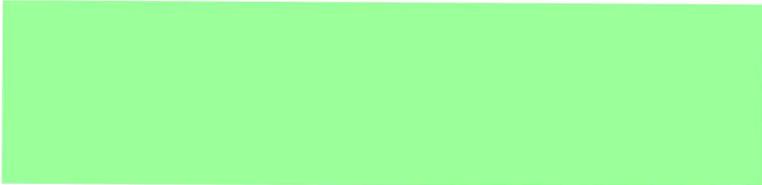


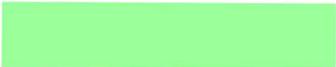


U.S. Citizenship
and Immigration
Services

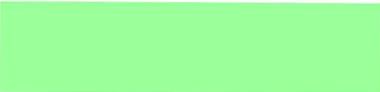
(b)(6)



DATE: **APR 09 2014** OFFICE: VERMONT SERVICE CENTER



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 (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,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the petition for a nonimmigrant visa and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The petitioner filed a motion to reopen and reconsider. The AAO granted the motion and affirmed its previous decision. The matter is once again before the AAO on a motion to reopen and reconsider. The motion will be dismissed and the petition will remain denied.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment 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 petitioner, a limited liability company organized in the State of Texas, claims to be the subsidiary of [REDACTED]

[REDACTED] The petitioner operates a gas station/convenience store and seeks to continue the beneficiary's employment as its operations manager.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity, and the AAO dismissed the petitioner's subsequent appeal. The AAO affirmed the director's finding that the beneficiary would not be employed in a managerial or executive capacity and further found that the evidence of record failed to demonstrate that the petitioner maintains a qualifying relationship with the beneficiary's foreign employer. The AAO observed that the record of proceeding did not include a brief in support of the appeal.

On motion, counsel contended that the AAO failed to consider the petitioner's appeal brief, which had been timely filed in support of the Form I-290B, and submitted copies of the appeal brief and supporting documentation, as well as documentation of their timely filing. The AAO granted the petitioner's motion to reopen, but upon review of the newly-submitted evidence, the prior decision of the AAO was affirmed.

Newly-retained counsel for the petitioner contends in the motion currently before the AAO that the denials of the underlying petition, the appeal, and the subsequently-filed combined motion to reopen and reconsider were due to ineffective assistance of former counsel. In support of this contention, counsel submits a brief accompanied by additional documentary evidence including an affidavit and a copy of a grievance form for the State Bar of Texas.

I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner filed the instant Form I-129 petition with the assistance of former counsel, [REDACTED] requesting both the continuation of the beneficiary's previously-approved L-1A employment with the petitioner as well as an extension of her stay in L-1A status. The director found that the beneficiary would not be employed in a primarily managerial or executive capacity, and denied the petition in a decision dated August 31, 2012. The director properly advised the petitioner of its right to file an appeal.

On October 2, 2012, a timely appeal on Form I-290B was filed by [REDACTED] newly-retained counsel for the petitioner. Counsel checked Box B in Part 2 of the form to demonstrate that she would be filing a brief and/or additional evidence in support of the appeal within 30 days. The AAO dismissed the appeal on March 29, 2013, finding that the petitioner had failed to overcome the basis for the director's denial.

On April 26, 2013, [REDACTED] filed a combined motion to reopen and motion to reconsider the AAO's decision. In Part 3, counsel noted that the denial was based in part on the fact that the supplemental evidence submitted to the AAO in support of the appeal, though timely filed, had not been considered by the AAO prior to its adjudication. The AAO granted the motion, considered the newly-submitted evidence, and ultimately affirmed its prior decision.

The current motion before the AAO, filed by newly-retained counsel [REDACTED], claims that the dismissals of the combined motion and the appeal, along with the denial of the initial petition, were the result of former counsel's incorrect assessments which resulted in erroneous filings on behalf of the petitioner. Current counsel for the petitioner submits new evidence, including an affidavit, in support of the ineffective assistance of counsel claim, and requests that the AAO review the merits of the petition as a remedy for former counsel's actions and allow the petitioner to refile for benefits under the L-1B classification.¹

¹ It is noted that counsel's prayer requests an amendment of the petition (i.e., to change the capacity of the beneficiary's employment from an L-1A manager or executive to that of a L-1B specialized knowledge worker. Counsel's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on motion as a petition for L-1B specialized knowledge classification is, therefore, rejected.

