

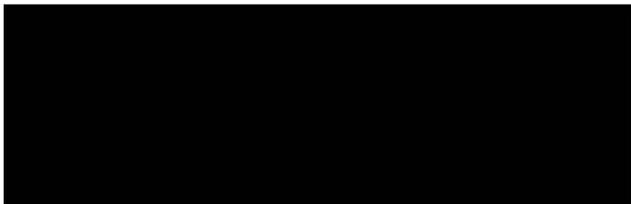
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**U.S. Citizenship  
and Immigration  
Services**

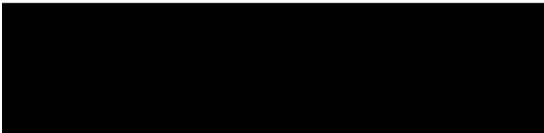
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File: LIN 05 800 54950 Office: NEBRASKA SERVICE CENTER Date: FEB 19 2009

IN RE: Petitioner:  
Beneficiary:



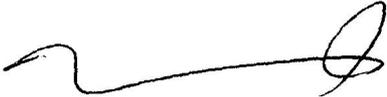
Petition: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON 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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa due to abandonment. The petitioner subsequently filed a motion to reopen. The director granted the petitioner's motion, but affirmed his decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the service center for further action and consideration.

The petitioner is a university and seeks to continue to employ the beneficiary as a part-time lecturer in its art department. The beneficiary was previously approved to work for the petitioner in this position in H-1B status from January 1, 2004 until May 31, 2005. On May 31, 2005, former counsel for the petitioner electronically filed the instant petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien of extraordinary ability in the arts.

The director issued a request for additional evidence (RFE) on July 19, 2005, granting the petitioner 12 weeks to submit the required initial evidence for O-1 classification and other documentation required for the adjudication of the petition. On February 16, 2006, the director denied the petition due to abandonment in accordance with 8 C.F.R. § 103.2(b)(13). The director advised the petitioner that it could file a new application with a new fee or, if it could establish that the denial due to abandonment was in error, a motion to reopen pursuant to 8 C.F.R. § 103.5(a)(2).

On July 2, 2007, represented by new counsel, the petitioner filed a late motion to reopen and requested that the 30-day time limit within which to file the motion be equitably tolled due to ineffective assistance of counsel. On motion, the petitioner stated that it had retained former counsel to prepare and file a petition to extend the beneficiary's H-1B status. Current counsel for the petitioner maintained that the O-1 petition was filed without the petitioner's knowledge or consent, and that the petitioner and beneficiary remained unaware that an O-1 petition had been filed until current counsel requested the file from U.S. Citizenship and Immigration Services (USCIS) and reviewed it in April 2007.

The petitioner also submitted evidence that it had executed documents to be submitted for the H-1B extension in June 2005 and asserted that former counsel took no action with regard to the H-1B extension.<sup>1</sup> In addition, the petitioner and counsel outlined in detail the steps taken by the beneficiary and petitioner to determine the status of the beneficiary's case, the alleged inaction of former counsel, and the misleading statements allegedly made by former counsel regarding the true status of the petition. Counsel provided evidence that a complaint had been filed with the Missouri Supreme Court's Chief Disciplinary Counsel regarding former counsel's alleged

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<sup>1</sup> Neither the petitioner nor the director appear to be aware that former counsel did in fact file an H-1B petition. USCIS records indicate that former counsel for the petitioner late-filed the H-1B extension on the beneficiary's behalf while the instant O-1 classification petition was pending. The petition and supporting documentation signed by the petitioner on June 21, 2005 were filed with the Nebraska Service Center on September 27, 2005 and assigned receipt number LIN 05 273 51466. The petition was denied due to abandonment on June 15, 2006, based on the petitioner's failure to respond to an RFE issued on February 17, 2006. The AAO has reviewed the record of proceeding for the H-1B extension filing. The RFE and denial notice were both addressed to former counsel, who did not pursue a motion to-reopen.

professional misconduct, evidence that former counsel was advised of the complaint, and evidence that former counsel had been referred for formal disciplinary proceedings as a result of the complaint.

Counsel requested that the petitioner be granted equitable tolling and that the motion to reopen be granted. Counsel further requested that USCIS “fashion an equitable remedy, restoring Petitioner to a position as favorable as that which existed prior to the ineffective assistance of counsel rendered.” Specifically, counsel requested that the petitioner be granted the opportunity to submit an H-1B extension on behalf of the beneficiary.

