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



U.S. Citizenship
and Immigration
Services



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DATE: **JUL 26 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The petitioner subsequently filed an appeal. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on motion to reopen. The motion will be dismissed.

The petitioner filed the nonimmigrant petition to classify the beneficiary as an 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 petitioner, a California corporation, operates an import/export business for spices, foodstuffs, jewelry, and dinner plates. It seeks to extend the beneficiary's stay in L-1 status for an additional period of two years so that he may continue to serve as Managing Director.

The director denied the petition on May 1, 2002, finding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive position. The petitioner appealed the director's decision on May 31, 2002. On May 18, 2004, the AAO dismissed the appeal based on two grounds: (1) the petitioner failed to establish that the beneficiary's duties would be primarily managerial or executive, and (2) the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States and abroad.

In response to the AAO's May 18, 2004 decision, the petitioner's new counsel filed an untimely motion to reopen on October 15, 2009, over five years, four months, and 27 days after the decision was issued. In defense of the petitioner's filing of an untimely motion, counsel raised the claim of ineffective assistance of counsel. Counsel does not address the merits of the director's or the AAO's decisions.

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

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

In support of the motion the petitioner submits an affidavit of the respondent dated October 8, 2009, 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; a copy of two retainer letters between respondent and former counsel agreeing to file the initial petition and subsequent appeal; a letter from the respondent's current counsel, dated September 24, 2009, sent to respondent's former counsel informing him of the allegations leveled against him and giving him an opportunity to respond; and a copy of the complaint filed with the California Bar Association dated October 8, 2009.

Assuming *arguendo* that all of the *Lozada* requirements are met, the evidence of record fails to establish that the outcome of these proceedings would have been different but for the alleged ineffective assistance of prior counsel. See *Miranda-Lores v. INS*, 17 F.3d 84 (5th Cir. 1994) (requiring actual prejudice be shown regarding the benefit sought); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1272-75 (11th Cir. 2005) (requiring prior counsel's performance be established as being so inadequate that it may have affected the outcome of the proceeding); *Zern v. Gonzales*, 503 F.3d 59, 72-73 (1st Cir. 2007) (requiring a need to establish that the outcome would be different such that there is a reasonable probability of prejudice).

In a declaration dated October 8, 2009, the beneficiary asserts that, but for the ineffective assistance of his former attorneys, the petitioner would have "appealed the dismissal of his Appeal to the Administrative Appeals Office." The beneficiary believed that had former counsel "further appealed or moved for rehearing," "his case would have plausibly come to a successful conclusion." Counsel for the petitioner states on appeal that former counsel's assistance was ineffective because he misadvised the petitioner as to the beneficiary's current legal status. Furthermore, former counsel failed to "investigate other avenues of legal recourse, such as a motion for rehearing or a further appeal."

The record is inconsistent with the petitioner's assertion that the beneficiary was unaware that he remained in the United States without authorization due to the ineffective assistance of his former attorneys. In his declaration, the beneficiary asserts that he "remained in the U.S. with his family, without knowledge that their presence was unauthorized." The petitioner attached a copy of the beneficiary's most recent Form I-94 to the initial petition; the form has an expiration date of November 30, 2001. The record also contains a copy of the director's denial dated May 1, 2002, issued with a copy to the petitioner. The beneficiary states that prior counsel "told [him] to remain in the United States because 'amnesty would come.'" The beneficiary does not claim that former counsel advised him that he was in the United States legally. The petitioner provides no clarification or evidence establishing on what basis the beneficiary thought he remained legally in the United States past the expiration of his prior authorized period of admission and the denial dated May 1, 2002.

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). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Furthermore, even if the motion to reopen had been timely filed with the AAO, it has not been established that the outcome of these proceedings would have been different. The petitioner attaches to the motion to reopen evidence of the beneficiary's "discretionary decision-making" in the form of (1) pro forma invoices signed by the beneficiary, (2) a letter from [REDACTED] describing the growth of the company in part due to contracts with the petitioner signed by the beneficiary, and (3) copies of tax returns filed by the beneficiary on behalf of the petitioner. This evidence does not address either of the bases for the AAO's dismissal of the appeal: (1) that a majority of the beneficiary's time has been spent performing non-qualifying tasks and therefore the petitioner failed to establish that the beneficiary's duties

would be primarily managerial or executive, and (2) that the record lacks evidence to establish that the petitioner had been doing business for the year prior to filing the petition.

While the petitioner asserts that it would have appealed the AAO's denial dated May 18, 2004, the petitioner, on motion, has not specifically identified any error of law or fact in the AAO's decision. Even if the AAO were to find that the petitioner established the ineffective assistance of counsel claim and allowed the late motion, the AAO would be compelled to deny the motion for failure to meet the requirements for a motion to reopen. 8 C.F.R. § 103.5(a)(2).

On review of the record, the AAO concludes that the petitioner received a fair and complete adjudication of his immigrant visa petition. The petitioner had the opportunity to argue the merits of that adjudication through the filing of the appeal, but was not successful. The failure to file a timely motion does not automatically constitute sufficient prejudice to warrant consideration of his late motion on the basis of ineffective assistance of counsel.

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. Here, that burden has not been met.

ORDER: The motion is dismissed.