The AAO further notes another issue barring the beneficiary's eligibility in this matter. To establish eligibility for the L-1 nonimmigrant visa classification, a petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. Counsel's motion specifically states in Paragraph 3 that "[the beneficiary] *has never* been employed in an executive, managerial, or specialized knowledge capacity." (Emphasis added). Absent evidence contradicting the

II. LAW AND ANALYSIS

A. Motion to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2) states that 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. In addition, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond; and (3) that the appeal or motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

On motion, current counsel submits a copy of an affidavit executed under oath on August 29, 2013 by the petitioner's director and authorized agent, [REDACTED], which outlines the details of the petitioner's agreement with [REDACTED], Esq. with respect to the actions to be taken during representation. Also submitted on appeal is a copy of a Grievance Form for the State Bar of Texas dated August 30, 2013, identifying [REDACTED] as the subject of the grievance and the petitioner as the complainant.

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

As a preliminary matter, the record contains conflicting information with regard to which of the petitioner's former attorneys the *Lozada* claim is directed. As previously stated, [REDACTED] represented the petitioner during the initial filing of the Form I-129 petition, but the subsequently-filed appeal and motion were filed by [REDACTED]. In the instant motion, newly-retained counsel for the petitioner vaguely states that "[the petitioner] hired an attorney, and its attorney filed incorrect L1A application/classification." The petitioner further states that the "filing of said petition was erroneous as L1B for specialized knowledge workers should have been filed instead."

veracity of this statement, it would appear that the beneficiary is ineligible for any benefits under the L-1 nonimmigrant visa classification. *See* 8 C.F.R. § 214.2(l)(3)(iv) (requiring the petitioner to submit evidence that the beneficiary as employed abroad was in a position that was managerial, executive or involved specialized knowledge).

Further review of the motion, however, reveals that the petitioner's claims are directed exclusively toward the petitioner's first counsel, [REDACTED]. Although the record contains copies of a grievance filed against [REDACTED] the motion in this matter specifically limits its claim of ineffective assistance of counsel to [REDACTED]. Therefore, the issue before the AAO is whether the petitioner has fulfilled the prerequisites for allegations of ineffective assistance of counsel against [REDACTED].

Although the record contains a copy of the required affidavit outlining the details of the petitioner's agreement with [REDACTED] the petitioner has failed to establish that it has satisfied the remaining two requirements under *Lozada*. Specifically, the motion fails to establish that (1) [REDACTED] was informed of the allegations leveled against her and given an opportunity to respond, and (2) a complaint was filed with the appropriate disciplinary authorities, or if not, why not.

Regarding the second criterion under *Lozada*, which requires that counsel whose integrity or competence is being impugned be informed of the allegations leveled against her and be given an opportunity to respond, the record contains no evidence that former counsel was notified of the allegations against her. It is clear under *Lozada* that counsel must be informed of the petitioner's allegations of ineffectiveness and given an opportunity to respond. *Lozada* specifically states that "[a]ny subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion." *Matter of Lozada*, 19 I&N Dec. at 639.

It is clear that the intent of the Board of Immigration Appeals (BIA) in establishing some of the criteria under *Lozada* is to provide prior counsel with the chance to refute any allegations of ineffectiveness made against her. The BIA explains as follows:

The high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel Where essential information is lacking, it is impossible to evaluate the substance of such claim Then, too, the potential for abuse is apparent where no mechanism exists for allowing former counsel, whose integrity or competence is being impugned, to present his version of events if he so chooses, thereby discouraging baseless allegations

Id.

Current counsel and the petitioner do not provide any evidence that [REDACTED] was notified of and given an opportunity to respond to the petitioner's allegations against her. In fact, the AAO notes that petitioner's affidavit was prepared on August 30, 2013, three days prior to the filing of the instant motion. Therefore, even if the petitioner had demonstrated that it had forwarded a copy of this document to [REDACTED] at the time it was executed, sufficient opportunity would not have been provided to [REDACTED] to respond to these allegations before the instant motion was filed on September 3, 2013. See *Asaba v. Ashcroft*, 377 F.3d 9, 12 (1st. Cir. 2004) (upholding the denial of a motion to reopen where insufficient time was given to counsel to respond to charges before filing

the motion to reopen). Moreover, there is no evidence in the record that the petitioner contacted [REDACTED] at a previous point in time to notify her of these allegations raised herein and afforded her an opportunity to respond. Therefore, the petitioner has not met the second requirement under *Lozada*.

