U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-K-D-

DATE: JUNE 22, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a teacher and autism spectrum disorder (ASD) education researcher, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not established that a waiver of a job offer, and thus of a labor certification, would be in the national interest. The Petitioner appealed the matter to us, and we dismissed the appeal and three subsequent motion adjudications.[1]

The matter is now before us on a fourth motion, a motion to reopen. On motion, the Petitioner submits a brief stating that she is providing new facts to establish eligibility. Specifically, she avers that her previous attorneys provided ineffective assistance.[2]

Upon review, we will deny the motion.

[1] *Matter of C-K-D-*, ID# 687588 (AAO Feb. 12, 2018) was our most recent decision in this matter.

[2] Petitioner's counsel for the filing of this petition was attorney [redacted]. On appeal and for part of the first motion, she was represented by attorney [redacted] who withdrew her representation in October 2016. The Petitioner was subsequently represented by attorney [redacted] for the first and second motions, and was not represented by counsel for the third and instant motions.

I. LAW

A motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). According to 8 C.F.R. § I 03.5(a)(2), 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.

The Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

First, *Lozada* sets forth the following threshold documentary requirements for asserting a claim of ineffective assistance:

- A written affidavit of the petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e. the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions.

- Evidence that the petitioner informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim.

- If the petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the petitioner filed a complaint with the appropriate disciplinary authorities (e.g. with a state bar association) or an explanation why the petitioner did not file a complaint.

Id. at 639. These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claim and to deter meritless claims. *Id.* Allowing former counsel to present his or her version of events discourages baseless allegations, and the requirement of a complaint to the appropriate disciplinary authorities is intended to eliminate any incentive for counsel to collude with his or her client in disparaging the quality of the representation. We may deny a claim of ineffective assistance if any of the *Lozada* threshold documentary requirements are not met. *Castillo-Perez v. INS*. 212 F.3d 518, 525 (9th Cir. 2000). Second, if the petitioner satisfies these threshold documentary requirements, she must also show that former counsel's assistance was so deficient that the she was prejudiced by the performance.[3] Specifically,

[3] *Lozada* at 632. In *Lozada*, the Board determined that Lozada was not prejudiced by counsel's failure to file an appeal brief (resulting in the summary dismissal of the appeal) because: he received a full and fair hearing at his deportation hearing, at which he was given every opportunity to present his case; he did not allege any inadequacy in the quality of prior counsel's representation at the hearing; the immigration judge considered and properly evaluated all the evidence presented; and the immigration judge's decision was supported by the record.

the petitioner must show that there is a reasonable probability that the outcome would have been different without former counsel's mistakes,[4] and that she had at least a plausible ground for relief.[5]

There is no prejudice if the adverse decision would have been issued even without former counsel's errors. *See, e.g., Minhas v. Gonzales*, 236 Fed. Appx. 981 (5th Cir. 2007).

II. ANALYSIS

In denying each of the Petitioner's previous motions, we found that the Petitioner had not demonstrated that she meets the second and third prongs set forth in the *Dhanasar* analytical framework. Furthermore, in our most recent decision, we found that her claim of ineffective assistance of counsel did not meet the evidentiary requirements set forth in *Lozada,* and even if these initial evidentiary requirements were met, the Petitioner had not demonstrated that her former counsel's actions prejudiced the outcome of these proceedings.

In the instant motion, the Petitioner avers that her former counsel, [redacted] "hastily" filed her petition before her first research article was published.. She also claims that her subsequent counsel submitted supporting documentation six months after the petition was filed, and that her article "could not be considered because it was forwarded after the initial filing date." With this motion, she now provides an explanation of the steps required to file a complaint with the Florida Bar; a letter dated September 20, 2017, indicating that the Florida bar forwarded a copy of the Petitioner's complaint to both attorneys and solicited their responses; and, letters each dated December 6, 2017, indicating that the Petitioner's complaints against both attorney [redacted] and attorney [redacted] have been forwarded to the Florida Bar's [redacted] branch office for consideration.

While the Petitioner's submission on motion does include evidence that she has filed formal complaints against her former attorneys, she still has not provided a detailed description of her agreement with either attorney explaining the specific actions counsel would take, as required by the initial evidentiary requirements outlined in *Lozada. Id.* at 639.

Regardless, as we stated in our prior decisions, the Petitioner has not shown that former counsels' actions prejudiced the outcome of the proceedings. The Petitioner has not established that the result in this matter would have been different even if the article and supporting documentation were submitted with the initial filing. Finally, the current motion submission does not offer new facts or evidence demonstrating that the Petitioner meets the second and third prongs of the *Dhanasar* framework. As such, the motion will be denied.

[4] *Yu Tian Li v. United States*, 648 F.3d 524, 527 (7th Cir.. 2011); *Delhaye v. Holder*, 338 Fed Appx. 568, 570 (9th Cir. 2009)

[5] *See Martinez-Hernandez v. Holder*, 778 F. 3d 1086, 1088 (9th Cir. 2015).

III. CONCLUSION

The Petitioner's motion to reopen does not include new facts or evidence satisfying the requirements of *Lozada* and establishing that former counsels' actions prejudiced the outcome of this immigration proceeding. Further, she has not demonstrated she meets the three prongs set forth in the *Dhanasar* analytical framework. Accordingly, we find that she has not established eligibility for the benefit sought.

ORDER: The motion to reopen is denied.

Cite as *Matter of C-K-D-*, ID# 1484911 (AAO June 22, 2018)