Acknowledging the “unusual circumstances” present in this matter, the director granted the petitioner’s late motion to reopen the proceeding. The director acknowledged the petitioner’s request for equitable tolling due to ineffective assistance of counsel, but found that the petition may not be approved for the following reasons:

It is more than once acknowledged in this Motion and its supporting documents that petitioner’s former counsel . . . filed the instant petition without the knowledge or consent either of the petitioner or of the beneficiary. Therefore, counsel appears to request with this Motion that a petition, which was fraudulently filed in the first place, should be reopened and approved in order to grant some sort of equitable relief to the petitioner. Even though the petitioner and the beneficiary may not have been responsible for this, the fact remains that the instant petition was improperly filed. There is no provision in the Code or in the statute for the rehabilitation of a fraudulently-filed nonimmigrant visa petition in order to grant equitable tolling, or any other relief, to a petitioner.

Counsel for the petitioner subsequently filed the instant appeal. On appeal, counsel for the petitioner contends that the instant O-1 classification petition was erroneously or negligently filed by former counsel, but not filed fraudulently as determined by the director. Counsel asserts that there is no evidence that former counsel sought to perpetrate fraud on USCIS, and that any fraud committed occurred with respect to former counsel’s misrepresentations to the petitioner and beneficiary. Counsel contends that there can be no doubt that the actions of former counsel constitute gross error, ineffective legal assistance and misconduct.

Counsel notes that “it is difficult to understand why the Service has reasoned that the I-129 application cannot be reopened because it was not the proper application to have been filed.” Counsel further asserts that it is unclear what remedy the director has granted, noting that “the very purpose of equitable tolling is to restore the petitioner to a position as favorable as that which existed prior to the harm caused petitioner due to ineffective assistance of counsel, which includes instances where counsel filed the wrong application on a Petitioner’s behalf.” Counsel emphasizes that the director provided no legal authority for his conclusion that USCIS is barred from re-opening the instant petition, and further notes that the director’s decision provides no analysis of the facts of this matter or the case law cited extensively in the motion to reopen.

Counsel concludes by once again requesting that the petitioner be granted equitable tolling and that the motion to reopen be granted in order to allow the petitioner an opportunity to submit an H-1B extension on behalf of the beneficiary.

Upon review, the AAO will withdraw the director's decision dated August 17, 2007. The petition will be remanded to the director, who is instructed to grant the petitioner's motion to re-open.

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).<sup>2</sup>

The evidence of record shows that all procedural requirements set forth in *Matter of Lozada* have been met. Therefore, the director's course of action should have been to re-open the matter and provide the petitioner the opportunity to remedy the results of the ineffective assistance of counsel. The AAO concurs with counsel that the director's decision to grant the motion, only to immediately deny the petition as fraudulently filed was improper and not legally supported.

The instant petition was denied due to abandonment, and the petitioner has established that the abandonment was due to the ineffective assistance of counsel. Therefore, the director is instructed to re-open the matter, and to reissue the request for evidence that was initially sent to former counsel on July 19, 2005. The director, in his discretion, should determine the form of relief to be granted so as to allow the petitioner and beneficiary the opportunity to pursue the H-1B extension it sought to timely file in May 2005.

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<sup>2</sup> On January 7, 2009 the Attorney General issued a precedent decision relating to ineffective assistance of counsel, superseding *Matter of Lozada*. 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 applied by the director and argued by counsel on appeal. 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).

Finally, it is noted that on motion, counsel for the petitioner suggested that the petitioner should be permitted to substitute an H-1B supplement in place of the O-1 classification supplement submitted by former counsel in order to correct the instant petition. However, as the H-1B extension petition was in fact filed by former counsel, the AAO notes that the director has the discretion to re-open LIN 05 273 51466 on Service motion in order to issue a favorable decision. *See* 8 C.F.R. 103.5(a)(5). The AAO has requested this petition and will return it to the director for review on remand.

Since it has been established that the late filing of the H-1B petition and the denial due to abandonment were due to the ineffective assistance of counsel, the director may reasonably excuse the untimely filed petition and adjudicate it on its merits. The regulations specifically allow the director to forgive the failure to file an extension petition prior to the expiration of the previously authorized status under these circumstances. *See* 8 C.F.R. § 214.1(c)(4). Such action would allow the petitioner the opportunity to withdraw the instant O-1 petition, which it never sought to file, and would restore the beneficiary to his previous position.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion. If the new decision is adverse to the petitioner, the director shall certify the decision to the AAO for review.