U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23396779

Date: DEC. 1, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, an athlete, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the petition, concluding that the record does not establish that the Petitioner satisfied at least three of the 10 initial evidentiary criteria. The Petitioner appealed; however, we dismissed the appeal, concluding that the record does not establish that the Petitioner satisfied at least three of the 10 initial evidentiary criteria. The Petitioner filed a subsequent motion to reopen, in which he requests "the opportunity to remedy the results of the ineffective assistance of counsel by submitting anew [*sic*] response to the USCIS request of additional evidence."

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, "new facts" are facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original application. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

II. ANALYSIS

By regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). Accordingly, we examine any new facts to the extent that they pertain to our prior dismissal of the Petitioner's appeal.

In support of the motion to reopen, the Petitioner submits a brief, asserting that his prior attorney, who represented the Petitioner at the time of filing the Form I-140, Immigrant Petition for Alien Workers, through the time of our decision on the appeal, was thereafter suspended by the Florida Bar for violations of Florida rules of professional conduct in 2019. The Petitioner also asserts that he has satisfied the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), "to the best of his ability." The Petitioner further asserts that the Director is "the official having jurisdiction over this matter" because the Director "is the official who made the latest decision in the proceeding," citing 8 C.F.R. § 103.5(a)(1)(ii).

Also in support of the motion, the Petitioner submits an attestation, in which he asserts, in relevant part, the following:

> The [a]ttorney . . . advised to file [a]ppeal and submitted Form I-120B [*sic*] on April 26, 2018.
>
> Attorney . . . ineffectively submitted Form I-120 [*sic*]. I won [redacted] Award after submitting my Form I-140 and the attorney requested to re-open my case based on this new fact.
>
> Form I-290B was dismissed on November 28, 2018.

The Petitioner does not otherwise address on motion to reopen a fact that existed at the time of filing the petition that his prior attorney failed to address on appeal.

First, because the Petitioner appealed the Director's decision and the Administrative Appeals Office (AAO) made a decision on the appeal, the AAO has jurisdiction over this motion to reopen. *See* 8 C.F.R. § 103.5(a)(1)(ii).

We acknowledge that the Petitioner's prior attorney has been suspended from the practice of law by the Florida Bar, and we further acknowledge that the Petitioner requests "approval of this motion to reopen the proceeding to be allowed to submit anew [*sic*] response to the USCIS' request for additional evidence." However, the Petitioner has not satisfied the requirements of *Matter of Lozada*, 19 I&N Dec. 637.

In *Matter of Lozada*, 19 I&N Dec. 637, the Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. The Board set forth the following 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. *Id.* Counsel's acceptance of responsibility for error does not satisfy the requirement to file a complaint with the appropriate disciplinary authority, particularly where the ineffective assistance allegation is provided by the same attorney. *Matter of Melgar*, 28 I&N Dec. 169, 170 (BIA 2020).

In addition to these documentary requirements, a petitioner must show that former counsel's assistance was so deficient that the petitioner was prejudiced by the performance. *Lozada*, 19 I&N Dec. at 632; *Melgar*, 28 I&N Dec. at 171.[1] Specifically, a petitioner must demonstrate a reasonable probability that, but for counsel's error, they would have prevailed on their claim. *Melgar*, 28 I&N Dec. at 171. Harmless error is insufficient. *See Lozada*, 19 I&N Dec. at 639 (explaining that individuals are "generally bound by the conduct of their attorneys absent egregious circumstances").

In this case, the Petitioner submitted an affidavit in support of the motion to reopen, attesting to relevant facts. However, the Petitioner did not submit in support of the motion to reopen evidence that he informed his former counsel of the allegation of ineffective assistance of counsel and that his former counsel had the opportunity to respond, as required by *Lozada*. *Id.* The Petitioner also did not submit in support of the motion to reopen evidence that he filed a complaint with the appropriate disciplinary authorities or an explanation why he did not file a complaint, as required by *Lozada*. *Id.* Instead, the Petitioner asserts on motion that "failure to comply with the *Lozada* requirements may not be considered where the alleged ineffective assistance is plain on the face of the administrative record." The Petitioner also asserts that "failure to report attorney's misconduct to a disciplinary authority or to confront his attorney direction where such action would have been futile is excused." However, the Petitioner cites only cases in the Ninth Circuit to support his assertions, and Ninth Circuit opinions are advisory, not binding, in the state of Florida, where the Petitioner resides and the attorney in question practiced law. Furthermore, as discussed below, even if the Petitioner had satisfied the *Lozada* requirements, the Petitioner does not establish that the outcome would have been different, but for his prior attorneys actions or inactions.

Next, the facts presented on motion that address the eligibility criteria at section 203(b)(1) of the Act and 8 C.F.R. § 204.5(h) may not establish eligibility. Specifically, as noted above, the Petitioner

[1] 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.

asserts on motion that he won an award "after submitting my Form I-140." The Petitioner does not otherwise address on motion to reopen a fact material to first preference eligibility that may affect the disposition of this matter.

A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). Because the facts presented on motion that address eligibility criteria at section 203(b)(1) of the Act and 8 C.F.R. § 204.5(h) occurred "after submitting my Form I-140," as the Petitioner asserts, they may not establish eligibility. *See id.* Accordingly, the record does not establish that the Petitioner has met at least three of the 10 initial evidentiary criteria required by 8 C.F.R. § 204.5(h)(3).

Moreover, the Petitioner's assertion that his prior attorney "ineffectively" addressed on appeal that the Petitioner "won [redacted] Award after submitting my Form I-140" is misplaced. In our decision, we noted several lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor that the Petitioner had received before the petition filing date, and we acknowledged that the record satisfies the criterion at 8 C.F.R. § 204.5(h)(3)(i). Therefore, even if the award the Petitioner received after the petition filing date could establish eligibility, which it cannot, it would not affect the outcome of the appeal because we already found that the record satisfies the applicable criterion.

Because the Petitioner does not offer any new facts supported by documentary evidence on motion to reopen that may establish eligibility, we will dismiss the motion.

III. CONCLUSION

The Petitioner has not satisfied the requirements of *Lozada*. Further, the Petitioner has not offered new facts supported by documentary evidence on motion demonstrating eligibility for the benefit sought. The Petitioner's underlying petition remains denied.

ORDER: The motion to reopen is dismissed.