Finally, although the petitioner has provided a copy of a grievance to the State Bar of Texas, this grievance names [REDACTED] as the subject of the grievance. Since the record does not establish that a complaint has been filed against [REDACTED] the petitioner is required under *Lozada* to provide an explanation as to why such action has not been taken. The record contains no such statement. The petitioner, therefore, has not satisfied the third requirement under *Lozada*.

The petitioner must satisfy all three requirements. Since the petitioner did not satisfy the second and third requirements under *Lozada*, the petitioner has not met all of the requirements to establish ineffectiveness of prior counsel, [REDACTED]. As such, the petitioner's motion to reopen may not be sustained based on the petitioner's claim of ineffective counsel.

Alternatively, although the motion to reopen is supported by documentary evidence, it does not state new facts to be proved in a reopened proceeding. The petitioner's brief and supporting evidence seek to establish simply that prior counsel's actions were erroneous, and not that the prior determinations of the director and the AAO were in error. Further, even if counsel had prevailed on its ineffective assistance of counsel claim against [REDACTED] the AAO observes that counsel, in the instant motion, did not address the propriety of the July 30, 2013 decision dismissing the previous motion. Rather, the instant motion claims that [REDACTED] erroneously filed the underlying petition under the wrong classification, which is not the subject of the instant motion and is not now before the AAO. The only issue correctly before the AAO on motion is whether the immediate prior

² In the event that the petitioner had claimed ineffective assistance of counsel against [REDACTED] on motion, the petitioner's claim likewise would fail. Although the record contains a copy of a grievance for the State Bar of Texas naming [REDACTED] as the subject of the grievance, there is no evidence in the record demonstrating that this complaint was actually filed. There is no proof of mailing, such as a certified mail return receipt or tracking number, nor is there documentation from the State Bar of Texas confirming its receipt of the complaint. Moreover, the grievance and the accompanying statement were prepared on August 30, 2013 and August 29, 2013, respectively, less than one week prior to the filing of the instant motion. Therefore, even if the petitioner had demonstrated that it had forwarded copies of these documents to Ms. [REDACTED] at the time they were executed, sufficient opportunity would not have been provided to Ms. Jeenah to respond to these allegations before the motion was filed on September 3, 2013. *See Asaba v. Ashcroft*, 377 F.3d at 12. Finally, the record contains no affidavit outlining the terms of the petitioner's agreement with [REDACTED] as required by the first criterion under *Lozada*. Therefore, even if the petitioner had alleged ineffective assistance of [REDACTED] as a basis for the instant motion to reopen/reconsider, which it did not, the petitioner claim under *Lozada* would fail for the reasons just articulated.

decision – in this case, the decision dated July 30, 2013 – was correctly decided. Counsel did not address that issue.³ Moreover, the instant motion does not allege ineffective assistance of counsel against [REDACTED] the attorney who represented the petitioner in the immediate prior decision. The instant motion will be dismissed for this additional reason.

B. Motion to Reconsider

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion to reconsider must be denied because the motion does not state reasons for reconsideration which are supported by pertinent precedent decisions to establish the decision was based on an incorrect application of law or USCIS policy and which establishes that the AAO's July 30, 2013 decision was incorrect based on the evidence of record at the time the AAO's decision was rendered.

C. Applicable Requirements

Lastly, even if all of the *Lozada* requirements had been met, the motion failed to meet another applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion did not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. As the instant motion does not meet those requirements, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion is dismissed. The petition is denied.

³ At Page 2, Part 2 of the Form I-290B, counsel indicated clearly that the instant motion pertained to the AAO's decision dated July 30, 2013. Despite counsel's acknowledgement that the petitioner seeks to reopen the July 30, 2013 decision, counsel did not address any aspect of that decision.