January 8, 2008 purporting to permit the employment of the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director further denied the petition because the petitioner intentionally concealed a material fact. Specifically, the director determined that the petitioner falsely answered questions in Part 4 of the Form I-129 pertaining to prior petitions.

The petitioner subsequently filed an appeal and a motion to reopen and reconsider. The director denied the separately filed motion and forwarded the appeal to the AAO for review. On appeal, counsel argues that the false averments in the Form I-129 were the fault of the petitioner's prior counsel, who failed to permit the petitioner, or an authorized representative, to review the petition prior to submission to U.S. Citizenship and Immigration Services (USCIS). The petitioner also claims in a declaration attached to the appeal that the signature on the Form I-129 is not the beneficiary's signature. Moreover, counsel asserts that, had "clouds" not been put on the credibility of the petitioner's evidence by prior counsel's concealment of material facts, the petition would have been approved. Finally, counsel indicates that the petitioner chose not to bring a disciplinary action against its prior counsel because it signed a release discharging prior counsel from all future claims in exchange for a payment of \$6,500.00.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must be summarily dismissed. While counsel gave an explanation for the petitioner's failure to submit credible evidence in support of its petition, it nevertheless failed to identify an

erroneous legal conclusion or factual statement in the decision for the AAO to consider on appeal. Consequently, the appeal must be dismissed.¹

Furthermore, it is noted that the petitioner claims on appeal that neither it nor an authorized representative signed the Form I-129. The regulation at 8 C.F.R. § 103.2(a)(7) indicates that petitions which are not properly signed must be rejected as improperly filed. Accordingly, even if the petitioner had properly stated a claim for attorney misconduct and established that it did not sign the Form I-129, which it had not (*see infra*), the only relief available to the petitioner would be the ultimate rejection of the petition as improperly filed.²

¹ On January 7, 2009 the Attorney General issued a precedent decision relating to ineffective assistance of counsel, superseding *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). *See Matter of Compean, et al.*, 24 I&N Dec. 710 (A.G. 2009). In *Compean*, the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* at 711-27. Although the Act and regulations also do not afford aliens a right to effective assistance of counsel, USCIS may, in its discretion, reopen proceedings based on the deficient performance of an alien's prior attorney. *Id.* at 727. *Compean* establishes three elements of proof and six documentary requirements that an alien must meet to prevail on a claim of deficient performance of counsel. *Id.* Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

Despite this change, the AAO will evaluate this appeal under *Matter of Lozada*, the administrative precedent that was applicable at the time the ineffective assistance of counsel claim was first made. Under general rules of legal construction, a substantive, non-curative, adverse change in administrative rules is not to be applied retroactively unless the language of both the administrative rule and the statute authorizing the rule requires such a result. *Uzuegbu v. Caplinger*, 745 F.Supp. 1200, 1215 (E.D. La. 1990). In this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*. A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. In this matter, the petitioner claims that it did not file a complaint with the California attorney disciplinary authorities because it "prefers amicable resolution of disputes." Instead, the petitioner apparently entered into a settlement agreement with prior counsel releasing counsel from all future claims. In exchange for this release, the petitioner received \$6,500.00. Although the petitioner submits an unsigned "Settlement Agreement and Release," this document, even if signed, does not appear to prohibit the petitioner from filing an appropriate complaint with the disciplinary authorities. In fact, under California law, counsel may not settle a dispute with a former client conditioned upon that client's forbearance from filing an appropriate disciplinary complaint with the authorities. *See Cal. Bus. & Prof. Code Ann. § 6090.5* (2009). Accordingly, as counsel's explanation for not filing a complaint with the proper authorities, given the seriousness of the forgery allegations, is not credible, the matter will not be reopened and reconsidered, and the appeal will be summarily dismissed.

²It is further noted that the record is not persuasive in establishing that the petitioner did not sign the Form I-129. The only evidence addressing this issue is the beneficiary's self-serving "declaration" that he did not sign the Form I-129. The petitioner did not submit additional handwriting samples predating the filing of the petition. In fact, supporting documents submitted with the petition, such as a stock certificate dated

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. The petitioner has not met this burden.

ORDER: The appeal is summarily dismissed.

December 3, 2007, bear signatures quite similar to the signature on the Form I-129. The petitioner also did not submit any expert analysis. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Finally, the "demand letter" sent to the petitioner's prior counsel dated April 14, 2008, and submitted on appeal, fails to mention the forgery of the beneficiary's signature. Instead, the letter focuses entirely on prior counsel's purported "negligence" by providing incorrect answers in Part 4 of the Form I-129. It is entirely incredible that, given the magnitude of the alleged wrong in forging the beneficiary's signature on the Form I-129, that neither the petitioner nor current counsel would bring this to the attention of prior counsel in the demand letter. Accordingly, it appears that the director's decision to deny the petition for concealing material facts was entirely appropriate and supported by the record.